C. B. II No. 249

LOK SABHA

SELECT COMMITTEE

ON

THE CONSTITUTION (AMENDMENT) BILL, 1969

[BY SHRI TENNETI VISWANATHAM, M. P.]

(i) Evidence

(ii) Proceedings of the Sitting of the Select Committee held on the 12th October, 1970.

LOK SABHA SECRETARIAT
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CORRIGENDA

to

the Evidence given before the Select Committee on the Constitution (Amendment) Bill, 1969 by Shri Tenneti Viswanatham, M.P.

Page 11, col. 1, line 10 from bottom for 'oumside' read 'outside'

Page 15, col. I -

(i) line 14, for 'list' read 'test'

(ii) line 26, after 'could' add 'not'

Page 25, col. II, line 7 from bottom for 'on implied express contract' read 'on implied contract'

Page 25, col. II, for existing lines 1 to 5 from bottom read 'part of public law. For the same reason, the law of acquiescence cannot be imported into realm of fundamental rights. So also I say that the doctrine of waiver cannot'.

Page 31, col. I -

(i) line 22, for 'Art. 13' read 'Art. 14'

(ii) line 12 from bottom for 'on' read 'so'

Page 32, col. I, line 32, delete 'it is'.

Page 32, col. I, line 6 from bottom for 'enough' read 'length'

Page 33, col. I, line 2 from bottom after the word 'introduced' add 'into non-fundamental sphere and then'

Page 34, col. I, line 7 from bottom, delete 'definition'

P.T.O.

Page 37, col. I, line 20 from bottom for 'Curws' read 'Curbs'

Page 38, col. I, line 4 from bottom for 'laid' read 'paid'

Page 41, col. II, line 12, delete 'a vast sin and'.

Page 51, col. I, line 5 from bottom for 'does' read 'deals'

Page 51, col. II, lines 12-13, delete 'not have been'

Page 58, col. I, line 4 from bottom, for 'is' read 'as'

Page 71, col. I, line 10 from bottom delete 'again'

Page 74, col. I, line 4, for 'Speakers' read 'speaks'

Page 75, col. I, line 4, delete 'coverage'

Page 77, col. I,

(i) Line 32, delete 'his'

(ii) line 33, for 'parts' read 'party'

Page 93, col. I, line 14, for 'Dalip Chand' read 'Dalip Singh'

Page 94, col. II -

(i) Line 18, for 'rendress' read 'redress'

(ii) line 23, after 'this' add 'may'

Page 105, col. II, line 4, for 'wanted to mention' read 'mentioned'

Page 111, col. I, line 18 from bottom for 'shorted' read 'shorter'

Page 112, col. I, line 22, for 'res Pudicata' read 'res judicata'

Page 114, col. II, line 8, from bottom delete 'of Law'.

Page 121, col. I, line 6, for 'new' read 'knew'
Page 122, col. II, line 10 from bottom, for 'parles' read 'parties'
Page 127, col. II, line 1, for 'in in' read 'it in'
Page 128, col. II,
(i) Line 20 for 'reat' read 'great'
(ii) Line 13 from bottom after 'ground' add 'to oppose the Bill'
Page 129, col. II,
(i) Line 7 from bottom for 'dismissig' read 'dismissing'
(ii) Line 10 from bottom for 'High' read 'High Court'
Page 131, col. I -
(i) line 6 after 'therefore' add 'there'
(ii) Line 9 for 'uniform' read 'uniformaly'
(iii) line 10 for 'as' read 'of'

M.C. CHAWLA
DEPUTY SECRETARY.

New Delhi;
Dated the 21st January, 1971.

COMMITTEE ON THE CONSTITUTION (AMENDMENT) BILL, 1969 BY SHRI TENNETI VISWANATHAM, M.P.

COMPOSITION OF THE COMMITTEE

Shri D. K. Kunte—*Chairman.*

MEMBERS

2. Shri C. K. Bhattacharyya
3. Shri Kanwar Lal Gupta
4. Shri Shiva Chandra Jha
5. Shri K. M. Koushik
6. Shri V. Krishnamoorthi
*7. Shri K. Hanumanthaiya
8. Shri Srinibas Mishra
9. Shri S. N. Misra
10. Shrimati Sharda Mukerjee
11. Shri K. Ananda Nambiar
**12. Shri A. S. Saigal
13. Shri Ebrahim Sulaiman Sait
14. Shri A. K. Sen
15. Shri Tenneti Viswanatham
16. Chaudhuri Randhir Singh.

LEGISLATIVE COUNSEL

1. Shri S. S. Shetty, *Additional Legal Adviser, Ministry of Law, Deptt. of Legal Affairs.*
2. Shri A. K. Srinivasmurthy, *Deputy Legislative Counsel, Ministry of Law.*

REPRESENTATIVE OF THE MINISTRY OF LAW

Shri Dalip Singh, *Deputy Legal Adviser, Ministry of Law.*

SECRETARIAT

Shri M. C. Chawla—*Deputy Secretary.*

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*Appointed *w.e.f.*, 31st July, 1970 in the vacancy caused by the death of Shri P. Govinda Menon.

**Died on 17th September, 1970.

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MINUTES OF EVIDENCE GIVEN BEFORE THE SELECT COMMITTEE ON THE CONSTITUTION (AMENDMENT) BILL, 1969 BY SHRI TENNETI VISWANATHAM, M.P.

Tuesday, the 21st July, 1970 at 14.30 hours.

PRESENT

Shri D. K. Kunte—*Chairman.*

MEMBERS

2. **Shri C. K. Bhattacharyya**
3. **Shri Kanwar Lal Gupta**
4. **Shri Shiva Chandra Jha**
5. **Shri K. M. Koushik**
6. **Shri S. N. Misra**
7. **Shrimati Sharda Mukerjee**
8. **Shri A. S. Saigal**
9. **Shri Tenneti Viswanatham.**

LEGISLATIVE COUNSEL

Shri A. K. Srinivasamurthy, *Deputy Legislative Counsel, Legislative Department, Ministry of Law.*

REPRESENTATIVE OF THE MINISTRY OF LAW

Shri Dalip Singh, *Deputy Legal Adviser.*

SECRETARIAT

Shri M. C. Chawla—*Deputy Secretary.*

WITNESSES EXAMINED

1. Shri B. A. Masodkar, Advocate, Member of the Bar Council of Maharashtra.

2. Hon'ble Mr. Justice D. Basu, Judge, High Court, Calcutta.

(1) **Shri B. A. Masodkar**

(*The witness was called in and he took his seat*)

Mr. Chairman: Mr. Masodkar, I welcome you. I have to make it clear that your evidence here shall be treated as public and is liable to be published, unless you desire that all or any part of your evidence is to be treated as confidential. Even then, such evidence shall be allowed to be made available to the Members of Parliament.

Before I ask my colleagues to ask you questions, will you explain your position?

Shri Masodkar: Mr. Chairman and hon. Members: As far as the Maharashtra Bar Council is concerned, we welcome the amendment of Article 32. But we have given our dissent as far as Article 226 in concerned. And I will briefly give the reasons behind this half-hearted policy as far as this Council is concerned. Before I do that, the Council desires to tell this Committee that there will be a great difficulty in amending Article 32 itself, for the reason that the Golakhnath's case decided that the Parliament may not have the power to amend Chapter III, and one of the articles being Article 32, it may not be possible to amend it. The Council is of the view that this useful amendment can be made by the Parliament by relying upon its powers under Entry No. 77 of the Union List. They desire to make it clear that that Entry gives power pertaining to the jurisdiction of the Supreme Court and a law can be framed to that effect.

Mr. Chairman, the objects and reasons given make it absolutely clear that this particular amendment came in the wake of the decisions of the Supreme Court which are now reported, and particularly one pertaining to Sales Tax. Following that their Lordships have also laid down that even though there is a fundamental right's breach, they will not interfere in their discretion. They didn't say that they will not entertain a particular petition. What they say is that having entertained a particular petition they will not give the relief. As far as Art. 32 is concerned, it is very doubtful whether this decision is correct. If you look to sub-Article 4 and we rely on sub-Article 4 that it is not even liable to be suspended, the word used is 'remedy'. It is not liable to be suspended except in emergency. The question is whether by virtue or use of discretion the remedy could be suspended or denied. The answer should be 'no'. But unfortunately the highest court has said 'yes'. We doubt very much the wisdom of this particular decision and we are here to endorse the view underlying this particular legislation that remedy under Article 32 should never be denied, otherwise in a democratic country Fundamental Rights will themselves be left illusory. Mr. Chairman, it is the view of our Council that suitable amendment by virtue of law which can be made in entry No. 77 should be made because there may be some difficulties as far as the Amendment 32 is concerned.

As far as the latter part of Article 226 is concerned, the Council desires to make it clear that it is not a Fundamental Right, 226 itself is not a Fundamental Right and the High Court should be left with the discretion which is usually used as far as Article 226 is concerned. If Fundamental Rights are to be preserved, Article 32 and amendment thereto is a sufficient guarantee that these rights will always be enforced. Therefore, this does not serve any useful purpose as far as Amendment of 226 is concerned. That is all besides the comments which we have given. If a further reference is necessary it will appear that this Bill carries out the purpose of the universal declaration of human rights particularly Article 8. By that Article it is declared that in the matter of Fundamental Right there shall always be a remedy. If Hon'ble Members and Hon'ble Chairman looks to the Article 8 of the universal declaration of human rights, it is the very essence of the fundamental right that there must be a remedy and it is no answer that the man was in delusion and was not quick to come to court. This is the policy even under the Constitution—to take the example of the United States Constitution, particularly the United States Judiciary Act 1789 Section 14. If a similar provision is required, the Burmese Constitution provides by Article 25. But in no Constitution there is such a provision that the discretion be used or shall be used in a particular manner. It is to give

effect to Article 8, such a provision is necessary in view of this particular decision. That is all we have to say as far as this matter is concerned.

Mr. Chairman: Have you seen the Advocate General Bombay's Article on this question?

Shri Masodkar: No.

Mr. Chairman: He is referring to the British practice where it is laid down under the Limitation Act that six months will be the limit. What will you like to say?

Shri Masodkar: As far as fundamental rights are concerned, I would like to say limitation should not govern them. It has been a debated question as far as India is concerned and there had been several decisions, taking contrary view and even the decision which is under consideration is not clear. On this particular aspect there are four judges who say differently. One judge says limitation should be applied. One judge says to them he would like to follow the principles underlying Limitation Act. He will prescribe limitation of one year. That is not a happy course.

Mr. Chairman: In Bombay Law Reporter of June 1969, there is a written Article by Shri Sheervai. He is discussing Moti Jain's case. He says, otherwise it will be wrong.

Shri Masodkar: My comments are now referred to para 9 where the Chairman is referring and where the learned Advocate General says: "that the principles of delay which apply to these proceedings are correct".

What I beg to submit is that writ proceedings are definitely different from what we call the ordinary suits and the principle that govern doctrine of repose which is the underlying principle of all limitation laws should not govern the principle underlying the fundamental rights. If a fundamental right is given, it must be available to every citizen every time. That is our view.

Mr. Chairman: He argues that these are writs which are in practice in U.K. and if there is limitation prescribed for those writs in U.K. then limitation indicated therein would be proper.

Shri Masodkar: It is not exactly the copy of this. If the Chairman goes to Article 32 and 226, it is not a copy at all. It is something new. Here we as a democratic country has laid down something new. Some more powers have been given. As I said in my previous submissions, in American Constitution there is no provision like Article 32 but they passed a statute *i.e.*, United States Judiciary Act. Excepting in Asian countries I found Article 25 of Burmese Constitution but as far as our Constitution goes it is really a definite improvement on Constitutional Law and there is some purpose for this.

Kindly see 226 and 32.

Para 9 high-lights only a matter of public policy. Here we are not concerned with public policy. Here is constitutional right and guarantee, and its enforcement.

Mr. Chairman: Those laches are also covered?

Shri Masodkar: No. There will be over-lapping. Laches may arise in different circumstances. Can court refuse even when we have to surrender our right to a particular man. May I invite your attention to the earlier decision in Kochnni's case—Report in AIR 1959, 142, Bashesher Nath's case. Suppose a man is discriminated against under Article 14. Whether it can be said that he had waived his particular right or is it capable of being waived. Their Lordship said that it cannot be waived. Kindly look to Arti-

cle 14, or go to Article 29—right of minority. Can it be said that the minority has waived its right and therefore it cannot be enforced at all? It is an injunction against the State.

Mr. Chairman: But there, the right is a continuous right.

Shri Masodkar: The right of liberty is a continuous right. Therefore, the judment is not an authority for saying that all rights can be waived. So, this one—in para 9—falls short of the principle that there are certain rights which are to be exercised in continuity.

Mr. Chairman: You think that even passage of time would not....

Shri Masodkar: Otherwise, that will be amending the Constitution itself.

Shri Tenneti Viswanatham: I am very glad that you have supported this Bill at least in part. You said that you are doubtful whether Art. 32 can be amended and whether the judgement in Golaknath's case will not come in the way. But the Golak Nath's case only said of Art. 13, in which it is said that you cannot pass any law which takes away or abridges fundamental rights. Here, the Bill proposes to say that 'no right shall be denied on the ground of delay, it is not abridging the right of any citizen, and, therefore, will you agree with me that Golak Nath's case will not come in the way?

Shri Masodkar: If I may say with respect, what Golak Nath's case decides is this—you cannot abridge nor enhance. Part III is not amenable to Article 368.

Shri Tenneti Viswanatham: Please refer to Judgement on Art. 13. Art. 13 says that you cannot pass any law which will abridge the fundamental rights.

Shri Masodkar: That is true.

Shri Tenneti Viswanatham: The Bill which is before you under discussion does not abridge. Therefore, Golak Nath's case does not come.

Shri Masodkar: May not.

Shri Tenneti Viswanatham: With regard to Art. 226, you say that it is not on the same footing as fundamental rights. In fact, Art. 226 has been the bulwork of democracy and the questions which are raised in Art. 32 are also raised in Art. 226. Therefore, would it not be inconsistent if we say that 'whatever may be denied in the High Court must be given in the Supreme Court' although the Supreme Court is not otherwise an appellate authority in regard to these matters? You have got a remedy under Art. 226 as well as Art. 32. If a man goes under 32, he must get. But, under 226, you say that he goes a bit late, and, therefore, we do not consider his application, whatever the merits may be.

Shri Masodkar: The reply is like this: If you see Art. 32, it is the right to move the Supreme Court by proper proceedings for the enforcement of the rights conferred. So, Art. 32 is for the purpose of enforcement of those rights which are given in Part III as a fundamental right. As far as Art. 226 is concerned, its purpose is provided specifically in that article. Therefore, our considered view is that Art. 32 stands on a different footing. If a citizen moves the Supreme Court which is the highest authority, as far as Part III is concerned, it cannot be denied. That is our view. As far as Art. 226 is concerned, you kindly see—'for any other purpose'. High Courts will be free to take this view for any other purpose.

Shri Tenneti Viswanatham: You can circumscribe. They shall not deny on the ground of delay. It does not subscribe. Does it?

Shri Masodkar: It may. Kindly take an example between the rights

which are purely statutory rights, which are enforceable under 226....

Shri Tenneti Viswanatham: They have got best powers under Art. 226. Is it your contention that the proposed amendment will restrict that power?

Shri Masodkar: That would be in a way. Our view is like this. Under Art. 226, the adjudication is of a very wide amplitude. There may be statutory rights coming in between Art. 226 itself. Different statutes are passed. Suppose, you say that there will be no limitation at all. The statute may end the right, but the High Court will have to say something.

Shri Tenneti Viswanatham: This enabling provision will enable the High Court to look into the matter. Afterall, what is Art. 226?

Shri Masodkar: The amendment is no remedy under the article—"..shall be denied by the High Court to the petitioner on the ground of delay."

Shri Tenneti Viswanatham: This is only enlarging its power. Do you know the number of cases dismissed on the ground of delay? I will give you the list. In 1959, they dismissed only 83 under Art. 226 on the ground of delay.

Shri S. N. Misra: In Punjab and Haryana, 9009 cases; in Orissa—1,423 cases; in Mysore—3,485; and in Gujarat—1,833.

Shri Masodkar: May I have a copy of this tabulation.

Shri Tenneti Viswanatham: There is also this fact that the number of dismissals is increasing.

Shri Masodkar: That is true.

Shri Tenneti Viswanatham: In 1960, they dismissed only 270 cases under this. In 1965, the figure rose to 523; in 1968—588 cases. The tendency, therefore, is to dismis cases in limine —"You did not come yesterday. You should have come yesterday. Therefore, get away from my place." This seems to be the attitude to put it in ordinary language. The number of dismissals is increasing.

Shri S. N. Misra: What is your objection? That under 226, the remedy should be limited to 90 days or 30 days or 60 days and not in the case of fundamental rights under 32....

Shri Masodkar: The answer is that fundamental rights cannot be abridged by the Law of Limitation. It is so incapable because we will be amending the Constitution, as I said, by putting a limitation.

Shri S. N. Misra: Are you aware of a sugestion that has been made that it would be better that no relief under this article shall be denied merely on the ground of delay unless the suit or any other alternative can be barred by limitation under any law for the time being in force?

Shri Masodkar: This is another way of applying the law of limitation. Now for example take the matter of a wrongful confinment or right to liberty. There may not be a suit at all provided by limitation. There can always be marginal cases which cannot be covered by limitation at all. Limitaton law governs those matters which may come either under section 9 C. P. C. or which are specifically there. But here is a constitutional matter which advisedly does not use any limitation We do oppose such a provision as far as fundamental rights are concerned.

Shri S. N. Misra: Suppose my property was acquired illegally and I can move the High Court and I can move the Supreme Court also.

Shri Masodkar: That is true.

Shri S. N. Misra: Then the position will be that the person will have to incur larger expenses and trouble by approaching the Supreme Court which remedy would have been otherwise available to him by the High Court. If he goes to the Supreme Court, there

will be no limitation, but in case of High Court, there will be limitation. There must be uniformity.

Shri Masodkar: If you want limitaton as far as enforcement of fundamental rights is concerned, it is not possible. Article 226 may be amended to the extent of the enforcement of fundamental rights not being barred by limitation. Then you will be putting both the articles on par. Article 32 is not for any other purpose, it is for the enforcement for the rights guaranteed by that part. Article 226 has wide amplitude, it can be operated upon the statutes. So, if it is only for the purpose of fundamental rights, you can suitably amend it to the extent of enforceing fundamental rights.

Shri S. N. Misra: Then you are of the view that as far as fundamental rights are concerned, there should be no limitation and the amendment may go in and for other purposes....

Shri Masodkar: There should be a discretion in the court because suits are already provided. Every statute gives a remedy and then you go to the Supreme Court.

Shri S. N. Misra: You think that there should be uniformity as far as the courts are concerned. One court gives 30 days, another 90 days and the third one year. There should be uniformity as far as Art. 226 is concerned.

Shri Masodkar: As far as uniformity is concerned, that is the sole purpose of the law. In fact that is the principle on which a law postulates the relief. But as far as Art. 226 is concerned, it is a very widely worded and we must make a distinction between enforcement of the fundamental rights and other statutory rights which come within the purview of Art. 226. You may fix uniform pattern as far as Art. 226 and 32 are concerned; there is no bar.

Shri S. N. Misra: It would differ from judges to judges and from court to court.

Shri Masodkar: If you say for the purpose of enforcement of fundamental rights....

Shri S. N. Misra: I am talking of the other remedy.

Shri Masodkar: Uniformity there may be, but it is in the interest of public that delay should be a ground for rejection.

Shri S. N. Misra: No rules are framed for limitation under Article 226. So, there cannot be uniformity. Do you think that there should be uniformity as far as limitation is concerned?

Shri Masodkar: The very word discretion suggests that there cannot be a uniformity. The case would differ—from facts to facts. Is it not proper to leave it to the courts that they should decide this in given time and under given circumstances? That should be the approach.

Shri S. N. Misra: If it is so, then it would be proper to leave it that the petition may be dismissed on merits and not only on the point of limitation. You can say that the person has been sleeping on his right, therefore, you are not entitled to the remedy.

Mr. Chairman: You have used the word limitation.

Shri S N. Misra: I may tell you that all the High Courts are of one view that after a particular time—which each one of these courts have fixed—they will not entertain the writ petition beyond that period.

Mr. Chairman: The limitation would mean under the Limitation Act, or as laid down by different High Courts.

Shri S. N. Misra: Most of them have not framed rules.

Mr. Chairman: Then it is not limitation; limitation will have to be clarified.

Shri Masodkar: There is such a practice even in Bombay that beyond

a particular given period, they would not be entertaining. All the judges have taken the view that ninety days is a good limitation keeping all the matters in view. But the matter is always like this. A recent example is that in Bombay High Court, they have interfered in the matter after four years, although in majority of the cases the limitation is three months. They have followed the principle laid down in 1927 the Privy Council that whenever there is an inroad on the right, that gives a fresh ground. So, Sir, discretion is good and in the interest of public policy. It must be left to the judges and the courts to find out the facts of each case. That is what I can say.

Shri Bhattacharyya: We find that the rule of limitation has been applied to these two articles on analogy. What is your opinion on that? Can the rule of limitation be applied on analogy?

Shri Masodkar: Limitation is a definite step. Analogy does not arise in the case of limitation. Either it is limitation or no limitation at all. That is my view.

Shri Bhattacharyya: In some of the High Courts, from the statements received we find that they have framed or are thinking of framing rules limiting the time for the parties to approach courts for relief under these two Articles. Can you have a law on limitation?

Shri Masodkar: No. They will be legislating because it is not within the scope of Article 226 itself.

Shri Koushik: When I put any question to you, it is not to test you but to understand and clarify my own doubts. I want to know in the first instance, talking of fundamental rights conferred on an individual, is it open to him as a matter of fact either to exercise those rights or make an agreement after he comes to know that his rights have been violated, in the nature of compromise?

Shri Masodkar: No. If you look at the inherent meaning of the various articles conferring the fundamental rights, they are, in a sense, the command to the State. There cannot be any agreement with the State against the Constitution.

Shri Koushik: Not necessarily with the State. You are talking of collective rights. I am talking of individual rights conferred as fundamental rights. So, with regard to these rights, can a man, after coming to know of certain violation of his rights, either exercise his rights or else compromise his claims with the party that is responsible for violating them. I should think he can. Am I right?

Shri Masodkar: I doubt very much. Our constitution does not permit this.

Shri Koushik: You say that such a contract would never be recognised under the Indian Constitution? Now supposing a piece of land of 'B' has been acquired by State 'A' under law 'C' for the purpose of 'D', namely, the construction of a factory. Now, B who is the owner of that particular area which is acquired and over which this factory is being constructed, knows that the law does not provide for it, that there is a violation of his right—his fundamental right. Now, can he not compromise, knowing that a violation has taken place and there is no proper law for the acquisition of the land.

Shri Masodkar: No, and there are two reasons. As far as the fundamental right to property is concerned, the words are "according to law". Therefore, if the law does not permit such an agreement and if there is breach of that particular law it is a matter concerning not only the fundamental right but the Act itself.

Shri Koushik: The question that I am asking you is if my land has been acquired and there is no law for it, I can either take immediate steps to establish my fundamental rights or,

alternatively, I may enter into an an agreement with that man or party who has violated my right. Is it open to me to square up the matter with that party?

Shri Masodkar: I doubt very much. You cannot contract such an agreement. It would be void.

Shri Koushik: It is not a void agreement. With full knowledge of the violation of my rights I am making an agreement.

Shri Masodkar: No. You may take the example of human traffic.

Shri Koushik: I have given an example; you can explain that. Why do you go in for another example.

Shri Masodkar: I would say that it would be a void act.

Shri Koushik: It would be a void act under what law? Have I no right to waive my fundamental right?

Shri Masodkar: No. A fundamental right is incapable of being waived.

Shri Koushik: Well, I thought that I could waive my right because it is a personal matter but you say that it cannot be. That is all I wanted to know. If you say that these fundamental rights can be enforceable by courts like the common law rights, I want to know whether it is possible for the courts to behave differently while applying the laws?

Shri Masodkar: That is a policy matter. Otherwise it would not have found a place in Part III.

Shri Koushik: Do you mean to say that the Supreme Court while applying the principle of common law should not apply that in the case of fundamental rights?

Shri Masodkar: Yes, Sir. It is our view that should not be applied in the case of fundamental rights.

Shri Koushik: Anyway I have made my position clear. I only want to know from you whether the doctrine of public policy which is meant for the benefit of the public under the common law should be included while discussing the fundamental rights.

Shri Masodkar: We are examining that in the context of the Bill. What I am pointing out is that this Bill does not fall within the scope of the Fundamental Rights.

Mr .Chairman: Barganining out one's right is treated as estoppel. Will he be able to plead for his fundamental rights in respect of anything that is done by him?

Shri Masodkar: This is not relevant here because that is not before the Committee. Doctrine of estoppel has nothing to do with the doctrine of *res judicata*. Article 32 has been advisedly put in Part III.

Shri Koushik: These rights are supposed to be a sort of giving an expeditious relief to the persons. That is the principle of common law.

Shri Masodkar: That is true.

Shri Koushik: The man should get an expeditious relief under Art. 32 on the ground of delay. Does it mean that the man is not to exercise his rights under Art. 32 and 226 to come before the court for an expeditious relief. You admit that a man seeking relief has to come before the court for expeditious relief without losing time.

Shri Masodkar: When we speak about expeditious relief, we have to speak about the powers of the court in giving expeditious relief to the person who comes before them say even late. If this is not written into our Constitution, we shall read it by implication. By implication the people who come before the Court under Art. 32 for getting expeditious relief should be refused the relief? Of course that is a larger question before you.

Shri Koushik: I now put to you another question. There is a common law. And there is fundamental right. Suppose under the common law the court does not give relief to the person in the plea that it has become time-barred. To give such a man a relief under the fundamental rights would it be proper? You say that a man has got a remedy under the common law. Suppose he sleeps over it. His rights are barred by time. He cannot come to the court for relief. In such a case would it be proper that he should be given a chance of being heard and a writ issued in his favour?

Shri Masodkar: May I say that the Common Law rights and fundamental rights are different and have nothing to do with Art. 226 and discretion thereunder.

Shri Koushik: Suppose a man comes before the court for relief after fifteen years. He loses the remedy under the common law. Can you subscribe to such a view? And can you subscribe to the view of a writ being issued in his favour?

Shri Masodkar: I think so because Art. 32 speaks that there shall be a fundamental right. It cannot be taken away by common law rights.

Shri Koushik: Would you deny an opportunity to a man at one stage and give him the same at another stage? Does it not mean that this is not good law or good policy?

Shri Masodkar: It is above the common law right. To clarify the position, if you look to the purpose of Article 32, the position will be absolutely clear. In common law rights, there are common rights. Common law rights are themselves called common law rights; they cannot be constitutional rights at all. But as far as the Constitutional rights are concerned, they say that they will be treated differently. There cannot be any objection to treat them as different rights.

When the hon. Member speaks of common law rights, they are governed by common law remedies. Article 32 is not a common law remedy, nor is it concerned with common law.

Shri Koushik: Under Fundamental Rights, it is my property....

Shri Masodkar: It is not a common law right. It is always stated in England that it is not a writ of right; it is a prerogative right. Take for instance, the prerogative writ and writ of right. They are two different things. One is sovereign function. When Article 32 speaks of the right to issue the writs, it is a sovereign power. That has been expressly defined in Article 32. And when the Supreme Court or the High Court say that we have got this power, they mean that we shall exercise it in the interest of the State; it is a sovereign function. It is not a common law right at all. Therefore, the analogy of the hon. Member would not help, because the Supreme Court can even after 15 years say that, 'Well, this was in violation of our Constitution'. There cannot be a seal of time on the lips of the Supreme Court....

Shri Koushik: I am asking you that if the argument is logical . . .

Shri Masodkar: Logic, may I say, Sir, again, with due respect to the hon. Member, is not a law....

Shri Koushik: Do you mean to say that there is no logic in law?

Shri Masodkar: One eminent jurist said that it is the experience of life not the logic of life. But the courts must have the power to say that here is the occasion where fundamental rights were trampled upon.

Shri Koushik: You just mentioned prerogative writs.

Shri Masodkar: They are not of writs of rights.

Shri Koushik: There is a certain amount of discretion in law to the court. By this amendment, are you not going to curtail this discretion, which is the essence of prerogative rights.

Shri Masodkar: No, Sir. Please note that Article 32 would lose its meaning when we are to act upon a given period of time. Therefore, I pointed out to the Chairman that there is some difference between Article 32 and Article 226.....

Shri Koushik: Do you mean to say that these rights which have been put in Article 32 and 226 have difference connotations than the one from where it is taken?

Shri Masodkar: I do not say that they have got different connotations. But I have already pointed out to you that it has got a different purpose. In a growing democratic Constitution that was written, it has a different purpose . . .

Mr. Chairman: What he is asking is that where a party claims some fundamental right, will it be granted to him adversely to the rights created for the benefit of some other party? That is what he is asking.

Shri Masodkar: To that., Sir, I have replied to him. For the rights there must be a legal basis. As far as the fundamental rights are concerned, they are the creation of the Constitution.

I will quote one thing. There was one litigation upto the Supreme Court and the Supreme Court had given the finding that they will not interfere as far as that is concerned.

Mr Chairman: 1968—Union of India.

Shri Masodkar: 1970—Supreme Court.

Mr. Chairman: AIR 470.

Shri Masodkar: They have taken the view affirming the case of Tirlok Chand.

They do not look to the fact whether a right is created. They simply say that right is created and then adopt doctrine that if a right is created, it must be according to law. If it is in enfraction with the fundamental right, it is no right. That is the difficulty.

Thcy do not see that Article 32 can be suspended only under sub-article 4. That argument is not noticed.

By denying discretionary power, they say we will not exercise the power. So, they are curtailing Sub-Articles 1 and 2 of Art 32. That in my humble view is not the course open.

Shri Koushik: Can you give me any authority in clear terms that Article 31 allows it to the Supreme Court to give relief for violation of fundamentarl right ignoring consideration of the public policy?

Shri Masodkar: How can there be an authority excepting which I got it and which I have put in my note—1959 Supreme Court 149—they went to this extent. They have made a distinction in that case.

Shri Koushik: Article 32(1) lays a duty on the Supreme Court to issue relief for violation of fundamental right ignoring considerations of public policy and the like.

Shri Masodkar: There is no law.

Shri S. N. Mishra: There may be remedy in respect of a person who has taken possession of your property by filing a suit under Section 6 or 9 of the Old Act—specific relief Act. My learned friend—Hon'ble Member—with me say that in respect of the same claim you cannot have two remedies. Is that possible or not?

Shri Koushik: You can have two remedies—one under the common law and the other under fundamental right. I say you have the remedy under the common law because limitation law comes in.

Shri S. N. Mishra: Even in respect of the common law civil suit based on specific relief Act (if that suit has not been filed for taking back possession or Section 9 of the old relief Act) gives relief. The answer to this is 'no'. You can file all the remedies under the Constitution. Is it not a fact?

Shri Masodkar: That is a fact.

Shri Shiva Chandra Jha: He has gone into the intricacies. I will say of law and the rights,, etc. But I want to start from a different context and I would like to know from Shri Masodkar (as you say that there can be no right) right should be according to some law. There is no right without law or what is the sanction by law? Then do you mean to say that there is nothing like natural right?

Shri Masodkar: What I said to Mr. Koushik needs a little addition. When we speak of natural rights, as far as India is concerned, they now form part of the fundamental right and when we speak of natural rights as far as natural justice is concerned, that forms part of the judicial pronouncement. But the doctrine of the natural rights do not exist for ever. When a legislature acts, it acts by a particular statute.

Shri Shiva Chandra Jha: It is clear that there is some natural right but natural law does not exist and it comes within the jurisdiction of law.

Mr. Chairman: They are covered by the Constitution or by the judicial pronouncements. There, all natural rights are covered and therefore they do not remain oumtside these two areas.

Shri Shiva Chandra Jha: I would like to know that asssuming that an individual or a citizen is denied or the people in general get rid of that law or the constitutional frame work within which they have been working uptil now and the natural rights were covered by that constitutional frame work till they change that frame work and after changing that frame-work they make another fundamental rights and other rights according to the fundamental tenets of 18th century as understood by the man in general. Even after the changed framework, natural rights take their natural form or shape, but until they change that framework they have no natural right.

Shri Masodkar: Is the Hon'ble Member speaking of revolution?

Shri Shiva Chandra Jha: I am taking law from another point.

Shri Masodkar: Suppose people get together. They scrap this Constitution and put these new rights. Then there will be different rights altogether.

Mr. Chairman: Then may be under the Constitution.

Shri Masodkar: Whatever the course may be left. Historically that has happened. You will find in socialistic countries there is different concept of the Constitution itself. You can have that.

Shri Shiva Chandra Jha: Right to live, right to work right to equality, right to opportunity, education, expression of ideas, all these are natural rights which have been accepted all over the world and after changing the whole framework, they make their law, the Constitution, compatible with these ideas. Natural rights will take their natural form, when fundamentally, the whole frame-work is changed. So, there are no natural rights and nothing like that. It is only that these are covered by the constitutional laws and judicial pronouncements. Now, the question is that we are talking according to our Constitution and in the context of the Bill. And here,

public policy matter was also raised. In these natural rights, there comes a stage when they are acquired rights, and those acquired rights are generally the rights to property. And the rights to property are protected by the fundamental rights and Part III of our Constitution. Assuming for instance that we the people of India, the makers of law, change that portion of acquired rights—we just take that out of the Constitution according to the procedure—and entertain those fundamental natural rights which are not acquired rights in a self-evident way. Then, we will be going back to those original natural rights by taking away these acquired rights. The next stage comes. The whole problem starts with the question of property. If the question of right of property is taken out of the Constitution, we will be in full compatibility with the Constitution, as is understood generally. Now, according to the Bill, it is to be inserted that "....no remedy shall be denied to any by the Supreme Court on the ground of delay." Now, this can be applied to two situations. My ideas, thinking, expression and other natural ideas are being suppressed. After 10 or 15 years, I will wake up and I move the Supreme Court that my ideas etc. are being supressed. And then, another aspect is that my property rights have been suppressed, and I move the Supreme Court. For these two points, I come to the Supreme Court and will start arguing according to the judicial way. So, the question is, assuming that this ground of delay is added and this amendment is made in the Constitution, will it not be compatible with the natural rights of ideas, expression, and not for property, and will this not be compatible with the basic natural rights. So, this amendment to the Constitution would be quite compatible with the natural rights as understood. So, there is nothing wrong with this amendment. The argument started when this right is being used for the defence of the property rights. Then the matters get complicated and public policies are affected. Just allowing the persons after years to move the Supreme Court for the defence, as it is written here, would be more for the public good. So, the amendment on the whole is compatible with the fundamental spirit of the natural rights and not acquired rights. Natural rights come out of the Constitution, and so the amendment is all right. When it is applied to property rights, complications arise. Whether public policy will allow this person to move the Supreme Court after years, or not, has to be decided.

Shri Masodkar: May I reply? Probably, the hon'ble Member is speaking of the personal rights like speech, expression etc. If I understood him correctly, he speaks of two different principles. For the purpose of the first, delay may not be ground, and for the purpose of the second, delay may very well be the ground because certain other rights come. What is being introduced by the amendment is that delay shall not be the bar. But I pointed out earlier the doctrine of conduct which may create certain rights; that may very well be considered by the court while denying the particular relief. But, on the ground of delay, whether the petition should be thrown out is the question put before us.

Shri Shiva Chandra Jha: Here is my question. For individual, or I call them natural rights or human rights. delay should not be put there. If the person moves the Supreme Court after years, he should not be debarred from coming to the Supreme Court and getting his rights. But for property rights—small property or big property—if he comes after years, and if there may be a clash with the basic public policy that is being pursued in the society at that moment, should the courts allow the person to move or not—that is the point.

Shri Masodkar: As far as the law of limitation as it applies to property goes, after a lapse of 12 years, it makes the other man the owner. There is no question of law beyond that. Pertaining to property, after a period of 12 years, the other man gets the ownership under the law itself. Therefore, the Supreme Court will never interfere because the other man is given the ownership. Such questions may arise. They may be adjudicated upon by the Supreme Court under the given facts and circumstances. But this ground of delay to throw out the petition is inconsistent with the fundamental right itself, because Article 32 is a fundamental right. It is neither of property nor of person.

Mr. Chairman: I think he has answered your question clearly.

Shri Shiva Chandra Jha: I am coming to the last point. After the Bank nationalisation and the way the Supreme Court reacted, the bank nationalisation was again repassed by Parliament. And as the society is demanding at present that the more the Constitution is made compatible with public good or public policy, you can say that it should be amended. Now, this Bill can be thought of from two points of view. If the question is of expression of ideas and what I call the human rights, then, it should not be rejected on the ground of delay. But, if it is a question of property of big landholders, after a certain period, they should be debarred from moving the Supreme Court. The Bill itself is for the good of the human rights provided there is some room made for acquired rights, and some room is made for natural rights or human rights.

Shri Masodkar: I have already replied. If I can usefully add, I can say that if the Parliament thinks that human rights are better, it can be a matter of policy of the Parliament.

Shrimati Mukerjee: You said that the rights are the creation of laws. I would like to submit that they are laws of nature. Laws are things which we make and therefore it is not that rights emanate from law. We just give them recognition through legislation. I would say that as far as your fundamental rights are concerned, those rights do not become any different tomorrow than what they are today, so long our laws are as they are. There is a delay in a person moving in a matter to see that his rights are safeguarded—why should that debar him?

Shri Masodkar: I think, he should not be debarred. I agree with each word of Mrs. Mukerjee.

Shrimati Mukerjee: Why are you so definite about the reasons for which the courts exist. You said that the courts exist to execute the mandate of the State. I think, the courts exist to guarantee justice to the individual.

Shri Masodkar: The latter is correct. Courts are not to execute the mandate of the State.

Shri Saigal: The Secretariat has prepared this classification as regards the limitations, as to within how many years it should be instituted, or in how many years, it should not be instituted. What is your opinion that it should be fixed.

Shri Masodkar: It should not be fixed as far as Article 32 is concerned. Article 32 is a fundamental right and it should not be governed by the law of limitation.

Shri Saigal: It shows many of the cases as dismissed as regards the limitation.

Shri S. N. Misra: It appears to be on record. From this chart I say so. Normally, the practice is that they do not give any reasons when they reject the cases.

Shri Saigal: Some provision should be made that they should give the reasons while dismissing the case.

Shri Masodkar: That has been the consistent view of so many courts and jurists that while dismissing, they should indicate the reasons.

Shri S. N. Misra: When the matter is dismissed, the judge simply writes 'dismissed'.

Shri Tenneti Viswanatham: Article 226—it is a power given to them for enforcement of the fundamental rights in Part III and for any other purpose and therefore, they have got a wide power. Now that wide power should not be restricted by selfdenying ordinances that we are not going to exercise that power if you come after ninety days.

Shri Masodkar: I have already made my submission on it.

Shri Tenneti Viswanatham: Article 19(f) relates to the fundamental rights 'to acquire, hold and dispose of property'. Article 31 relates to the right of compensation. These have nothing to do with the existing laws with regard to the acquisition of property or the right to lose property. Therefore, when we deal with fundamental rights, the question of intervening rights does not arise. The fundamental right is to acquire and dispose of property; it has nothing to do with the intervening right of somebody else.

Shri Masodkar: Yes, Sir.

(The witness them withdrew)

(ii) Hon'ble Mr. Justice D. Basu, Judge, High Court, Calcutta.

(The witness was called in and he took his seat).

Mr. Chairman: Mr. Basu, you will be knowing that your evidence will be treated as public?

Mr. Justice Basu: Yes, but in my private capacity as an academician?

Mr. Chairman: Yes, of course. Now, may I suggest that before questions are put to you, you may elucidate your position first?

Mr. Justice Basu: In fact, that is my idea also because, unless I give you some idea as to the issues involved, so far as I understand, there may be some chance of just missing the point.

Now, though the Bill itself is very short, the real object I think has been clearly brought out in the Statement of Objects & Reasons. That object is stated in the first para of the Statement of Objects & Reasons. Now, may I draw your attention to the second para? The last line states that it is "not in the province of Courts to prescribe any limitation to any clause". Some of the learned judges, it is stated have expressed themselves in regard to this in the wrong way. What they want to say is that even if there is no statute of limitation to govern the jurisdiction of the Supreme Court under Art. 32 or 226, some sort of limitation should be applied by analogy. That is something with which I can never agree. That is my first point. What I want to say is not that everything stated in the majority judgment should be discarded. There may be something in it which may be useful. What I mean is that where there is some delay and that has been properly explained by the litigant, he should be given relief. Duration of time is not the criterion for refusing relief under Art. 32. Art. 236 I shall take up later on. That is the issue to be decided before giving of answers to questions on this Amendment Bill.

The second thing I want to say is that it is a very basic error, as some of the learned judges have commented upon, to import ideas of equitable jurisprudence in the matter of exercise of the prerogative writs which belong to the common law of the King's Bench of England. There are peculiar and special doctrines pertaining to equitable jurisdiction. It would be wrong to import these things for the exercise of prerogative writs.

If they remain they will create some sort of wrong impression in the minds of not only the lawyers but also of the inferior Courts, because the approach itself will be altogether different. If it is equitable jurisdiction, the approach will be from the standpoint of conscience and that approach will have to be made when the conscience of the litigant is not clean. When the party has not come with a clean conscience, he is not entitled to remedy. So the conduct of the litigant is a primary list for the exercise of equitable jurisdiction. There the conduct of the litigant is the most important thing. So, in that sense even a lapse of time may be a good criterion because he does not deserve the sympathy of the Court. But prerogative writs are not of that nature. They were issued by the King's Bench, on behalf of the King as the fountain of Justice, in order to remove maladministration, where the common law writs could reach. That is why these are called prerogative writs.

Equity came in because the common law was defective. That is why the Chancellor used to use some sort of 'discretionary' remedy. Discretionary and extraodniary remedies are not on par. A prerogative writ is *extraordinary* but not a discretionary remedy in the same sense as the equitable remedies of specific performance or injunction are.

In fact, the tabulation of cases which has been supplied by the Ministry of Law is very useful. I must say here that this gives a complete list of all the cases. Fortunately, many of them appear in my extracts of the Tagore Lectures. I would submit at the beginning that much depends upon the approach that you take to the subject. Nobody will say that if a cause of action for breach of fundamental rights takes place in 1950 the aggreived person can come to court at any time he likes, say, in the year 2001. Everybody understands it. That is not the point here. The test is not the measure or length of time but the test is whether he has got any excuse for coming so late. It is evident that there is no time limit fixed by the constitution. It can be late by three months; again it may not be late in 12 years. So the tabulation of these cases merely with reference to a period of time may relate to queries put by the Select Committee regarding the timelimit of three, four, or five years. I do not know that. But I am speaking on guess. As a matter of fact if you go through some of the majority judgments, there is a blunder committed according to me. With all respect due to their Lordships they have used expressions to suggest that the length of time as the test but it is no test at all. So also is the good conduct of the client. It would have happened before a court of equity jurisdiction like specific performance, injunctions and all sorts of things. Equitable reliefs are not governed by statutory limitations. Fortunately, in India, there are statutory limitations to even to govern an equitable remedy. But even then there is no remedy when a person does not come with a clean conscience and his conduct is such that he does not deserve any relief, the court uses discretion. But article 32 says that the right to move the court is guaranteed. So, if the causes of action and other things are established, then the court has got no discretion in the matter.

Then of course a question might arise as to why should an explanation of delay be required. After all, a writ proceeding is a proceeding in a court. It is a judicial proceeding. It is not like a Panchayat. After all it is a court and therefore it must be seen whether the cases involve a civil proceeding or criminal proceeding or some of civil proceeding or whatever it might be. The Supreme Court has already held that it all depends on the relief that you are going to give to a person. A proceeding under Art. 226 or 32 may involve civil rights, while criminal proceedings might arise out of detention etc. Once you say that this is a civil proceeding then certain minimum principles governing any

sort of judicial proceeding should be followed. In a suit, there must be a plaint to show that the plaintiff has grievances. But, if any statement is wrong the defendant has to show it in his written statement. In a criminal case, there is a complaint or police report or whatever it may be. But, in civil proceedings pleading is required to find out the issues which should be determined so that the court can come to a decision—not in the air, but on the issues which are raised—on the issues to be derived from the plaint and written statement. It so happens when a suit is brought before the court by an individual, he should plead as to why he wants relief. In a writ proceeding—there is a petition which is required to be duly supported by the affidavit of the petitioner or by anyone competent to do that, while the respondent—whether it is a State or any other authority—also comes in with what is called a counter-affidavit or objection or whatever it might be. And both of them have got to say what they want to say in order to succeed. The petitioner's defeat or success depends on the issues raised. Therefore a lot of importance attaches to a pleading in a judicial proceeding. Otherwise it will be just like a wild business. When a man comes to the court late, he must explain the delay just as a person must make out his cause of action. You cannot apply Art. 226 or 32 in a blank paper for the simple reason. It is not a *tamasht*—it is a judicial proceeding. In some of the majority judgments, one illustration is given that if it is a writ proceeding wherein someone makes an incorrect statement called *suppressio veri or suggestio falsi* or he makes an intentionally false statement, then he would not be entitled to any relief. I say that is not particularly an equitable doctrine. That is a doctrine belonging to the law of pleading. There is a chapter in our Civil Procedure Code which says that one will have to show the circumstances under which he comes to the court. If he alleges fraud or mistake then he has to show how he has committed the mistake or fraud has been committed upon him. That is the law in England. In India the fundamental and primary principle of a judicial proceeding is also this. If a person comes up before the court in a writ proceeding long after the cause of action arises, say, after twelve years, it is bounden duty to explain as to why he has come to the court so late. If the court does not accept that explanation, it is not because his conduct is bad but because he has no good explanation. That is the law of pleading. That will apply everywhere whether it is a fundamental right, or other right under the ordinary law. The law of limitation is distinct from the law of pleading.

Mr. Chairman: Now, have you done with that?

Mr. Justice Basu: If you allow me I can even elaborate my points. Or you may ask questions.

Mr. Chairman: I wanted to ask only one thing. Why in pleading there is delay is not explained.

Mr. Justice Basu: I am putting it very clearly that the fundamental right is there but if he does not explain the delay as to why he has come to the court so late, he has no proper pleading.

In the beginning I said the fundamental rights are to be enforced by a court. But in the court there are certain minimum rules of procedure that have to be followed. In the Calcutta High Court a man is not allowed to enter with an umbrella. An Umbrella is not a shot gun. But still he cannot be allowed to come there with an umbrella. In the court you are not allowed to read newspapers; you may say that the court is not hearing you and so you are only reading the paper. There the question of discipline comes. Some people may not agree. But even in this Committee if I want to sing or dance, I don't think you will allow me to do so.

Mr. Chairman: He should explain as to why he came late.

Mr. Justice Basu: Yes, if the plaintiff or suitor or litigant or petitioner

or whatever name you give comes to court and asks for a judicial relief, he has to do certain minimum things. For example, take a written pleading. Why is it required?

Mr. Chairman: Will it not be merely procedural?

Mr. Justice Basu: No, Sir, it is a part of the procedure. I think it has been already noted that the entire Civil Procedure Code has not been imported into it. But there are certain things which have been already imported.

So far as the pleading is concerned, my own impression is that pleading is the first step. You cannot enter into a temple of justice without this. Pleading is the first thing which moves the court. If you don't disclose the facts, will anybody give you the relief?

Mr. Chairman: Suppose he does claim that his fundamental right has been violated, but does not explain why he did not come during the last twenty years....

Mr. Justice Basu: I appreciate that that would be doing the same thing. But I must say how the fraud has been acted upon, what is the point, my signature has been violated, something like that. That has got to be disclosed. You say that there is nothing in the Constitution in Article 32 or anywhere within the four corners of the Constitution which says that you must make a written petition or a pleading that you must disclose all the particulars, all the facts? That is absolutely correct. But, still these rules have been made under Article 226. Unless the atmosphere is created there will be no fundamental right. So the atmosphere is like this.

Mr. Chairman: Would it not be in keeping with the particular suggestion that proper procedure ought to be followed?

Mr. Justice Basu: I do not agree with that observation that a fundamental right is not beyond all rules of evidene, procedure, limitation. I shall say something about this. These are basic principles, and unless I elaborate a little, it may be difficult, because the links will not be available. What is the law of limitation? Somebody has said it is also in public interest. I fully agree. Limitation is not arbitrary. Everybody knows, a stale claim may also mean a false claim. That is true. But the statute of limitation, we should never forget, is the creation of the Legislature; it is a creature of the legislature, and there are so many decisions, where we find that limitation is a creature of statute; it cannot be imported; it cannot be extended to other spheres by equitable considerations. Where there is no statute of limitation, there is no limitation. On this point there are hundreds of decisions. So, when the legislature minds, it can a statute of limitation relating to trespass or any other cause of action.

So far as the constitutional remedies are concerned, it is not subject to legislative restrictions, because Article 32 is guaranteed. It is never stated, "Subject to....", so and so. If you have got a copy of the Constitution, in many places it is said, 'Subject to such restrictions as may be imposed by the law.....". Law means the legislature. There is nothing like that in Article 32, but it is there only in several Articles, like 19, 31, and so on.

So far as the fundamental rights are concerned, they are not subject to legislative restrictions. A right is not fundamental if it is subject to regislative restriction. They cannot be touched. Now, if Article 32 gives you a guarantee, a right, to move the Supreme Court, the legislature also cannot put curbs upon this exercise of right by introducing a statute of limitation to govern Article 226. Therefore, a statute of limitation is no doubt a matter of public policy, but it can reach only a particular sphere, not within the Constitution.

Secondly, where there is no statute of limitation, there cannot be any limitation by analogy. A constitutional remedy is an extraordinary remedy. It is not an ordinary remedy which is governed by the statute of limitation. Therefore, any length of time will not measure the availability of the extraordinary remedy.

Suppose you are a king of England. I come to you. Let us say that my fundamental rights have been taken away. I say give me relief. Suppose the correct story has not been told and the truth has been suppressed or any of the columns of the paper or petition are not filled in and nothing is disclosed—no cause of action is, disclosed; then how can the king give relief? It is not by way of exercise of discretion but by asking—'What do you want in your petition'? It has nothing to do with limitation.

There may be cases where he may come afer a great length of time—15 years. I think in one of the two cases relief has been given after a very long time—say 15 years. Three cheers for the judges who have done that, because the question is not of length of time, if there has been a clear violation of the fundamental right. The question is—Has he been prevented from coming to the court or has he got a right excuse? Supposing the cause of action arose in 1950. There is an affidavit alleging something out of which he lost all his dependents or he was having some disease. It requires three years or five years to be cured and if he comes after 10 years and can show that all this time it was not possible for him to come to the court, in that case (I may remind you that) Section 5 of the Limitation Act applies even to the case of ordinary legal rights. The explanation of the delay might be given. So, they are asking for the explanation of the delay. That is the first point. The second is it has got nothing to do with fundamantal or non-fundamental right. It has to determine whether the court should grant him the extraordinary relief.

Mr. Chairman: Therefore, you mean that the court can conveniently say that because of certain reasons that you have not come in proper time we refuse to exercise the prerogative. It might not be barred by limitation.

Mr. Justice Basu: I have objection to the words 'proper time', if you had thought of length of time. (

Mr. Chairman: Proper time in a particular case; it being an extraordinary prerogative which we have to exercise. We have to apply our mind.

Mr. Justice Basu: In these very papers somebody has given an illustration. Suppose a man loses his job. He has been dismissed. In contravention of art 311. He has a right to come under Article 226. But an ordinary service cause does not relate to a fundamental right. It has been held without approaching the higher authorities departmentally, he has a right of revision. Certainly a man will not fight a lion in his den. He has to retain his service. He has been suspended or reduced. He is fighting with the employer. The court only insists that he must come to the court immediately. He could approach his immediate superior and remote superior to see if he can get extra-legal treatment. If he fails, then you can say that he is bound to come to court immediately thereafter.

Supposing there is some sort of statutory rule which says that when the Secretary takes some action you can approach the Minister or the Central Government or do this or that. If you are dismissed by the Under Secretary, you can appeal to the Secretary. He does that but fails. Will any man with a common sense say that to make a representation after 20 years thereof is a good thing? Therefore, a little amount of discretion is left to the court. It is not an automation.

Mr. Chairman: I said discretion. I only said we will not exercise prerogative in our discretion. It is not a discretionary right.

Mr. Justice Basu: I would omit the word 'discretion'.

Mr. Chairman: Would you like the courts to exercise this right even if it impinges somebody's right?

Mr. Justice Basu: I want to make it clear. We must always make a distinction between different types of rights and remedies. That is a basic question of jurisprudence. Everything is not of the same nature. Suppose you are pick-pocketted or your throat is cut by somebody. Then some rights are statutory. The remedy is given by the statute. For example to obtain a licence for a ration shop. That is governed by the statute itself. There are certain rights which are common law rights —right to possess my land. No statute is required. But to recover possession from a trespasser the statute will say, if you do not come within 12 years then it is time-barred. That is the limitation.

There are other rights which are not of this nature. So far as the fundamental rights laid down by the Constitution are concerned, they are not of that nature. They do not depend upon the feelings of your neighbour like rights under the Law of land—say, immovable property. It has got boundaries. There are people on each side. If you encroach 5" into another's land, that is trespass.

There are other things, such as nuisance. You would like to play a gramophone record and your neighbour cannot sleep. You may not sleep the whole night but if you do like that or the neighbour's sleep is disturbed, then of course the question will come that your neighbour also has got certain rights. It is one of the basic things that you should exercise your right in such a manner that the other person's right is not violated. So far as the fundamental rights are concerned, it is true that even in the case of fundamental right it should not be exercised in a way that another man's fundamental right is infringed. There have been cases relating to strike, picketing and all that where the question of right to form an association, conflicting with the similar right of the other man or an employee's right clashing with the corresponding right of the employer.

Under Article 32 that is not the question. Fundamental rights as it is very well-known to people, initiated in jurisprudence, are the replica of the old doctrine of natural rights which are incidental to society. So, the society cannot touch upon the natural rights of man. The society is to serve the man and not a man has to serve the society. The society may regulate the other rights. So, these natural rights have been incorporated in the Constitution so that they will not be touched by the Legislature in the collective interest. And we should never forget it. If that is so, what happens? These are guaranteed against the Legislature and if an other man has acquired some rights because of some delay in my coming to the court; it cannot be a legitimate cause for refusing me, because you are not doing some favour to me. You are doing favour to the Constitution by enforcing the fundamental rights. But, then you might say that you want explanation. As I have said, that has nothing to do with the defendent. The court must first see whether this man (the petitioner) has come with a proper excuse and whether he is prevented by a right cause to come to the court. The question of alternative remedy may not apply. The court has already laid down that where there is a question of violation of fundamental rights and other considerations for refusing relief, these things will not apply as regards to fundamental rights because it is engrafted in the Constitution that certain rights cannot be touched even by the Legislature. Therefore, the question that the

other man has acquired rights because of my delay in coming to the court is not relevant.

Mr. Chairman: But the law of the land says that the rights created in favour of somebody are also protected.

Mr. Justice Basu: Certainly, no doubt. You look at the situation when it is a question of association of the employees, and the right of the employer to carry out his profession. One is the right of association; another is the right to carry on business (91-G). I have got a right to stop my business and drive you out. There is the question of competition between the two fundamental rights belonging to those two persons. It is not that the employer will break the head of the employee or the employee of the employer's: the power is given to the Legislature in the public interest. May I refer to the clauses of art. 19, because that would be better? The Legislature is given in the public interest, the right of so adjusting competing rights by imposing reasonable restrictions on the exercise of the right. Say, in exercising the freedom of speech, he does not vitiate the right of other man. I am exercising the right of speech. By way of limiting it, the Law of Defamation will be made. Why? Because of Article 19(2). The Legislature will make a Law of Defamation. What will happen in the case of a conflict between the different rights is already there in the Constitution. Suppose, my property has been taken without compensation. I come to the court after five years. There is a legitimate excuse; so, there is no botheration at all. Now, a Respondent might say that this land was acquired and it was given to us for starting a company, or for some residence. I could sympathise with the person aggreived and I also sympathise the person who raises the point. That is quite logical. Humanly, that may be a very good consideration, but that is violating the fundamental rights. It is for the State to give such Respondent *ex-gratia* payment, if he is needy. But so far as the Constitution is concerned, there is nothing to prevent relief being granted to the petitioner provided it is a fit case for interference by the court on other grounds.

Mr. Chairman: In case there is no proper remedy provided by the Legislature?

Mr. Justice Basu: There is another thing which might be working in your mind. Somebody has given an illustration of a case of refund in taxation. So far as the refund of the money cases are concerned, they should not be confused with the issue with which we are now dealing. The question is whether a law of taxation has violated a fundamental right. It may do that in one or various ways. For example, it is imposed by a discriminatory law. Then, Article 14 will be hit. Supposing, the procedure laid down for imposition, collection etc., is violative of natural justice. That restriction will not be reasonable according to Article 19—(5) or (6). Then the court will say that this is an unreasonable restriction to carry on the profession; therefore, this taxation law is void. Then the question comes about the ancillary relief. The only primary relief that the court will give is to say that this statute is unconstitutional because it constitutes unreasonable restrictions on the fundamental right under Cl. 19(i)(f) a (g)—his right to carry on profession or his right of property. Then, that is the first thing—some sort of a declaration. Then, the other thing that the court will do in the normal course, is to restrain the State or the opposite party from enforcing this invalid law. The court says that it is unconstitutional. Therefore, the second one is also a primary relief. Then comes the question: Should he get anything further? The question of refund is a question of *ancillary relief*. Various issues arise out of the question of giving relief like

refund. I may go into that question only if you allow me sufficient time. But I would tell you that that is only an off-shoot of the main issue because for the refund, there may be other relief available. Suit is the ordinary relief for a refund, for example, what is called a suit for money paid and received by mistake of fact. The money has been collected under an illegal or unconstitutional tax. Then that amounts to money being paid under a mistake of law, because the law is not there. "You have received my money. The basis upon which you received it was also thought by me to be a good law. But, today, the court says that that is a bad law. Therefore, I must get my money back." The ordinary remedy will be to go to the civil court. The respondent realised the money under a law which has now been declared by the court as invalid. Therefore, the entire proceedings from the beginning to the end, and everything done from demand to the collection, are invalid, and I must get back my money. But, when it has been collected in exercise of the statutory power and that statute is declared illegal, then the court has got the power to restore that man in the same position where he was before.

Mr. Chairman: The case before me is different. Whether it is the responsibility of the court to reconcile such matters or not. I have a right to enrol as a voter or for election. If I do not do it in proper time, and the election takes the place. Can I have the right....?

Mr. Justice Basu: That is governed by another article and not by any of the fundamental rights. Actually that is not a fundamental right; that is governed by Article 326—"Elections to the House of the People and to the legislature shall be on the basis of adult suffrage....."

Now it has properly been held that the creation of statute will be governed by statutes made by Parliament under a power which is given in Chapter 1 of the 1st list of the 7th Schedule, election to Parliament, 72; you have got to lay down the procedure as well as other incidence of the exercise of the right of suffrage. Therefore, that illustration is totally irrelevant to the present topic.

Mr. Chairman: There will be another cases. Here is a case. "60 days beyond the time permitted for availing himself of the alternative remedy." In such matters where the statutory authority passes an order in relation to a matter.....

Mr. Justice Basu: On what page it is.

Mr. Chairman: It is on page 8.

Mr. Justice Basu: Let me read it:

> "In such matters where the statutory passes an order in relation to a matter exclusively committed to its jurisdiction, the remedy provided by that statute must be pursued and the fact that a particular person has not availed himself of that remedy and allowed the same to be barred by limitation is no ground or justification for allowing him to approach this Court under Art. 226".

It means that the right is created by statute and the remedy is also created thereby. Is that a fundamental right? That is also irrelevant, for it is not a fundamental right, that is statutory and non-constitutional. It has been laid down that where the right and remedy are provided by the same statute, you must follow that procedure. Of course even in the exercise of a statutory right, a person might violate the Constitution. These are the niceties of law. While exercising a statutory law, you may violate anothers fundamental right.

Mr. Chairman: How would you reconcile to dismissal in limine?

Mr. Justice Basu: You permit me to refer to a decision which is reported in the Calcutta Weekly Notes. There I have dealt with this in detail

and as to what should govern the court for dismissing in limine. I have discussed this law thread-bare on that subject. I have said that if there is a justiciable issue, if you have got something which should be decided by the court, whether that is correct or not, that is not the point. The point is whether you have got something arguable. If you have nothing arguable, that must be dismissed in limine, but supposing you have got an arguable issue, whether fundamental or otherwise, the court is bound to issue a Rule and I am supported by some of the Supreme Court decisions. Now the Supreme Court decisions are not uniform, but the consensus of the Supreme Court decisions is on this point that if there is an arguable issue, the Rule should not be refused.

Just to reduce the work of the court, dismissal in limine without taking into consideration whether there is an arguable issue or not, would not be correct. You can go in appeal, if it has been decided by one Judge to a division bench of two Judges. In some of the High Courts, a petition urder Article 226 is heard by a division Bench; supposing dismissal in limine is made by them, the only way is to go to the Supreme Court under Section 136. It is again a special leave, discretionary and extraordinary. I may tell you that a very eminent lawyer of the Supreme Court, who has got a very prolonged and respectable legal backing in his career has told me with great remorse that during the last vacation of the Supreme Court, the dismissal in limine of petitions has taken by lots.

You will appreciate that to reduce the number of cases before the Supreme Court and High Court is no consideration in a court of justice.

Mr. Chairman: Would you make some distinction between Articles 32 and 226 ?

Mr. Justice Basu: In regard to 226, I have always held it that the enforcement of fundamental rights is the duty both of the High Courts and the Supreme Court —All the stalwarts of the Supreme Court like Justice Patanjali Shastri have said from the very beginning and very rightly that the fundamental rights are guaranteed by the Constitution against the legislature and it is a duty of the courts to enforce the fundamental rights. I would never budge from that position.

Article 226 reads :

"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....for the enforcement of any of the rights conferred by Part III and for any other purpose."

Some part of it is common with Article 32.

In so far as Part III, is concerned, once you say that the right is guaranteed, if there is any law which contravenes a fundamental right, that will be void. But during the early days of the working of the Constitution some of the Supreme Court judges unfortunately have thought that even so far as fundamental rights are concerned, the jurisdiction under Art. 226 is discretionary. That is not correct. Now the Supreme Court has corrected the position, that it is the duty of the the High Court as much as it is the duty of the Supreme Court to enforce the fundamental rights. So, even if the party comes after a lapse of years I should say that the length of time should not be a measure because I agree with the proposition which has been very clearly stated in the Statement of Objects and Reasons, that it is not in the province of Courts to lay down the statute of limitation. So, length of time should not be a consideration even there, even so far as my expla-

nation clause is concerned. That is why I have not changed that. But I think it should be applied to both 226 and 32 because once the Supreme Court has followed that this is as much a duty of the High Court to enforce the fundamental rights, the same amendment should apply to both. You will see that in the last page of the cyclo-styled papers I have said that the same amendment should be made in both the clauses, and I want to stick to that. Heavens will not fall if you add that. So, I would say that limitation of duration of time should not be the basis.

Mr. Chairman: I have done now You are in the city tomorrow.

Justice Basu: Yes. I shall be glad to assist you as many times as possible.

Mr. Chairman: Thank you. We will meet again tomorrow at 10 o'clock.

(The witness then withdraw).

MINUTES OF THE EVIDENCE GIVEN BEFORE THE SELECT COMMITTEE ON THE CONSTITUTION (AMENDMENT) BILL, 1969 BY SHRI TENNETI VISWANATHAM, M.P.

Wednesday, the 22nd July, 1970 at 10.00 hours.

PRESENT

Shri D. K. Kunte—*Chairman.*

MEMBERS

2. Shri C. K. Bhattacharyya
3. Shri Shiva Chandra Jha
4. Shri K. M. Koushik
5. Shri S. N. Misra
6. Shrimati Sharda Mukerjee
7. Shri A. S. Saigal
8. Shri Tenneti Viswanatham.

LEGISLATIVE COUNSEL

Shri A. K. Srinivasmurthy, Deputy Legislative Counsel, Legislative Department, Ministry of Law.

REPRESENTATIVE OF THE MINISTRY OF LAW

Shri Dalip Singh, Deputy Legal Adviser.

SECRETARIAT

Shri M. C. Chawla—*Deputy Secretary.*

WITNESSES EXAMINED

(i) Hon'ble Mr. Justice D. Basu, Judge, High Court, Calcutta.

(ii) Shri S. N. Jain, Acting Director, Indian Law Institute, Bhagwan Dass Road, New Delhi.

(i) Hon'ble Mr. Justice Basu.

(The witness was again called in and he took his seat.)

Mr. Chairman: Before my colleague asks questions, may I put one question?

Mr. Justice Basu: After you finish, I may be permitted to say something in continuation of what I said yesterday so that the questions by the hon. Members may be put in the proper direction.

Mr. Chairman: My question is this Is the fundamental right extinguishable by lapse of time by the conduct of the party?

Mr. Justice Basu: The answer is an absolute 'no'. What I propose to do now is this. This may be helping the Committee also. I would like to give my comments on the report of Shri

Seervai though of course that has come to me informally.

Mr. Chairman: Yes, you can do so.

Mr. Justice Basu: These questions are bound to arise. After all Shri Seervai also is an eminent man and there is no doubt about that. I have my personal respect for him. I have known him personally also. He has got a very mature experience at the bar. Here he is giving a written memorandum. Apart from that he has written a book on the subject. We must also pay attention to that. Now you may be quite anxious to know what my reactions are. My views are absolutely to the other direction. Let us first take up Shri Seervai's Report, page 2, para 2. One thing which should be mentioned here is that Shri Seervai or some other people think that the law of limitation is also a part of the law procedure like the Civil Procedure Code or something like that. In jurisprudence, the Law of Limitation is no doubt called an adjective law. No doubt, in a way, it is a means of enforcement of a legal right which a person may otherwise have got. But it is not purely a law of procedure. Take for example the Limitation Act, 1908. Many of you have seen Sec. 28 of the Act. That extinguishes the right of one person and created it in favour of another. Now the Chairman had asked me whether the Fundamental Right was extinguishable? All law of limitation is partly substantive and partly procedural, and if we said that the enforcement of fundamental rights should be governed by the main principles or the primary principles of law of procedure still it does not follow that the law of limitation being a part of the procedure must also apply to the fundamental rights. Because the Law of limitation is a creature of Statute and cannot be extended beyond its terms. This is the preliminary thing I want to say.

In para 2 he said: "In my opinion, the Bill raises far-reaching questions relating to the administration of justice, and if passed, would be productive of great public and private mischief...". About that, my humble opinion is that the fundamental right is the greatest mischief that any democratic country gives. In an autocratic regime like that of the Czar of Russia or the Stewarts of England there could be no fundamental rights, no individual rights. We have not only got legal, individual rights as they have got in England, but we have enshrined some of them in a written Constitution, saying that this is an invoidable part of the Constitution which cannot be wiped off even by the peoples' representatives, even by the popular votes of the people. Even if a mischief has been done, I must add that so far as I am concerned, whatever be the weight of that opinion, if there be anything worth mentioning in the Indian Constitution, that is Part III.

The next thing is that he says: "Except where a right is conferred on grounds of public policy, *e.g.* abolition of untouchability, every right conferred on a person is for his benefit and it is open to him not to exercise the right or to make such arrangement as he thinks fit, if he believes that his right is violated...."

I have got to say something on this point. The latter portion of this sentence deals with the doctrine of waiver which has also been referred to in another part of this note.

Now, you know very well that the law is divided into two parts: Public law and private law. The doctrine of waiver is part of the law of contract, which is private law. It has been held by the Privy Council in Dawsons case that the doctrine of waiver is founded our implied express contract. The doctrine of fundamental rights is part of public law. For the same not be imported into the realm of reason, the law of acquiescence canthat the doctrine of waiver cannot fundamental rights. So also I say

be imported into the realm of public law. Of course, there is something to say against that. In the United States there is one right to which they have applied the doctrine of waiver occasionally. That is the doctrine of immunity against incriminating statement. In our Constitution, we have got Article 20(3). The American Constitution has got something corresponding to that, that no man can be compelled to be a witness against his wishes. No person shall be compelled. But supposing I am not compelled, and I jump up into the witness box and say, 'I shall give evidence', is it a breach of the constitutional provision? Is that a waiver? It is not waiver. That will not come within this prohibition because I have not been "compelled" that is now permitted by s. 342A of the Criminal procedure Code.

He says: "....and it is open to him not to exercise the right or to make such arrangement as he thinks fit, if he believes that his right is violated...." It is absolutely correct, that if I prefer to sleep all the 365 days or for six months like the 'Kumbhakarna', nobody can compel me to wake up.

Mr. Justice Basu: Well, we must be afraid of everybody, just as we should be afraid of our ownself. First of all, supposing there is a one rupee note and I do not take it up but if there is one lakh of rupees, I take up that with a fear in my mind.

We in India are distrustful of the judges individually. Though I am myself a judge, I do not say that I am a demi-God. At least some sort of objective standard should be there. Where there is no statute of limitation should we leave it to the judges individually to coin up a particular length of time? Therefore, length of time can never be the standard. When the petitioner comes and says these are the reasons, why I could not come yesterday—because my mother's *sradh* ceremony was being performed,—who is the devil sitting on the Chair who will not listen? That is the question.

It has been established by the highest authority that a fundamental right cannot be extinguished by lapse of time or by inaction. A fundamental right cannot be extinguished either by estoppel or by acquiescence or by lapse of time. In fact you will be interested to know that so far as the royal authority in England is concerned it has been held by the House of Lords very recently that prorogative is not lost by lapse of time. It was last exercised in the 17th or 18th century in the case before the court. The doctrine of waiver of fundamental rights under our Constitution, I submit respectfully is not sound in jurisprudence. The suggestion is that all the fundamenatl rights contained in Part III are not inserted on grounds of Public policy; it is only a few of them for example abolition of untouchability is considered to be the public policy in India. Similar is the provision that there should be no discrimination between man and man. I am sorry to say that this is absolutely incorrect and if there is any spirit here of those people who had made this Constitution he would protest against such a statement.

There is doctrine of double jeopardy which is in Article 20. I am taking very minor instance. No person shall be prosecuted or punished for the same offence more than once. The question is that a person has committed theft, and for the theft at my house, he has been convicted by a sentence of fine. Then I tell Members of Parliament, no this is a very bad man. It should not be like this. He must be prosecuted again. Induce the police. Bring another case against the man, perhaps stronger case,—to send him to jail. I may tell you Supreme Court has done some injustice to this clause. In England if a man is tried and acquitted then he cannot be prosecuted again.

Our Supreme Court has said, well one part is in the Cr. P.C., the other part is in the Constitution. I have given reasons in my commentary and why that interpretation should not be accepted. I want to put as a layman. Is this for the benefit of that man, for the individual or is it for the benefit of everybody in the land? It is one of the essential principles of Justice—natural justice. This immunity from double jeopardy is derived from the philosophy of natural justice. It is not a matter for individual bargain.

In England the best feature of administration of justice is the presumption of innocence against the accused so that any innocent person may not be convicted. Before the advent of the modern system of administration of justice, there was trial by ordeal. There was not trial at the beginning. Either you walk on fire or touch the fire or something like that. The man may be dead. He need not be convicted. That was replaced by the system of trial by jury—12 Members who are gentlemen of the neighbourhood. They tried in a crude manner but even then it was much better than the ordeal. After hearing the evidence, you are held guilty of theft. That was supplemented by the modern principle of jurisprudence, *i.e.*, the presumption of the innocence of the accused, and another thing that he must be tried only once. If there is error in trial, there may be revision or something like that, but not a fresh prosecution.

In India Section 403 of the Criminal Procedure Code is there. Underlying that is the principle that he must not be tried for the same offence twice. Is it simply for his benefit or is it the public policy of this land that no man should be tried twice judicially for the same offence?

Part III is for the benefit of the public and the makers of our Constitution thought that, they should enshrined them in the Constitution to safeguard them from legislative intrusion only because it was for public interest and that these are the minimum safeguards and guarantees against miscarriage of justice. It does not rest on anybody's sweet will or anything else. So, that is my belief.

Para 3: Fundamental rights are for public benefit and for the public interest. They cannot be waived on the sweet will of the person. The chapter on fundamental right does not make any reference to rules to Civil and Criminal Procedure Code. The limitations have been referred to in Trilok Chand's case. My comment is that not all the provisions of the Civil Procedure Code or the provisions of the Indian Evidence Act will apply but only those primary principles which go with the established notions of natural justice or established notions of judicial procedure. So, therefore, I have no objection even to that part. Then he says that fundamental rights themselves are made subject,—speaking broadly, of restrictions in the public interest.

Mr. Justice Basu: I told you yesterday that it is only in Art. 11 that the power to impose restrictions upon fundamental rights has been conferred on the Legislature to be made in public interest. For example, you look at Art. 19(5). "Nothing in sub-clauses (d), (e) and (f)—that means right of liberty —shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing reasonable restrictions on the exercise on any of the rights conferred by the said sub-clauses either in the interest of the general public or for the protection of the interests of any Scheduled Tribes." There are numerous instances given in the text-books and you can find from any of them what comes under reasonable restrictions in the public interest. For example, in the interest of public morality, they may say that you may not use your house for being used as

a brothel. That is not given in the Constitution. But they empowered the Legislature to make a law to impose reasonable restrictions upon the use of the house. My comment on (3) is, that it is restricted to the specific ambit of Art. 19, and Art. 32 or 226 should not be interpreted in general as limited by such considerations. If we import that doctrine in Art. 32, it would be doing what I should say improving upon the architecture which has been built by the framers of the Constitution by some sort of usurpation.

Now, para 4: "Articles 32 and 226 of the Constitution mention by name the various writs which the English Courts have issued for centuries."

> "....Except for the writ of *habeas corpus* which involve the unlawful imprisonment of a person either by a public authority or by a private person..... all considerations relevant to the adminstration of justice are borne in mind in granting or refusing the wrist." This is not correct in toto.

> "For centuries it has been settled in England that these writs must be applied for with the utmost expedition, and as regards the writ of *certiorari* a period of six months has been prescribed as a period within which an application must be made with power to the Court to condone delay if sufficient cause is shown."

Now, the first thing that I want to caution is to link or classify all the prerogatives in one clause. As a matter of fact, all these writs have individual traits or features which are not of the same order. As a matter of fact, *habeas corpus* and *mandamus* cannot be put together. To certain extent, *habeas corpus* is a writ of right. You can get *habeas corpus* once you are able to show that the imprisonment is illegal. But *mandamus* is said to be discretionery and there are certain principles which would govern the exercise of *mandamus*. Each one of them have got individual characteristics. So, to say that all the consideration of administration of justice will apply to the administration of each of the rights is not complete or fully correct. Now, the second thing is "for centuries it has been settled in England...." This is incorrect. The six month limitation for *certiorari* has been prescribed only in the English Supreme Court Rules. They have framed RSO and there, they prescribed six months limitation. That is the rule of the English High Court or Supreme Court. Now, if our Supreme Court formulates a rule like that, the question will arise whether we could engraft such a rule in view of Art. 32(1). The difference between England and India is that we have got guaranteed fundamental rights, and it is in aid of those fundamental rights that the prerogative writs have been imported. There is nothing like that in England. Therefore, there is nobody in England to say or challenge the validity of the Supreme Court Rules by which it has been provided that six months is the limitation. If such a controversy arises in India, and if we lose the fundamental rights as barred by limitation, then there is an end to the Constitution and to the system of constitutional government in India. It would be better to scrap the Constitution the next morning.

The next thing I want to say about *certiorari* is: In Engliand there was a doctrine that if the legislature by a statute excludes the remedy of *certiorari* right, then the English High Court (or Supreme Court) cannot issue a writ of *certiorari*. For example, there is a statute, which provides that an order shall be final, the English courts had held in the past that in such a case the writ of *certiorari* had been excluded. But, the English people are indomitable. They fight for justice. Therefore, afterwards they found that this doctrine is not salutary, and by the recent statute—The Tribunals & Inquiry Act, 1952, it has been provided that the

writ of *certiorari* cannot be excluded by statute. So, even in England, the law to day is that by legislation, you cannot exclude the prerogative writ of *certiorari*. Fortunately for us, in some cases it has been held that in India that prerogative writs cannot be excluded by statute because our right is guaranteed under 32(1). Therefore, it would be unconstitutional for the legislature to say that on certain occasions *certiorari* shall not be available or certain orders of the quasi-judicial authority shall not be available for judicial review. It would be unconstitutional and a most regrettable state of affairs. Therefore, it does not help to say that. For centuries in England it has been held that there is a limitation for *certiorari* right." There is no limitation in India. If such rules are made, they would be subject to constitutional challenge. And so far as my hope goes, I hope that our Supreme Court judges will not fall into this trap. They will not commit this blunder by making a rule of limitation for the prerogative writs.

The next thing is that he has cited an old decision of the Calcutta High Court. My preliminary comment is that much water has flown down the Ganges since then. To cite this case is not a good precedent. He says that "the purpose for which the writs should be issued follow from the name and nature of the writ itself and it has been rightly so held." I think that it is totally irrelevant to what we are discussing now. Art. 226 may be used for the enforcement of fundamental rights—50 per cent for the fundamental rights and 50 per cent for the enforcement of other legal right. This 'other purposes' has not been defined in the Constitution. So, some judicial exposition was required to interpret what is meant by 'other purposes'. This case is a commentary upon the 'other purpose'. We are not concerned with the 'other purposes' at the present moment. My only comment is that this decision will not help us to the solution of the problem before us. And so far as the first portion is concerned, when he says that the essential principles of the prerogative writs are imported, does he want to say that the rules of the Supreme Court of England have been imported by the makers of our Constitution in Art. 32? If the answer be in the negative, you can altogether ignore para 4.

Now come to para 5. In this para, he says of the general doctrines of procedure. He cited the doctrine of res judicata. He has given the case of *Daryao V. State of UP.* It is given in page 4. My submission on this point is like this. *Daryao VS. State of U.P.* is not a bad decision at all so far as its one portion is concerned. That portion is that the doctrine of *res judicata* may apply to the decisions of prerogative cases. For example, ther is one petition under Art. 32. That is decided on merits on all issues. He loses, should he be allowed to bring another petition? So also regarding petitions under Art. 226. But supposing he brought one petition under Art. 226; that has been decided, should he be debarred from bringing another petition in Supreme Court. Certainly not. I have given reasons for this answer in the Tagore Law Lectures delivered by me and those have been considered as irrefutable and irresistable arguments by certain foreign authorities.

Shri Koushik: In deciding a petition under Art. 32(1), should not the principle of res judiciata be discussed on a point of public policy?

Mr. Justice Basu: I was only wanting to say that the object of the present amendment is to say that mere delay would not be a ground for refusing a petition under Art. 32. That has not to do anything with *res judicata*. Largely speaking, I say that, *res judicata* is one of the principles which are based on public policy, there is no doubt about it. That is called the principle of finality of litigation, otherwise it would go on.

I do not agree wth the latter development of barring an application under Art. 32 because a previous application under Art 226 has been decided. But I do not know, why they have applied *res judicate* to this situation. The answer might be that they want to avoid plurality of cases before the Supreme Court. That, I submit is not a judical doctrine.

Shri Koushik: I am asking you not only with regard to *res judicata* on a point of public policy there are several principles which are actually taken into account in 'judging whether a certain writ is to be issued or not. Do you agree that this is correct?

Mr. Justice Basu: I have already said that all these belong to the same rank, but these doctrines do not belong to the same class.

Shri Koushik: Are they not intended to prevent mischief or to see that justice is done?

Mr. Justice Basu: That is true but they belong to different branch of jurisprudence. We could not bring them together. At the beginning, I have said that so far as the doctrine of waiver is concerned that pertains to the law of contract. There is no scope of importing the law of contract to the realm of fundamental right. Aquiescence is a doctrine or equity or the court of chancery. It has to do nothing with the common law prerogative writs. Therefore, the doctrines of acquiscnece or laches have no application so far as the rights outside Equity are concerned.

Estoppel is a doctrine pertaining to the law of evidence. In India we do not have the equitable estoppel. Whenever the question of estoppel arises, we have to apply Section 115 of the Indian Evidence Act, and it says that if a person makes a certain representation which induces the other party to change his position then the right belonging to the first man will not be enforceable in a court of law. That also is not of the same nature as acquiescence. Now coming to the doctrine of *res judicata*, it is what is known as estoppel by judgement. That is not exactly a rule of evidence. *Res judicata* is not merely evidence but something more, estoppel by record. That means not that you have done something, not that you have made a representation, but that the court has decided your case. Say, in the year 1947, you brought another petition and you lost it, therefore, no evidence will be allowed because there has been a decision by a proper tribunal. Therefore, why should we enter into all these complcations of different branches of law.

I will explain this.

The people cannot behead you twice. What can they do after your head has fallen? The Japanese wanted to do that with the Chinese when they invaded them. We have here adopted the English system of justice. And there are certain basic principles of English system of justice which are now still being followed in India. You want to adop a new system of jurisprudence. For example the Indian Penal Code or the Civil Procedure Code are sought to be revised. That is now before the Law Commission.

Mr. Chairman: Let us talk about the present position.

Mr. Justice Basu: The law of *res-judicata* will apply to proceedings under Art. 32 or 226 if the same court has heard the petition. That can be decided on merits. But, I protest against that part of the decision where it has been held that if a person has been denied the relief by a High Court, he will forfeit his right to move the Supreme Court which is as guaranteed under Art 32, it is not a good judicial principle.

The next point is about this. The rule of pleading provides for insisting on your cause of action. The Supreme Court has held already on this point

that if by a change of circumstances, some thing new has taken place, then the doctrine of *res judicata* will not apply. Suppose he brings a petition in a particular situation. There the question of applying Art. 14 does not arise. But, by a change of circumstances something new may have taken place, which has caused discrimination.

Mr. Chairman: That is self-evident.

Mr. Justice Basu: I have got to explaint it. When the question is put to me, I must answer it. Yesterday a question was put to me. Suppose some right accrued to the other party by lapse of time. Should we consider delay, in such circumstances as sufficient for rejecting a petition under Art. 32? I am giving you a concrete example. Art. 13,15 and 16 say that there should be no discrimination against any citizens on grounds of religion etc. It has been applied by the Supreme Court even in the matter of government service. Suppose there is a patent discrimination. There s no doubt that an individual can come after five or ten years to the Supreme Court saying that Art. 14 of the Constitution has been violation, if he can properly explain why he could not come earlier.

When a person asks for leave against the administration on this ground, he must implead in that petition all other employees who would be affected if relief is given to him. Such opposite party can also raise many issues and may even bring before the Court such objections as if he has lost this or that because the petitioner has not come to Court on long. What the court has to do in such cases is that it would hear also his point of view and then decide. The person affected seeks to get his fundamental right enforced. Under the Constitution of India, the President of India, Members of Parliament and the Ministers and Judges who have taken their oath to uphold this Constitution have got the duty to safeguard this right of the particular person. The person should not be refused relief on grounds of limitation or the like, whatever consideration be shown to the Respondents grievances.

Paragraph 6 deals with principles of *res judicata*. I need not dilate on that. Paragraph 7 deals with waiver. We need not go on that. There is a world of a difference between ordinary civil litigation and writ proceedings. The principles governing ordinary civil litigation should not apply to the realm of prerogative writs or to the enforcement of the fundamental rights. That is why in fundamental rights there is a separate chapter—Chapter III.

Now I come to para 8. This is also about waiver. But the Supreme Court has held that in the circumstances of the case, he has a right to press his cause of action. He may say that he has got the right to object to the formation of—constitution of—a jury. For example, a Negro may say that there must be some Negro in the Jury. If he is convicted notwithstanding such objection, the conviction is quashed if, however, he has stood the trial without raising any objection that the jury was not properly constituted. And so he has lost the case he is not heard in the objection thereafter. We are not discussing that question here. We are discussing a simple question as to whether the court can say when a person is deprived of his fundamenal rights that he should go home without his being heard because he has come after the lapse of any particular period of time. There has been no trial at all in this case. This is the simple question and nothing else.

Now I come to para 9. In my opinion the majority judgment of the Supreme Court in the case of Tilokchand Motichand v. H. B. Munshi will apply to the delayed writ proceeding is correct. It is said—They proceeded on grounds of public policy which are part of our law and such public policy subserves the public need. There is no reason why statutes

of limitation should bar every claim but should not bar the claim of enforecment of fundamental rights. In my opinion, the Limitation Act should provide a relatively short period for the enforcement of fundamental rights as would appear to the court to extend the time for sufficient causes".

May I give an extra-Judicial answer to this observation? There are some of the architects of our Constitution—who are still alive. Shri Mushi is the only person who is alive I think. Why don't you get his opinion also on this. If he agrees, I prepared to wipe out all my evidence from the begining to the end. I use a very simple word that this statement is very atrocious. If the statute of Limitation should bar other claims why should it not bar the claim for the enforcement of fundamental rights? In my opinion, instead of longer period a relatively short period should be provided for enforcement of fundamental rights."

I am sorry to say that I would rather join the D.M.K. in burning the Constitution if this suggestion is accepted. The sooner it is done the better it is. This is my simple answer. I may add that the judgment of the Supreme Court has made this rather complicated. I have no objection to the first sentence in the first case in the tabular statement made here. If this is the proposition that is adhered to by the Supreme Court namely, that no relief should be given to petitioners who without any reasonable explanation approach this court after inordinate delay I would not have come here and I would not have submitted my memorandum. But you see here that at least there are 13 Supreme Court decisions which lay stress upon the enough of time.

So far as reasonable explanation is concerned, this is the judgment of Justice Sikri. He said:

> "No relief should be given to petitioners who without any reasonable explanation approach this court under Art. 32 after inordinate delay...."

I would only request you to turn over the pages of Mr. Justice Sikri in Tilockchand's case next.

Look at the next portion of third paragraph. That yardstick of time, that length of time, has again been introduced in Tilokchand's case. In Rabindranath's case they have taken both the things:

> "Each person ought to be entitled to sit back and consider that his appointment and promotion effected a long time ago would not be set aside after the lapse of a number of years. There is a limit to the time which can be considered reasonable for making representations...."

I do not accept this statement that there is a time limit which can be considered reasonable for making representations. I ask you, 'what is your reasonable time-limit'; none will agree with each other. I am very sure. One hon. Member may say one year, another may say three years, another may say five years and so on.

Look at other things. Allow me to read out the judgment of several judges. I may also give some illustrations; otherwise you may think that I have given a distorted version. Please see Item No. 1, at page 6. Union of India v. K. K. Colliery Co., A.I.R. 1969 S.C. 125 (Justice Hegde): The most surprising thing is that Justice Hedge, whose judgment is very, very liberal, at page 2—says, "It is not a discretionary power....", that very learned judge says here, at page 6:

> "The impunged notification was issued on October 9, 1963, and the writ petition was filed on March 23, 1964, well within 6 months of the date of the notification. This

delay is not sufficient to refuse the relief prayed for."

I am giving other illustrations also. See page 8, item No. 1—Tirumurthi Tran sports v. R.T.A., Coimbatore (1970) IM.L J 14 (M.M. Ismail J.):

"In such matters where the statutory passes an order in relation to a matter exclusively committed to its jurisdiction, the remedy provided by that statute must be pursued and the fact that a particular person has not availed himself of that remedy and allowed the same to be barred by limitation is no ground or justification for allowing him to approach this Court under Art. 226. In matters like this, where a person complains against any order of the RTA, he should come to this Court with the utmost promptitude for the protection of his interest which is purely individual and peculiar to him, as against the public interest sought to be served by the order of the RTA...."

Come to No. 4, page 9: "When tax is levied by a mistake of law, it is ordinarily the duty of the State, subject to any provision of the law relating to sales tax, to refund the tax...."

Then he says: "If refund is not made, remedy through court is open, subject to the same restrictions and also to the period of *limitation*, namely, *three years from* the date when the mistake had become known to the person who had made the payment by mistake."

This is the first occasion where the court has held that they must refuse leave. I say that merely the length of time should not be the test. You read the Supreme Court decision.

Trilok Chand, is an extension of a doctrine which was first introduced into the fundamental sphere Different pleas have been given—say 5 years, 90 days, 60 days, etc. should be the limitation. If that be the policy which is acceptable to Supreme Court, then of course I will submit that you make a legislation or let the Supreme Court fix a definite length of time.

Shri Tenneti Viswanatham: Whatever may be the origin, at present no citizen has got a right or remedy beyond a law in force or the Constitution. Therefore, they should be guided by the wording in the various statutes or the Constitution. There is no other method. Either refer to High Court or the Supreme Court. With regard to Article 32 and 226, one guiding principle of interpretation must be that whatever action may be taken by the Court, it must be in aid of the furtherance of the rights given there and not with a view to destroy them or circumscribe them.

Mr. Justice Basu: I agree with it.

Shri Tenneti Viswanatham: In the matter of fundamental rights when two private parties have some problem under the Property Act, provision of Article 226 or 32 be provided . . .

Mr. Justice Basu: That has already been laid down. As a matter of fact even under the English Law of Prerogative, writs, it has been established beyond any doubt that these do not apply simply against private persons. I told you this at the beginning. A private individual may be a Respondent in a writ petition but the remedy is not against him, but it is against the State.

Shri Tenneti Viswanatham: When a man goes to Court invoking Article 32 or Article 226 he goes against the State rather than the individual who is benefitted....

Mr. Chairman: Only against the State.

Shri Tenneti Viswanatham: Other rights have been created in violation of fundamental right is wrong. Certain rights are supposed to be created. In fact they have no legal origin.

Mr. Justice Basu: Because of inaction or indolence ....

Shri Tenneti Viswanatham: Government passes an order or the local authority passes an order. By the time court gives the decision other people have stepped into it. After four years when the matter comes up, will it be open to the Government to turn round and say because other rights have been created, you cannot take any action?

Mr. Justice Basu: There was a 'Maulvi' who was very much conscientious that he should not do anything wrong. One day he saw that his wife has cooked a chicken. He said we have not got a fowl. She said that a neighbour's chicken came to our territory. It is our property. He said it is absolutely against our scriptures and we should not touch it. The wife said the chicken belongs to my neighbour but spices are ours. Well, that is true, he said. The soup is our property. But I shall not touch the meat. When she was pouring that, one piece of meat was coming. Then he said it was coming out of its own course. I am not taking it out myself. Certainly let it come. The main point is like this. What is the object of a fundamental right? Why have you brought it into the Constitution? There is no question of another man's benefit.

It has been held by our courts that where the Government or a Governmental authority makes a mistake and promotes a man either by mistake that there was a vacancy; or by misinterpreting the rule. The vacancy did not exist then. If that man is removed afterwards and the real person is brought in, that would not amount to reduction in rank. Why has it held so? It is because there is no legal right definition. So far as that man is concerned; it is due to misconception. If the executive authority unfortunately dismisses the man in office by way of reduction in rank or suspension by practising discrimination, by violating Article 14 and then brings another man, the dismissed man has legal title only because he has been illegally dismissed.

I agree with the learned Member that the person has no legal title. Supposing Government thinks that he is an efficient man and he has discharged the duties of that post for six years; we should not demote him to a lower post. A supernumerary post may then be created for him. But why should the man whose fundamental right has been infringed suffer.

Shri Tenneti Viswanatham: Now I will not say this. If this theory of subsequent rights intervening goes, he is upheld and greater mischief is likely to arise. I can dismiss a man. Supposing I am an authority to appoint and dismiss. There is Art. 311. I bring some favoured man. And after sometime when this man goes to the court, I will argue that "no, no .... other people have got other rights. Therefore, you cannot come in." Can you say so?

Mr. Justice Basu: I will give you a more concrete illustration. You know this Spoils system of employment as obtained even in the USA up to the 19th century. And though, competitive examinations are now introduced in the USA, still there is a considerable area where this is going on. The President can bring his own man, like the old Corporation of Calcutta. So, he brings his own man. Or, supposing that misfortune befalls us and the present Government is turned down. The next day another party comes in and dismisses all the judges, civil servants etc. and they bring their own men. And these people, unfortunately could not pronounce or express their views because the system of administration was otherwise, and the new set of men work for three years. And fortunately, by the ways of God, this atrocious Government is again thrown away and our friends come in again, and the old system of judiciary is restored. Do

you think that when the aggrieved persons come berore the Supreme Court, the Supreme Court should say that 'you were all dismissed illegally', but these people also became very much efficient. They must be kept and you may go elsewhere'. Would that be doing justice or not? That is the question.

Shri Tenneti Viswanatham: The question is this. I draw your attention to the sentence of Justice Hidayatullah in Trilokchand's case where he says that the Constitution has not prescribed any limitation.

Mr. Justice Basu: He said even in the summary.

Shri Tenneti Viswanatham: If a limitation is put by law, whether it will be supported. He said it would be void.

Mr. Justice Basu: There I agree with him wholly.

Shri Tenneti Viswanatham: But he said that "what cannot be done by a law, I will do it as a Judge." He says 'leave it to me.'

Mr. Justice Basu: I quite appreciate. That will be supporting the 'divine right of courts.'

Shri Tenneti Viswanatham: Therefore, it is not on the statute. It is not the province of the courts to legislate.

Mr. Justice Basu: Absolutely correct.

Shri Tenneti Viswanatham: Justice Hidayatullah is right in saying that no limitation is made, and unless you amend the Constitution and repeal the Art. 13, you cannot put any limitation. Even with regard to Art. 226, which deals with the fundamental rights, it cannot be done.

Mr. Justice Basu: That is one part: I told the other part yesterday. Though Art. 226 is not a fundamental right, that is a constitutional provision. Art. 226 is also to that extent guaranteed by the Constitution because it is a part of the mandatory provisions of the Constitution. It is not a recommendatory provision. And there is no question of limitation. Assuming that no such rule is made, then the court cannot devise any sort of imaginary duration of time. Then the only thing the court can say is "this is an extraordinary remedy and you must be diligent."

Mr. Chairman: But the operation of other statutes will not be barred in the matter of other matters.

Mr. Justice Basu: If that is statutory, it will be governed by the statute.

Shri Tenneti Viswanatham: Justice Hidayatullah's judgment makes it clear that while the Parliament cannot put any limitation, the court will do it—according to the will of the judge. Secondly, you were saying that my amendment is quite all right if a few words are added *viz.* provided the delay is explained. Yesterday, you were good enough to say that that is a part of procedure and not substantive law, just as you explained the case of Amin. It is quite reasonable to ask a man to explain the delay. Therefore, it is a part of the pleadings. Therefore, will you say that it can very well be introduced in the rules of the High Court, or rather made a part of the Article?

Mr. Justice Basu: The difficulty is that you are the legislature. Even if you say something in the Report, the courts may or may not do so, because you have introduced this proposition. I wanted to be exhaustive. If the Supreme Court makes the rule and you make an amendment, your amendment will be supplementary.

Shri Tenneti Viswanatham: Once you introduce as a part of this amendment, will it not simply mean that the court has got the power to consider whether the delay is justified or

not, and on that ground alone to reject it?

Mr. Justice Basu: You read the first sentence of Ravinder Nath's case. "no relief should be given to the petitioners where no reasonable explanations come after a lapse of time." Therefore, that is the uncodified law of the court at the moment.

Shri Tenneti Viswanatham: The relief is given or not is not the question. The question is whether they will entertain the petition. The relief may or may not be given on other grounds. That is different altogether.

Mr. Justice Basu: Of course, the amendment is suggested in order to make the old proposition comprehensive, because, even in England, the law is that if there is any delay, that must be explained.

Shri Tenneti Viswanatham: Anyway you should have no objection if it is incorporated in the rules of procedure.

Mr. Chairman: I have read your sentence—"no remedy". The Supreme Court says that you file the petition and we refuse to give you any relief. That is exactly what the Justice is suggesting.

Shri Tenneti Viswanatham: My question followed what he said. Yesterday it is said, and we are very clear and agreed 100 per cent, that this question of limitation should not be there in the substantive law. If such a question of explaining the delay should come, it should come in the pleadings.

Mr. Justice Basu: I also agree with you. You are dealing with this amendment. Once this is passed, then only you observe in your report that you suggest that the Supreme Court will make such a rule.

If you say only 'on the ground of delay', it would not be quite scientific. Instead 'if this is otherwise explained', that would be all right.

If you want very good decisions, perfect decisions from the judiciary, you should also help them.

Mr. Chairman: Your suggestion will also raise another point. That is what is the reasonable explanation and who is to be satisfied?

Mr. Justice Basu: Unfortunately, I am the only judge here. You have to do something with the judges. Now you see there are many things which are left to the discretion of the court not because they are the only wise people, but because there is no other way, for example the question of assessing costs, damages. Now there is a provision in the C.P.C. Section 35(A) for compensatory cost. Suppose the litigation is frivulous and therefore the court wants to chastise him by imposing him compensatory cost, i.e. saddling the plaintiff and not the defendant. Now is it not left to the discretion of the court to put any amount? You yourself have given that discretion. There is no machinery for assessing costs.

Now a suit is dismissed. There are certain rules in certain courts, for example in the Original Side of the High Court in Calcutta. There is a scale given; the Appellate Side have different scales, but even thereafter there is discretion for what is called the 'counsel fee' and for miscellaneous cases, there is no scale. For example, a man has brought a frivolous petition and the court is not very much pleased with his conduct. That discretion must always remain with the court in assessing the costs.

It is reasonable care which is expected of everybody. Now you are cleansing the barrel of your gun; it must be reasonable. But should you not take care to see that it is unloaded? So, a standard of reasonable care is there. What that standard is to be given to the judges to esti-

mate, according the circumstances of each case.

In India, there is no jury system so far as civil cases are concerned, so the judge has to act both as the court and the jury. I will relate you an incident. At Siliguri, a very respectable motor repairer had constructed his workshop with logs of wood. Wall was made of wood and everything was of wood. Now a foreigner gave his car worth Rs. 36000/- for repair to them. The car was burnt by accident. That case was decided by me. Here what is the standard of reasonable care? If he had kept fire extinguishers, you would say that he had taken reasonable care. In this case I had to hold that to construct a wooden garage for repairing motor cars where most of the things are inflammable is in itself want of reasonable care. So this has got to be left to the court. That decision was not even appealed against.

Shri Tenneti Viswanatham: In paragraph 9 of Justice Hidayatullah's judgment, it is said "In India, where the Limitation Act which prescribes different period of limitation for suits, ...". But the petition under Art. 32 is not a suit and also not a petition or an application to which Limilation Act applies. To put curws in the way of enforcement of fundamental rights through legislative action will be questioned under Art. 13(2).

Mr. Justice Basu: I have started my note by saying that if there is any decision for which the Supreme Court will be remembered in future, it is the Kochunni's case. It has been said there that it is the duty of the court to enforce fundamental rights. Chief Justice Hidayatullah would be remembered for this sentence: 'to put curbs in the way of enforcement of rights through legislation might well be questioned under 13(2)'.

Mr. Koushik: Many things have been cleared by you; we are highly indebted to you. Now your amendment to the bill is that no petition should be thrown on the ground of delay if the delay is explained. You have said that when this Bill is properly explained, the question of time-limit will have to be considered. In other words the proposed amendment and your suggestions are both intended to see that the petitions are not thrown out on the ground of delay.

Mr. Justice Basu: The courts are the representatives of the people and they should hear when there is a petition.

Shri Koushik: Having gone through the table of cases,—you quoted the latest one—Rabindranath—don't you think that the Supreme Court judges have upheld the objection which had been disallowed? And the remedy has been provided for actually. With regard to the period of limitation, in spite of whatever observations they might have made, don't you agree with me that the Supreme Court judges have come to the conclusion that no limitation should be as such prescribed?

Mr. Justice Basu: You say that this amendment may not be necessary.

Shri Koushik: Are you sotisfied with this or not?

Mr. Justice Basu: Let me give my answer.

Shri Koushik: From this catalogue of decisions given, do you think that the Courts are exercising what you and I want to exercise?

Mr. Justice Basu: Let me start with the policy matter. A man cannot even trust himself. When a man is afraid and is chased by a leopard or something what does he do? The tiger or leopard is just below the tree. Sometimes it so happens that out of fear the man might take out his chaddar or cloth and bind himself with the tree so that he may not fall a prey

to the leopard. That covers out of the sum-total of all these decisions.

Shri Koushik: I am happy to hear such stories. Give me the answer to my question.

Mr. Justice Basu: I am giving my answer. I would only request you to have little time to hear me. I have dealt with the subject of the delay in my commentary which runs into five editions. I had been consistently contending in my Commentary that the Supreme Court has not disallowed a single petition under Art. 32 on the ground of delay. Take the case of *Bhailal* appearing on page 4 which took place in 1964. If you look into my previous editions of the Commentary, that is before 1964, upto III editions, I have always said that so far as fundamental rights are concerned there is no discretionary remedy like the English decisions which deal with ordinary rights. So far as fundamental rights are concerned under Art. 32 the Supreme Court have got extraordinary powers when they decide the cases of fundamental rights. It has been observed in that connection that mere delay should not be a ground for refusing a petition whether it is under Art. 226 or 32, so far as fundamental rights are concerned. My thesis was that it is the duty of the Supreme Court to see that the fundamental rights are enforced. It was only after the *Bhailal Case* came into being that I had review the position in my subsequent editions—Fourth and Fifth Editions. I have protested against this. I suppose Tilokchand's case will be a subject-matter of my next edition. On page 5 of your Tabular Statement this is what has been stated:

> "Where a person comes to the court for relief under Art. 226 on the allegation that he has been assessed to tax under a void legislation and having laid it under a mistake, is entitled to get it back. The court, if it finds that the assessment was void being made under a void provision of law and the payment was made by mistake, is still not bound to exercise its discretion directing repayment."

The question is whether he should get back the money. But there was a limitation of three years' time for a suit to claim that on grounds of mistake. Under Art. 226 you are giving some relief for which there is no Statutory limitation. Why should we fix the limitation? If this is the view of the Supreme Court, then I do not think you should bring in more amendments to the Constitution. You have already got 23 amendments to the Constitution. There is the case of Shri Gokalchand. By taking away the fundamental rights you will not help us. Coming to Bhailal's case, I should say that not a suit but a petition under art. 226 has been brought. You will please refer to page 5 wherein it has been stated as follows:—

> "Where even if there is no such dealy the Government or the statutory authority against whom consequential relief is prayed for raises a *prima facie* triable issue as regards the availability of such relief on the merits on the grounds like limitation the Court should ordinarily refuse to issue the writ of mandamus for such payment."

You raised a point of dismissal in *in limine*. The Court has got the power to refuse to issue a writ. I could not understand as to why on that issue a *rule nisi* should be refused. The opposite Party may raise a counter petition on the ground of limitation.

Mr. Chairman: You need not elaborate.

Shri Koushik: Now, I will take only a short time. The remarks in regard to Rabindranath's case, according to the gist given here are "there is a limit to the time which should be considered reasonable for making representations. If the Government has turned down one representation,

the making of another representation on similar lines would not enable the petitioners to explain the delay". The limit which he means is anything which is reasonable, which can possibly be explained to the satisfaction of the Court. So, what is the objection you have taken to this limit?

Mr. Justice Basu: It is only one of the decisions the Supreme Court has made and if it is consistently followed by the Supreme Court, there is nothing to protest.

Shri Koushik: I have given you this instance just to show that the Supreme Court has been actually going into these things. Take the Trilok Chand's case. It is stated therein "delay is explained on the fcts of the present case". That means there was an issue before the Court where the delay has been explained.

Mr. Justice Basu: Which item you are citing?

Shri Koushik: Trilok Chand's case.

Mr. Justice Basu: The Supreme Court is not thinking of whether the time taken for a man to bring a petition under Article 32 has been reasonably explained or not.

Shri Koushik: I am only quoting these to show that the Supreme Court is thinking of these things—whether the time taken by the man is reasonable or unreasonable.

Mr. Justice Basu: Please see para 5 on page 3, that is, "A. P. Saxena *v.* Union of India: A.I.R. 1968 S.C. 754 (Bachawat J.)" where it is said. "It is surprising that the petitioner seeks to challenge the appointments after a long lapse of time. He has not given any adequate explanation as to the delay in filing the writ petition."

Shri Koushik: I agree with that and it only shows what I have been explaining to you.

Mr. Justice Basu: My point in referring you to this particular para is that the Supreme Court, even without this Bill of Amendment or any such thing, has in some cases actually considered the merits to find out whether the man has explained as to why he has taken so much time. What I want to say is that some judgments—for example Mr. Justice Sikri's judgment—do proceed from the concept of reasonable explanation. He is perhaps one of the few judges who have dealt with "reasonable explanation" in their judgment. But, unfortunately in the Trilok Chand case Mr. Justice Sikri has also dealt with limitation. That is why I wanted to read out some paragraphs. Supposing we take up paragraph 7 "No doubt, no period of limitation has been prescribed for the institution of a petition for writ. But, it must be filed within a reasonable period. This is based on the principle of equity that delay defeats equity". It seems to me however that the above proposition is not quite appropriate for petitions under Article 32.

"It is common knowledge that appeal representations to the higher authorities take time. The time spent in pursuance of this would be accepted under the Limitation Act." I agree with him, but then he says that if this was practised the security of Article 32 would be destroyed. But still, he follows it up with the statement, in the Bhailal case "Where a person comes to the court for relief under Art. 226 on the allegation that he has been assessed to tax under a void legislation and having paid it under a mistake is entitled to get it back, the Court, if it finds that the assessment was void, being made under a void provision of law and the payment was made by mistake, is still not bound to exercise its discretion directing repayment. Whether repayment should be ordered in the exercise of this discretion will depend in each case on its own facts and circumstances. It is not easy nor is

it desirable to lay down any rule for universal application". Well, this is understood. But then, he goes on "Where even if there is no such delay the Government or the statutory authority against whom consequential relief is prayed for raises a prima *facie* triable issue as regards the availability of such relief on the merits on grounds like limitation, the Court should ordinarily refuse to issue the writ of mandamus for such payment." Can you agree with this—that whenever the statutory authority raises a prima facie triable issue as regards the availability of statutory relief on the merits on grounds like limitation, the Court should ordinarily refuse to issue the writ?

Shri Shiva Chandra Jha: Mr. Basu, you said yesterday and today also that the court has or must have some reasonable power of discretion, and so if this Bill is passed, still the court can block the petitioner on the ground that satisfactory reasons have not been given in the petition and the restoration of fundamental rights may be denied to the petitioner. I mean that still it is by the discretionary powers of the court.

There is no question of delay. If there is no satisfactory explanation for the delay, the writ petition would be rejected. That is what you said?

Mr. Justice Basu: I am saying that because the court has to observe certain formalities. If we introduce scandulous words in a petition, the court may order them to be struck off. Or, supposing your petition contains abusive words, slanderous words, then the court may throw it away summarily because you have done something contrary to the decorum of the court. They may ask you to go back and draft it again. Well, this discretion must always remain with the court.

I say that to obtain a reasonable explanation for the delay is necessary. I think there should not be any period of limitation....

Shri Shiva Chandra Jha: Whatever may be the procedure, by the use of discretionary power by the court, the petition can be rejected..

Mr. Justice Basu: On many grounds.

Shri Shiva Chandra Jha: Mr. Basu, you will agree that the individual judgment is based or guided generally by what Justice Holmes used to call 'inarticulate major compromise.'

Mr. Justice Basu: Quite right.

Shri Shiva Chandra Jha: I am just asking the question. That discretion is conditioned by the inarticulate major compromise.

Mr. Justice Basu: That will always remain so long as we remain under the Anglo-Saxon system of justice.

Shri Shiva Chandra Jha: We will come to that later. So this 'inarticulate major premise' that the judge of the court gets is further conditioned by the socio-economic society..

Mr. Justice Basu: What is your object?

Shri Shiva Chandra Jha: I am coming to that. Will you accept that?

Mr. Justice Basu: Yes. Then what happens?

Shri Shiva Chandra Jha: If the society is Anglo society or what is generally called a classless society, this inarticulate major premise' would be according to that. Will you accept it?

Mr. Justice Basu: Quite right. But what are you driving at?

Shri Shiva Chandra Jha: You said yesterday—you proceeded historically —that the king was the fountain of justice and there was no question of fundamental rights at that time. Later on the people made the king..

Mr. Justice Basu: In England

Shri Shiva Chandra Jha: Anywhere. Let me illustarte. Suppose an employee is vicitimised. He comes to the Court and says that his fundamental right is violated. At the same time the State or the court has to see that the person who is posted or is employed in his place is also not victimised, and the State has every right to..

Mr. Justice Basu: I have already given you the answer.

Shri Shiva Chandra Jha: This is my question: If there is some restraint or some way out to condition the discretion of the courts or the judges, then there will be little room for variation, and here would be no delay. The delay would be eliminated.

Mr. Justice Basu: You are against the amendment? I must know what is your object?

Shri Shiva Chandra Jha: If the Constitution is changed radically, like the right to work in which there will be no exploitation in the Society or income ceilings are also put there, then there will be restraint on the discretion of the courts and the judges and this delay factor is also eliminated. The amendment is partial over the philosophy of natural right of justice.

Mr. Justice Basu: You want to say that amendment is necessary or not.

Shri Shiva Chandra Jha: I want your answer. With the amendment already provided is there some restraint on the discretion of the judges? Because of the procedure which has been in practice, at present the chances are that the Petition should be for the restoration of the fundamental right also. If the fundamental rights or human rights are to be restored, not only the Bill will be passed but.....

Mr. Justice Basu: You are not concerned with this amendmnet Bill. You are concerned with a radical change of the Constitution so that such problems do not arise. This is a question of absolute revision. Rights such as right to work, etc. which are in the directive principles, have to be made part of the fundamental rights. I will be the first person to congratulate the person who proposes this. But together with these rights, the entire 'duty' chapter in the Soviet Constitution and all the totalitarian Constitutions of the other countries will have to be adopted. It is a vast sin and the worst crime to destroy public property. It is the worst crime to say anything against the security of the territory of India. But if that is stopped you will have a better land and all these minor things may not arise.

Shri Bhattacharyya: This Bill proposes two amendments to Article 32 and 226. The amendments are provided in the same way so that no restriction can be put on a remedy to ensure enforcing fundamental right under Article 32 and 226. You kindly stated yesterday that it is also provided in the Constitution that Article 226 deals with Part III of the Constitution and also non-fundamental right matters. Keeping that in view, do you agree with the amendment proposed to Article 226. Does it relate only to that part of 226 which deals with Part III of the Constitution only?

Mr. Justice Basu: I have given my mind to that and logically Mr. Bhattacharyya is correct that it should be in consonance with the discussion that we have made. The second clause relating to Article 226 might be a little limited, saying that there is no remedy under this Article in so far as its enforcement on fundamental right is concerned. By inserting those words in consonance with the discussion which we have already had that should be limited or modified by restricting it to fundamental right. But there is one danger. Supposing you add the words as proposed by me and you accept my amendment 'the delay is restrained' put it under Article 226 as it is provided and then introduce those words 'in so far as it relates to

fundamental right' then look at the picture. If there is fundamental right under Article 226, the delay must be reasonably explained. If it is a non-fundamental right reasonable explanation will not be necessary. If you deal with my amendment, that should govern both the cases.

Suppose you insert these words 'no remedy under this Article in so far as the enforcement of the fundamental right' and at the end 'except where there is reasonable explanation', what will happen? This clause in toto will not apply to fundamental right under 226. Either in 226 or non-fundamental right delay will be the ground and you will not be able to resist this and court might say, delay is there and it is finished even if there is reasonable explanation. The court may say there is reasonable explanation but you have brought the Petition after six months or nine months, thus it is rejected.

Supposing you do not accept my amendment. What will be the result? 'No remedy under this Article so far as it is concerned, the enforcement of fundamental right shall be denied by High Court to the Petitioner on the ground of delay or merely on the ground of appeal'. So it is a question of fundamental right. Then delay will be no ground. No question of reasonableness or anything of the kind will be there. After the lapse of a century if the man is alive he might come. As a matter of fact it has been held by the Supreme Court in some cases where the man is illegally turned out of employment so far as the arrears of salary and other things are concerned, his son might come to the Court and say, he must be deemed to have been in service and should get those claims of increments which go by the time scale. Then his pension will be greater and gratuity will be better and that has been given. Supreme Court says in such cases it should be done.

Suppose there is no amendment, you leave the matter to the court. Then do not make any amendment at all.

If you codify one portion, you will have to codify all the portions. If you codify one portion and not the others, the result will be this code will not apply to the other things and you will have to draft another thing to check the judiciary. Of course, if they paid heed to the amendment viz., that the legislature does not like that the petition should be dismissed on the ground of lapse of time and if they transform themselves with that idea, well and good.

Mr. Justice Basu: I do not know what will happen to your Bill, but I have dealt with it academically.

(*Witness then withdrew*).

(ii) Shri S. N. Jain, Acting Director, Indian Law Institute Bhagwan Das Road, New Delhi.

(*The witness was called in and he took his seat*)

Mr. Chairman: Mr. Jain, you know that your evidence is a sort of public evidence and that it is liable to be placed before the Parliament and all that. You can make your observations first.

Shri Jain: I have already submitted a Memorandum, and I have nothing to add.

Mr. Chairman: We have looked into it. You can add anything in addition.

Shri Jain: As you know, I am against the amendment, the reason being that there must be some kind of limitation before a party could file a writ petition before the Supreme Court or the High Court. The reason being that if stale claims are allowed to be filed, evidence may get lost, new situations and circumstances may develop and new rights may emerge. If these new rights are allowed to be disturbed it is not a very good thing. Because of these three reasons viz. evidence may get lost, new situations may develop and new rights may emerge by the lapse of time, I am

against the amendment. I have supported my statement with reference to one concrete illustration relating to import licences. Suppose an individual is wrongly denied by mistake an import licence during the period 1969-70, and he waits for a number of years. Meanwhile, the economic situations may change and the Government may have completely banned the import of that commodity. Now, after a lapse of 10 years, he comes before the court and the court does deny relief on account of delay. Because of the mistake in the licence granted, the individual may stand to benefit whereas the public interest will suffer. This is a concrete illustration. Perhaps, many other examples can be taken, but this is a good one and goes to show that there should not be any amendment to Art. 32 or to Art. 226.

Shri Tenneti Viswanatham: You have said that limitation must be put. Can I draw your attention to the Tilokchand case, which was responsible for this Bill? Justice Hidayatullah's observations:—"....A petition under Article 32 is not a suit and it is also not a petition or an application to which Limitation Act applies.. To put curbs in the enforcement of fundamental rights by legislative action might well be considered under Art. 13(2)". Therefore, there is no question of abridging the right granted under this limitation. The majority judgment itself says that it cannot put limitation. But what it does say is that although by legislative action, you cannot prescribe limitations, 'as a Judge sitting and hearing the case, I will apply the period of limitation". Is it right?

Shri Jain: Well, if you are thinking of the Constitutional objection to this Amendment, there is no difficulty....

Shri Tenneti Viswanatham: I am saying that you ask a limitation to be prescribed. And you have given certain reasons. That is all right. You have given general reasons for the law.

Shri Jain: It is one thing to prescribe limitation and another thing to say that the court will not deny the petition on account of delay. If you wish to prescribe limitations, I am not against it. But, once we do that, then, perhaps, there would be other difficulties. Suppose, we say that if the petitioner comes within a year, the petition would be heard. Then the difficulty would be that there would be varied situations and varied limitations may have to be prescribed.

Mr. Chairman: The question put by the hon'ble Member is, after the Golak Nath's case, could anyone restrict a fundamental right acquired by putting this limitation? By putting the limitation, will not the fundamental right be restricted? It will be restricted, because on the ground of delay, the petition will be dismissed.

Shri Jain: But the amendment provides....

Mr. Chairman: I am not talking of the amendment. Your suggestion is that there should be limitation. If the limitation is now prescribed—it is not laid down in the Constitution—it will mean restriction on the right. It has been acquired under Art. 32 and that will be going against the Golak Nath's judgment. You are suggesting that there ought to be limitations. The hon'ble Member is putting the question that: will it be possible to suggest limitations in view of the fundamental rights?

Shri Jain: The judgement suggests a period of one year. Justice Hidayatullah thought of 6 months.

Mr. Chairman: He is coming to the constitutional question. Whether a limitation could be laid down under the Constitution?

Shri Jain: The law, at present says that there should be some limitation.

Mr. Chairman: It does not say.

Shri Jain: It says that the petitioner should not be guilty of laches.

Shri Tenneti Viswanatham: Laches, waiver and adjudicator and in theory of other man's rights. These are all different things. Now, in this case—in the so called laches of waiver—there is something of an active element in the conduct of the petitioner. It has nothing to do with the limitation.

He can sleep till the last day and then he gets up. There must be some active element, some act of commission or omission. Therefore, it has nothing to do with limitation. Estoppel has already been explained to be the law of evidence by the previous witness. These considerations do not come. Art. 32 says, it is a part of chapter on fundamental rights. Art. 32 is not out of the fundamental rights. The right to move the Supreme Court to enforce the above fundamental right is guaranteed. Therefore, it is a fundamental right; you cannot put any curb. You cannot prevent any man from going to the court on the ground that he did not come yesterday. Will you agree with that?

Shri Jain: Well, it would help us better, if you keep two aspects of it in view. The first is the question of amendment; whether it should be amended....

Shri Tenneti Viswanatham: Art 32 gives a guarantee to the citizens to move the court and it is unrestricted; no limitation has been prescribed and if we prescribe limitation it will go against Art. 13 of the Constitution.

Shri Jain: That is a controversial question; I have not given thought to it.

In one way, it may abridge the fundamental rights, but the Supreme Court has been saying that one should not be guilty of laches.

Shri Tenneti Viswanatham: It is a different concept.

Shri Jain: What amounts to laches, there is also a question mark.

Shri Tenneti Viswanatham: There are no rights or remedies excepting under existing law of the Constitution in India. There must be a law in force or a statute or Constitution; beyond that no judge can import any concept, therefore, by analogy, he cannot bring any limitation.

Shri Jain: You will see that two judges bring in limitation and two judges do not. Justice Hidayatullah does not bring in law of limitation. Majority is not bringing any law of limitation.

Shri Tenneti Viswanatham: The Supreme Court has moved in the direction of putting curbs first with regard to the non-fundamental rights, and then they may do so in case of fundamental rights also.

Mr. Chairman: You will see that though justice Hidayatullah does not talk of limitation, all the same, he says that no legislation could put any limitation with regard to fundamental rights. He just says that judges could do this by their own decision.

Shri Tenneti Viswanatham: No right can be created excepting through law and anybody saying that he has a right which has no legal connotation cannot be supported. The fundamental rights are against the State. Saying that my fundamental right was violated by your action and now you cannot turn round and say, it is true, by my action, somebody else has got a right—he cannot put a plea. There is an RTA case. He passsed a wrong order, somebody else got the right. Then the Supreme Court said it is a wrong order. That man cannot be allowed to say that he has got certain rights and that rights should go in his favour.

How are these rights created? So far as fundamental rights are concerned, they are not created by contract, or by agreement or by some other law. They are fundamental rights provided in the Constitution and the offender is primarily the State. Therefore, my

consideration is against the State and if the court says that the fundamental right has been violated, it should not also at the same time say, that when I violate, it creates a right for somebody else. It should not create. I would draw your attention to Shri Rajagopalan's judgment, in which he has given a very clear statement of the case.

Shri Tenneti Viswanatham: Once it is proved to the satisfaction of the Court that by State action a fundamental right of the petitioner has been infringed, it is not only the right but the duty of the Court under Article 32 to offer relief to him by passing appropriate orders in that behalf. Do you agree with this statement?

Shri Jain: In the context of the other rules.

Shri Tenneti Viswanatham: Now, referring to the example you have given. You say that if a licence is wrongly refused and after a length of time the individual approaches the Court for relief, by which time the whole situation would have changed and this would pose problems.

Shri Jain: Yes. The law will be applied at the time the cause of action arises. It will not be the present law. Supposing in 1970 motor parts are being imported but in 1975 these motor parts are being manufactured in India. Now, in 1975 the petitioner can import the motor parts much cheaper and make a profit where as in 1970, he may not have made so much profit.

Mr. Chairman: You are distinguishing between two things--his right and the profits that may accrue to him out of that right. When there is assessable change, whether relief should be granted or not is your point?

Shri Jain: What I am pointing out is, supposing in 1970 his licence was refused and supposing the individual approaches the court after a lapse of over five years and when he comes in 1975 the whole economic situation has changed. Then, what law does the Court apply?

Mr. Chairman: Taking for granted that he is entitled to the licence under the 1970 law the 1970 law would necessarily apply.

Shri Jain: In 1975 the licensing policy might have changed.

Mr. Chairman: In the case you state, even if the person is given the licence he would not be able to take advantage of it.

Shri Tenneti Viswanatham: It is only a question of either not following the procedure or totally exceeding the jurisdiction or misapplying the law altogether.

Mr. Chairman: All right, thank you Mr. Jain.

The witness then withdrew.

MINUTES OF THE EVIDENCE GIVEN BEFORE THE SELECT COMMITTEE ON THE CONSTITUTION (AMENDMENT) BILL, 1969 BY SHRI TENNETI VISWANATHAM, M. P.

Saturday, the 1st August, 1970 at 10.00 hours.

PRESENT

Shri D. K. Kunte—*Chairman.*

MEMBERS

2. Shri C. K. Bhattacharyya
3. Shri Shiva Chandra Jha
4. Shri K. M. Koushik
5. Shri K. Hanumanthaiya
6. Shri Srinibas Mishra
7. Shrimati Sharda Mukerjee
8. Shri Tenneti Viswanatham.

LEGISLATIVE COUNCEL

Shri A. K. Srinivasamurthy, *Deputy Legislative Counsel, Legislative Department, Ministry of Law.*

REPRESENTATIVE OF THE MINISTRY OF LAW

Shri Dalip Singh, *Deputy Legal Adviser.*

SECRETARIAT

Shri M. C. Chawla—*Deputy Secretary.*

WITNESSES EXAMINED

(i) Shri M. C. Setalvad, M.P., 11, Safdarjang Road, New Delhi-1.

(ii) Shri C. K. Daphtary, Former Attorney Genaral, A-8, Maharani Bagh, New Delhi-14.

(i). Shri M. C. Setalvad, M.P.

(The witness was called in and he took his seat)

Mr. Chairman: Mr. Setalvad, we are thankful to you for having agreed to come and give evidence. It may be made clear to you that your evidence will be treated as public and is liable to be published, unless there is a desire on your part to treat it as confidential. But all the same, it will be made available to the Members of Parliament.

We are thankful to you for the

small brief note. Would you like to say something more about it?

Shri Setalvad: No, you may ask me questions and I will answer them.

Mr. Chairman: You have said in the note that certain property rights could be created adversely to the right of a person. Now such property rights would require twelve years under the Limitation Act.

Shri Setalvad: We do not require 12 years always, it may be 3 years in some cases. For example wrongful occupation may result in a shorter period of limitation.

Mr. Chairman: Even then it will be normally three years and not less than that. Even the Limitation law lays a period of as long as three years before a party does take any action. But in addition to this fundamental right to property, there are other fundamental rights also. Would they create any adverse position against the party.

Shri Setalvad: Take the illustration which I have given. The property of a man is taken by the Govt. claiming a title to it. They pass it on further and get some consideration for it. Now all these rights will be created and if you allow delay not to be effective, the result would be that you will be affecting the rights of all these innocent people, who acted without reason to suspect anything wrong.

Mr. Chairman: They will not be treated as innocent, as per law.

Shri Setalvad: Everybody is supposed to know the law, but this doctrine has its limitations.

Mr. Chairman: Then any action of Govt., if it is not according to law in the initial stages could be by passage of time legalised.

Shri Setalvad: Here the question relates to a special provision made by the Constitution for a special purpose. The question is the scope and limits of approach to the Supreme Court. Should it be unrestricted—may it be twenty years or thirty years? Will that be equitable and just?

Mr. Chairman: I want to know whether any action of Govt. which is opposite to the law in the initial stages does it become within law after passage of time.

Shri Setalvad: Sometimes apart from limitation, other doctrines are involved; in law, the law of estoppel and various other doctrines. Supposing a man seeks to enforce a fundamental right, but he has been guilty of some conduct which can amount to estoppel even that will prevent him in law from making the claim.

Mr. Chairman: Take a case, where the party has not acted in any particular manner as to allow that to go against him. In that case, would the action of the Govt. which is not according to law in the initial stages become lawful after passage of time?

Shri Setalvad: The amendment proposed is that delay will not result in a denial of the relief. That means that delay does not matter and it is of no consequence which to me seems an extreme position to take up.

Mr. Chairman: That might be the position, but I want to understand this. Your note said that action taken in case of property would be by lapse of time according to law.

Shri Setalvad: If the Govt. have not acted according to law, it would be open to the aggrieved party to seek remedy very soon. If after some time successive other titles are created in third parties then if delay is not to be taken into consideration, people who have acted without any suspicion may have to suffer.

Mr. Chairman: I was only seeking clarification for the party being called to take action very soon.

Shri Setalvad: Mr. Chairman, the position today is that there is no period of time as limitation. In a certain case, two judges took the view that notwithstanding a lapse of 10 years or 12 years there was no delay because of the special circumstances. It is for the Court in each case to decide whether the delay has been such as to bar the remedy under the doctrine of laches. The law of limitation would perhaps not be competent to affect fundamental rights. But the question whether there has been enough delay or such delay as to justify deny to the party the remedy would be a question for the Court to decide in each case. That is how it is at present.

Mr. Chairman: There have been certain cases where the petitions have been dismissed *in limine* or cases where some sort of period like 60 days or 90 days, or whatever it is, has been generally laid down. This Bill is to get over this position that has been created by the courts. It does not say that the Court does not look into it.

Shri Setalvad: Let us consider the Bill as it stands. A man would be able to go to the court after a lapse of 50 years to enforce a fundamental right. That is what the Bill says.

Mr. Chairman: The Bill only says that no remedy under the Act shall be denied to a petitioner on the ground of delay. If there are any other grounds for denaying it, the Bill does not question it.

Shri Setalvad: If there is no other ground a man can just sit quiet for 20 years and then go to court. The whole principle of the law of limitation is that questions which arise in regard to legality of action should be disposed of within a certain period of time. That is the whole principle and all countries have accepted it. Now, this principle which, though not enforced by legislation is sought to be enforced by the courts, by leaving it to the Court to determine in each case whether there is or there is not enough delay to justify denial of the remedy. That is really the principle of the Supreme Court's decision.

Mr. Chairman: It would not be proper to deprive fundamental rights enshrined in Chapter III. They are continuing fundamental rights.

Shri Setalvad: But once the right is broken, there is a breach of the right.

Mr. Chairman: Take, for instance, the right to enter into a temple. In this case there can be no limitation. Therefore, except in the matter of property there would be no other fundamental right in which case the delay would not be there.

Shri Setalvad: There may be cases, for example, where a man barred through actual delay has acted in a manner which had given the impression to the persons dealing with him,-that is, the persons on the other side who deal with the property or whatever the subject matter is—that he is not claiming any right. In such cases he cannot all of a sudden make a claim. He would be barred by the law of estoppel.

Mr. Chairman: We will leave the property rights for the present. As far as property rights are concerned, 3 years in the case of certain properties, 12 years in the case of certain other properties etc. have been laid down. As a matter of fact in the matter of property, the Legislature has been careful enough to give a long reach to the period. So leave aside property matters. Are there any other rights in which case adverse effects could be created against the party?

Shri Setalvad: There could be various other rights created. It is difficult to lay down a doctrine that no amount of delay would bar enforcement of fundamental rights under Article 32. It would create problems. Take for instance, the right of free movement. A man was denied entry in

a certain area, we shall say, in the year 1965. He does not do anything about it. we shall say, till 1975 and then makes a claim and takes action against the concerned party complaining of a breach of his fundamental right which took place 10 years earlier. Would that be reasonable?

Mr. Chairman: What would be wrong about it?

Shri Setalvad: I would ask what would be right about it?

Mr. Chairman: Whatever the period, it is a matter of fundamental right and it is a continuing right.

Shri Setalvad: He tries to enter a certain area once and he is debarred, say in 1965. He then takes no action about it till 1975. Then, nothing further being done, no further action being taken against him, he not being debarred again, is it reasonable that he should go to court in 1975?

Mr. Chairman: Well, I am just putting it to you to intimate the correct position. I have now no further question to pose. How about you Mr. Viswanatham?

Shri Tenneti Viswanatham: I would like to ask some questions. Now, in answering the Chairman you raised certain considerations if a man came after a long delay. You put across the question whether it would be reasonable or not. Now, under Article 32 (you know the terms better than I do) the Supreme Court shall have the power to enforce any of the rights conferred by this Part. Now the courts at present, after this Constitution, derive all their power only from the Constitution. There are no other powers like inherent powers or any such thing. The powers of the court have been derived only from the Constitution. Therefore, neither the Parliament nor the courts can do anything in derogation of the Constitution.

Now the ground of delay and reasonableness of delays and all these things were apparently in the minds of the Constitution-makers at that time. Under Article 32 the Supreme Court has powers to enforce those rights. Not only that. They have added another clause not content by saying that the Supreme Court shall have the power to enforce the rights. They added another clause by saying that 'the right to move the Supreme Court by appropriate proceedings for enforcement of the rights conferred by this Part is guaranteed.'

Now, you have commented in your statement that that right is only a right to go to the court.

Shri M. C. Setalvad: That is the right "to move the court".

Shri Tenneti Viswanatham: All that my Bill seeks is the right to move the court which shall not be in any way circumscribed.

Shri M. C. Setalvad: As soon as you approach the court, your right to move is exercised. You have approached the court. But, as to how the court shall deal with your application is a matter which arises later, that is, after you move or approach the court.

Shri Tenneti Viswanatham: What is meant by moving the court?

Shri M. C. Setalvad: You move the court asking your application being considered for enforcement of fundamental rights.

Shri Tenneti Viswanatham: I am allowed to stand before the court.

Shri M. C. Setalvad: And to make an application.

Shri Tenneti Viswanatham: But the court will also have to know what the contents of my application are. The Court will therefore have to hear me under this Article. They cannot straightaway say as to where is my cause of action? Since I have come

after a long delay, they will not hear my representation.

Shri Setalvad: The Court has always to pass an order on my application. As to what orders the court shall pass on the application on the merits or otherwise is a matter left to the court.

Shri Tenneti Viswanatham: I have got a right to move whether they have got jurisdiction or not. I can go on a writ. I suppose the right to move the court has got some wider significance than mere physical right of filing of an application.

Shri Setalwad: Of being heard.

Shri Tenneti Viswanatham: I must be heard on the substance of my representation. I cannot be told that I cannot be heard. Since I have come to-day instead of yesterday I was late and hence I could not be heard. The Constitution is specially intended when such a situation arises. And that is why in my interpretation of the Constitution—I may read out clause (1) of Art. 226, otherwise it would have been content with sub-clause (2)—it says that the Supreme Court shall enforce the right. So, the right to move the Supreme Court is also guaranteed.

Shri Setalvad: May I give my view as to why this has been enacted? Normally, the Supreme Court is a court of appeal. The writ jurisdiction does not exist in the Supreme Court normally. The right of approachnig the court for enforcement of fundamental rights is conferred by this Article. It further ensures that the court shall hear the applicant in the matter of enforcement of fundamental rights. But, for speedy action one can also go to the High Court under Art. 226 by filing a writ.

Shri Tenneti Viswanatham: Article 226 does not contain a clause like this.

Shri Setalvad: The right under Art. 226 is not similar to that guaranteed under Art. 32.

Shri Tenneti Viswanatham: As long as there is a democratic Constitution and there is a court, every suitor has got a right to go to the court even under Art. 226. Suppose the clause does not exist. I have got the right to go to the court and make my representation. You can dismiss it on several grounds such as limitation of time etc. Art. 226 deals with enforcement of my fundamental right. There the position is different. Under Art. 32 the right to move for the enforcement of my fundamental rights is guaranteed. They cannot say that you have come late.

Shri Setalvad: May I put it this way? Suppose you move the court for enforcement of your fundamental rights. The court says that in the circumstances of the case—by reason of your coming to it after a lapse of years—it will not enforce your rights. When the court holds that it does not deny the applicant the right to move the court. It hears the applicant and then it refuses relief.

Shri Tenneti Viswanatham: On the ground of delay.

Shri Setalvad: Yes, merely on the ground of delay.

Shri Tenneti Viswanatham: For example, the Jubbulpore High Court has given us a list of writ petitions dismissed *in limine* on the ground of delay during the last ten years.

Shri Setalvad: That might not be under Art. 32 but under Art. 226.

Shri Tenneti Viswanatham: That also refers to Art. 32.

Shri Setalvad: Art. 226 does not guarantee the right to move. The distinction between Art. 226 and 32, as I understand it, is this. So far as the nature of the right to move is concerned, under Art. 32 it is guaran-

teed, but under Art. 226 that right is not guaranteed. This is the distinction.

Shri Tenneti Viswanatham: It looks like that. When once my petition relates to certain fundamental rights, Art. 226 specifically says that.

Shri Setalvad: Unlike Art. 226, Art. 32 deals only with the enforcement of fundamental rights by the Supreme Court.

Shri Jaganath Rao: The word begins by saying "Notwithstanding anything contained. . . . . " This is an additional jurisdiction.

Shri Setalvad: This is a supplementary right.

Shri Tenneti Viswanatham: The rights conferred by Part III clearly say that the right to move the Supreme Court for enforcement of fundamental rights is guaranteed by the Supreme Court. Even in the case of high courts it is guaranteed in the sense that Art. 226 begins with "Notwithstanding anything in Art. 32 . . . .etc." Under Art. 32 it will be the duty of the High Court to enforce the rights under Part III of the Constitution.

Shri Setalvad: Under Art. 226 the High Court has jurisdiction to enforce these rights.

Shri Tenneti Viswanatham: I am asking you as to whether it is not the duty of the Court to enforce that?

Shri Setalvad: Let me try to put it this way. Do you agree with me or do you not that there is a distinction between the rights under Art. 32 and under 226? The distinction, in my view, is that whereas the Constitution expressly guarantees the right under Art. 32, it does not guarantee any right at all under Art. 226. It does not only with fundamental rights but also many other rights. By it the court is given jurisdiction to issue writs in the nature of *mandamus, certiorari* etc. including matters for enforcement of fundamental rights.

Shri Tenneti Viswanatham: Suppose I go to the court, the court hears me. It is a different matter whether it gives a decree in a suit in my favour or not. It can enforce it. Therefore, Art. 226, although it is not like Art. 32, will give us practically the same rights so far as fundamental rights are concerned.

Shri Setalvad: The position not have been under Art. 32 is different.

Shri Tenneti Viswanatham: On the other hand that subclause has to be related to Art. 226.

Shri Setalvad: Then why is the gurantee not enacted in Art. 226?

Shri Tenneti Viswanatham: Because it is subject to the phrase 'notwithstanding....etc....". I am not arguing with you because you would not agree with me. Suppose the court says that I have come on the ground of delay. I may or may not have the right. Since I am late they can say that they cannot look into my case. Suppose I come under Art. 32. Would you like the court to say so?

Shri Setalvad: I did not say that, in every case of delay the court should refuse. The court should certainly have the power to refuse relief under Art. 32 on the ground of delay. That is my view.

Shri Tenneti Viswanatham: The question of one's conduct is different totally. All that we say is that the Constitution-makers specifically put that clause there; the right to go to the Supreme Court itself is a guaranteed right, only to avoid these difficulties.

Shri Setalvad: But for that clause, it might well be that the Supreme Court may not entertain any of these applications and may ask the applicant in each case to go to the High Court under Art. 226....

Shri Tenneti Viswanatham: All that my Bill says is that, "Do not refuse to entertain my application on the ground of delay". My Bill says. "Go into the merits of my application and all the circumstances".

Shri Setalvad: May I ask you, what is more reasonable than the court telling you, "Your right has been violated. But what did you do for six years? Could you not come to the court earlier?" If you can convince the court that you were not able to do it earlier, the Court will still allow your application but if you are not able to convince the court, then the court may disallow it.

Shri Tenneti Viswanatham: That is why this Bill has come. What cannot be done by law cannot be done by the judge.

Shri Setalvad: In this case probably you would put a fetter under Art. 32. The Court itself does not put a fetter. The legislature cannot put a fetter.

Shri Tenneti Viswanatham: I agree with you on all these things.

Now we will come to another aspect. Certain courts are now thinking of fixing limits for these various applications. At present there are no rules. But they are thinking of making some rules.

Article 226 also deals with fundamental rights.

Shri Setalvad: Article 226 deals with many rights. Fundamental rights come at the end.

Shri Tenneti Viswanatham: They come in the begining. Please look at it. The article is intended primarily for that and for any other purpose; primarily for the enforcement of....

Shri Setalvad: I do not think so. I shall read it. I was wrong. 'Any other purpose' comes later.

Shri Tenneti Viswanatham: Therefore, what cannot be done by law cannot be done by a judge.

Shri Setalvad: I cannot give a final opinion in the matter. I would like to consider it. So far as Art. 32 is concerned, I am sure. But I am not so sure about Art. 226.

Shri Tenneti Viswanatham: Madhya Pradesh has given us a list of the cases dismissed on grounds of delay. They altogether come to nearly 19,000 cases in ten years in all the High Courts.

You do not agree that Art. 32, the right to move, is a guaranteed right in the sense which I understand?

Shri Setalvad: In the sense in which you understand it the right to move includes the right to move the court at any time; I do not agree. You have a right certainly to approach the court, leaving it still open to the court to deal with the question of delay on merits. The delay would be gone into on merits.

Shri Bhattacharyya: What wuold be your reaction if the amendment proposed in the Bill is modified in this way—No writ should be denied merely on the ground of delay provided the delay is satisfactorily explained.

Shri Setalvad: That is the law at the moment.

Shri Bhattacharyya: This Bill has come up only because there was difference among the judges.

Shri Setalvad: In the leading case difference arose as to whether there was delay which was explainable or not. Four judges took the view that it was unexplainable while the other two took the view that it was explainable. But the doctrine that delay can bar the remedy was not disputed even by these two judges.

Shri Bhattacharyya: The Chief Justice went to explain that he wanted to impose some sort of limitation on the exercise of rights under this Article but since he thought and thought rightly that legislatures could

not impose any restriction by law it would be under Article 32 he thought the court could do it by their own order. That is why he went in that way. Is it your opinion that the courts by their own order can impose a limitation which the legislatures cannot impose under the Constitution.

Shri Setalvad: Yes, because the courts have a discretion and one of the grounds on which they can exercise the discretion is refusal of relief on the ground of inordinate delay.

Shri Bhattacharyya: The question will come up to this that whether dismissal of the application or refusal to give relief was merely on the ground of delay or on other grounds which they thought did not explain the delay sufficiently. Is it specifically limited only to delay and if delay is excluded other explanations for coming to the court late may be discussed by court and considered by the court and decided upon. In those matters the discretion of the court is not excluded by the Bill. This Bill only limits the decision of the court to this one issue that they will not refuse to give relief on the ground of delay. So, in the matter of delay what would be the standard of satisfaction which will be accepted by the court remains to be determined. It may differ from judge to judge; it may differ from court to court. Then what will be the actual position in the matter of delay stands?

Shri Setalvad: In alll these applications the very crux of the matter namely whether there is or there is not an infringement of the fundamental right is left to the decision of the court. What is there wrong in leaving it to the court to decide in each case whether there has been unreasonable delay or not.

Shri Bhattacharyya: As Mr. Viswanatham put before you one of the grounds on which the court may refuse to give relief is that if any rights have been created in the mean time after the right is violated and relief is sought for in the intervening period.

Shri Setalvad: One of the judgements says so—equitable considerations will arise and so on. Justice Sikri's judgement says so.

Shri Bhattacharyya: Do questions of equity come in the matter of enforcement of fundamental rights?

Shri Setalvad: I think they do. If you yourself have acted unreasonably so as to allow various other factors to come into play then you must explain why you were sitting silent for such a long time. If you are not able to explain you suffer the consequences.

Shri Bhattacharyya: I believe his contention is that the rights created in the mean time should not be regarded as rights at all because my rights are continuing for all the time.

Shri Setalvad: Some rights may be continuing rights. There is no question of these being barred by delay. It is only when the infringement is once and for all and finished that the question of delay will arise and not in other cases.

Shri Koushik: Mr. Setalvad I want just to recapitulate what you have said that as soon as a petition under Article 32(ii) is presented to the Supreme Court the question if there is any delay the man gives reasons for the delay; the other side actually attacks or accepts it. Then the court will decide whether there is any delay. If they are satisfied then the matter will be proceeded and petition will be admitted and decided upon merits. Merely because the petition is presented there is delay the Supreme Court is not going to throw it out.

Shri Setalvad: It will hear the party and give its reasons for refusing relief if it thinks that there has been unreasonable delay.

Shri Koushik: The second point I would like to know from you is under Article 32(ii) only the right to move is guaranteed but relief is not guaranteed. So giving of relief in a particular case depends on various matters. Am I correct in saying that under Article 32(ii) so many types of writs are given; are all these writs discretionary writs or except in the case of *habeas corpus* which is not discretionary in all other cases am I correct all these writs are discretionary?

Shri Setalvad: Normally the grant of writ is discretionary.

Shri Koushik: I wanted to know whether these writs under Article 32 are subject to the doctrines based on public policy as under the common law.

Shri Setalvad: To a certain extent they are. There has been some divergence of opinion on the question of writs both under 226 and 32 and courts have expressed different views. The view expressed by the Supreme Court is that we should be governed by the general principles laid down by English Law but not by the technicalities—laid down by it in the matter of writs.

Shri Koushik: After all the principle of administration of justice is to see that no injustice is done to anybody. In the case which has been catalogued and given to us—Mr. Hidayatullah says in Tarlok Chand case that party must move the court before other rights come into exisence. The court cannot harm innocent parties if their rights emerge on delay in moving the court.

This is based on public policy. The doctrine of public policy is intended to advance cause of justice and also to suppress any injustice. I say rights which are enumerated in Article 32(2) have also to be judged whether issuance is necessary or not, looking to the general principles based on public policy.

Shri Setalvad: That is so.

Shri Koushik: Do you not think that in spite of this amendment not being there whether the Supreme Court is not following proper policy?

Shri Setalvad: I do not claim to know of all the cases decided in the Supreme Court, but generally speaking the Supreme Court has in a number of judgements laid down that the Supreme Court is the protector of fundamental right, it is their duty to enforce them to the largest extent possible. Chief Justice Shastri laid this down.

Shri Koushik: Therefore the procedure that they are now following is in consonance of what is required and no further amendment is required in so far as Article 32 is concerned.

Shri Jagannath Rao: Do you mean to say that the right to move the Supreme Court or High Court should go without the period of limitation?

Shri Tenneti Viswanatham: The intention of the Constitution is to see that the ordinary law of limitation does not apply to fundamental right where they are interpreted.

Shri Jagannath Rao: Even under the common law.

Shri Tenneti Viswanatham: There is no common law. There is only Constitutional law.

Shri C. K. Bhattacharyya: Can the Law of Limitation be applied by....

Shri Setalvad: The ordinary law lays down certain periods of time during which an application should be made. That is a standard which may be followed. It is a code of justice. The Court has got to deal fairly between the State on the one hand and the subject on the other. It has to see whether justice is met by applying the doctrine which is laid down in the ordinary law for certain purposes.

Mr. Chairman: Thank you very much, Mr. Setalvad.

(*The witness then withdrew.*)

(ii) Shri C. K. Daphtary,
Former Attorney General,
A-8, Maharani Bagh,
New Delhi-14.

Shri C. K. Daphtarys

(*The witness was called in and he took his seat.*)

Mr. Chairman: Thank you very much for agreeing to give evidence. I will come to the formalities. I have to bring to your notice that your evidence will be treated as public and is liable to be published unless you desire that a part of it might not be published, and even then, it will be made available to the Members of Parliament.

Would you like to say something initially?

Shri C. K. Daphtary: The problem of the right under Art. 32 is very difficult as may well be imagined. There is much to be said on both sides. On the one hand, as a plain proposition, as a flat proposition, it can be said that the approach to the Supreme Court is a fundamental right. There is no limitation placed in the Constitution itself on the exercise of that right by way of limitation of time or indeed any other conditions of time. Therefore, it must be allowed absolutely unrestricted place. That is one aspect. On the other hand, like everything else, wrong advantage may be taken of this particular facility, and one can imagine, and in fact one knows of cases where the advantage has been taken wrongly. I can give an instance—somethink based on Tilokchand's case, which is the latest case. There, an individual said he did not know that payment had been made by him by reason of unlawful provision, until there was a judgment of the Supreme Court in another matter, sometime later, which declared that particular Section to be invalid. He thereupon filed proceedings in the Gujarat High Court, which failed. He then filed a petition under Art. 32. And that Judge deals with the question of the effect of the failure of proceedings in the Gujarat High Court on the petition under Art. 32. They were peculiar to that case and need not apply everywhere else. But consider that case where one of the Judges at last said—"well, a man does not know that he has paid under a mistake. He comes to know four years later that that Section was invalid. Why should he be precluded from asserting his right?" That is sound enough. Now take another case. The man knows that the Supreme Court has held that Section to be invalid. He waits for another four years and then comes to the Supreme Court. Is the answer to be—"well, there is no limitation and no bar. He could have come after ten years." This poses the other side of it. Take the case where, some years ago, UP and other provinces levied sugar cess. In UP alone, it ran into some crores of rupees. That was challenged. The challenge succeeded and there was invalidity act. Now, suppose, someone of those very sugarmill owners had not challenged it for 7 years, by which time, half of those crores of rupees would have been utilised in something and the other half might have gone down the drain, as usually happens. The State is then called upon at the end of 7 or 8 years to say—"produce me these 40 or 50 crores of rupees." If the answer is that there is no limitation, what has to be done? But consider the practical inconvenience that would result—both sides having acted *bona fide* in the sense that the State made the levy without any dispute or concious of invalidity, and the man paid it without conscious of its invalidity. But both parties being innocent, who in that case is to suffer? The public to suffer by having Rs. 50 crores paid up and from where? Now, these are

the conflicting points of view. The two judges in the case—Shri Sikre and Shri Hidayatullah have taken the view that though limitation as such does not apply, this is a remedy where some discretion must be left. A man conscious of his right does not move for years; other people's right have come into being. If the proposition is absolute, take the case where my land is taken away illegally. I do not know it, let us say. After 6 years, I file a petition to set that acquisition aside. I do not file a petition. In the meantime, other peoples' rights have come in. Some one has taken the land and built a house. Is it to be taken away from him? What is to be done with regard to him? He will say, "I have a property in which I have a right." All sorts of consequences will follow. My own feeling to conclude is this that there must be some constraint, some limit to the apparently unlimited right to enforce a fundamental right.

Now it cannot be put on paper because everybody's circumstances and combination of circumstances that may operate in a given case cannot be foreseen. Any rigid rule in a matter of this kind is likely to cause hardship one way or the other. To say the Limitation Act applies would be wrong in itself. To lay down a period would be wrong. Equally wrong, I think, would be to say that there is no period of limitation. Therefore, to my mind the soundest way is, as has been, to keep it open to the judges to take into consideration what in England has been called the equity of the matter. When you talk of the taking away of a fundamental right, it means a real and effective taking away. If I am hurt, I know it and I go immediately to the lawyer and say, what about this. I may be wrongly advised, that may be a different matter. He may say that "I have to challenge it"; he may say "that it is doubtful, but I am going to challenge it, and take the court's decision." But if a man chooses to sit by in the face of deprivation for a long period, I think, it is reasonable to asssume that it has not pinched him. I mean, that is what it comes to. My property is acquired and I am paid compensation. If I feel that the compensation is too low and I feel really pinched, I would immediately protest. But if I feel that it is reasonable, I need not bother. Now the test, therefore, in every case will have to be what is reasonable in the circumstances of the case. That is nothing unusual. We talk of reasonable man and what he would have done under the circumstances. We speak of a contract to be performed, where there is no time limit, that it is to be performed within a reasonable time. I want a man to execute a deed of sale in pursuance of it, I call upon him to do it, I must give him a reasonable time. So this concept is very common.

Why should it not be left to the court, who will no doubt exercise the discretion wisely, and as they have said that they will take it that the right is there and there is no limitation and no fetter, but the burden would be on the other side to show some such gross neglect in granting the relief which would preclude the court from granting it. If you show sufficient cause as to why you could not do it within a reasonable time, they will accept it.

Now what is justified or not? Has he got good reasons for the delay or not? If it is not well, do not given him the right. If third party rights have intervened, that is another consideration. Those may intervene the next day, then the court will say, that is not good enough. But supposing the period of five years or three years has elapsed and someone's rights have intervened, the court will say that you have no good cause.

I think, personally, that it is dangerous to lay down that no delay shall operate to defeat Art. 32. Equally it would be wrong to lay down a period of limitation which is fixed in point

of time. My submission is that it should be left to the court in appropriate cases which would be, I think, comparatively few to refuse.

May I give an instance here? A large number of Income Tax Officers moved in the matter of promotion, seniority etc. challenging various things which had happened. One lot of them had filed a writ some years ago and it succeeded; the others waited to see what is going to happen and even then after some time they filed their writ. Now the people who had been, as they alleged, wrongly promoted had by then become Commissioners, Members of the Board of Revenue and some had even retired. Now surely the court will say in such cases— 'the period of years you are concerned with is a different period of years; in fact in the second case the period of years was earlier than the one in the case that was decided. You waited all the time. In the interval, people have been promoted, you want me to demote that Commissioner and make him an Income tax Officer. This is unfair'. This is what he would say.

This difficulty has arisen due to the reason that when our founding fathers made the Constitution, they had the experience of situations which were far different from the situations that exist today. They were good gentlemen but had certain conceptions of their minds based on their own experience over the years past and acting on that experience, they laid down certain things. We know today, Sir, as to what goes on in the House, what goes on in the Assembly—All sorts of things—they would be shocked to see. One of them himself has often told me that they could not conceive of a line of behaviour, a line of conduct, so different from what they had provided for them.

Today, the number of matters which come up under Art. 32 are so varied—promotions, schools, education, universities, Vice-chancellors, promotions by reason of caste, promotions by reasons of nepotism, favourtism—all these are being challenged—they could not conceive all these.

In this set of circumstances even assuming that they thought that well, this is a fundamental right, every one should have no limit, the time has come when some kind of conditioning has to be put upon it and that has been rightly put in this particular judgement, I think. In fact, in two judgements which have been delivered, on the whole the majority has really given that expression. This is my view, Sir.

Now with regard to Art. 226, I may add a word. But the right to approach the High Court is not a fundamental right and it has always been recognised that a number of factors operate in Article 226 which may not operate in Article 32 which is a more appropriate remedy by way of suit. It may involve a matter of evidence and the High Court says "well, this is a writ petition under Article 226". They need not go into in detail and take evidence etc. But for a petition under Article 32 they are bound to take evidence if necessary. They cannot say to the person "go and file a suit because it is too much trouble for us to go into the evidence". Delay has been a lone factor under Article 226 and a recognised factor. It may not operate to the same extent under Article 32 and it would be more easily excused than under 226. That is the idea. Therefore, I think it is a mistake trying to lump Articles 226 and 32 together. The considerations are very different.

One word more, Sir, on the question of delay. The writ petition is supposed to be a speedy remedy. It is resorted to as a 'speedy remedy' and every petition winds up with a paragraph which says that the petitioner prays for a speedy and efficacious remedy. Well, if you want a speedy and efficacious remedy why not come to us speedily? Or, at least, show anything which a reasonable person would say "I understand you could not have come earlier and it will be excused" so that there is no danger of anyone being

really defeated. We are all conscious of our rights. Everyone is conscious of his rights and, being conscious of his rights, if he sleeps for a long time and then wakes up, the Court may say "I am not satisfied, for you have not given reasons for coming late". May be in one case a period of 4 years may be too late and in another case 5 years may be too late and in another, 6 years may not be too late. It all depends on the circumstances of each case. They are so diverse that they cannot be covered by any omnibus provision.

Mr. Chairman: Do you agree with me if I say that the fundamental rights have been enshirined in the Constitution to guarantee protection to an individual against the throes of society and the State, taking into consideration the fact that the State is becoming more and more all-pervasive and all-powerful and therefore there may be practical inconvenience? Even so, should not the fundamental rights of an individual be protected?

Shri C. K. Daphtary: As a general proposition I perhaps could not take exception to that. In fact, I started with it as one aspect of the case. Now, the inconveniences are many—practical inconveniences like the U.P. case which I had mentioned earlier. It is a question of equity and fairness. The delay may be such that the court can show "you have not behaved fairly in delaying". It is an equitable doctrine and even in England, Sir, as you are aware, the common law took notice of the Limitation Act. At the same time they said "yes, equity is there provided you show some reasons why you did not approach me in good time." Otherwise, to allow a man to come after 30 years would be an extreme step.

Mr. Chairman: These are exceptions you are pointing out but I was mentioning it is a general proposition. Then, there is another part in Article 32 which says that the state shall not make any law which takes over the rights conferred by this Part. If a common law be made under Article 32, under this Act no action of the State or an individual can take away a fundamental right.

Shri C. K. Daphtary: I agree that administrative action cannot equally take away a fundamental right.

Mr. Chairman: If a common law be made that action would be valid?

Shri C. K. Daphtary: A law is made, it exists; it is not challenged; although it may be wrong, it exists. One knows of a law which has operated for 20 years without being challenged; lots of things have been done under that law; even people have been hanged under the law which is invalid, let us say. But, until it is challenged, it is good.

Mr. Chairman: Taking that very case, if people have suffered under it, will they not have a remedy against the State for having suffered only because a period of time will bar the remedy? Well, you yourself cited this case.

Shri C. K. Daphtary: But, I then said that if his suffering is real, he would have awakened to it long before. In fact, the delay shows in itself that he has not suffered.

Mr. Chairman: Well, I would readily agree with that point. No, I think there was a case in the matter of property. For instance, a tresspasser can be on my property for 11 years, 364 days and on the 365th day I can go to court and be within the law. So, there is much latitude in the matter of property. Where as a tresspasser has been using my property and even building on it, I can sleep for 11 years and 364 days. When that latitude is given here, why should not the same latitude be given in other matters.

Shri C. K. Daphtary: But, unfortunately, you cannot lay down a rigid rule. You may say that when it is 12 years for property, why not 12 years

for all fundamental rights? To that, the answer would be that for some fundamental rights there is no limitation at all. So, the 12 years analogy is not an analogy in the sense that for certain rights no limitation is laid down.

Mr. Chairman: In that case, the very fact that there is no limitation is there as far as certain fundamental rights in Chapter III are concerned, it means that it may even be more than 12 years.

Shri C. K. Daphtary: Yes, I agree that nothing has been said in the Constitution about it.

Mr. Chairman: Then there is another case to which you referred. For instance, you said that a building that some body else had superseded might not be grantable. You see, therefore, that you are denying me my fundamental right only because you are finding it inconvenient. That is why I referred to inconvenience. As I have said I do not want to give a seat to anyone when someone is already sitting on it. I can give him some other seat. Like that every citizen has equal opportunity. If somebody else comes, all right get some more chairs. What is wrong with that? There is a case of I.T.O. There the people say that their rights were taken away. My plea would be to do justice to them.

Shri C. K. Daphtary: If I remember aright there were more than 20 petitions. If these twenty had been promoted, they would all have been Commissioners by now.

Mr. Chairman: Will you agree that basically they were interested in guaranteeing the citizens the justice?

Shri C. K. Daphtary: The income-tax case is on the ground of equality of opportunity. I would venture to say that that kind of equality of opportunity was something which they certainly did not envisage. This is a thing which has been pleaded for all sorts of cases which, I am sure, they never thought of. It has come to the stage that to-day a large number of writ petitions are filed entirely on the equality of opportunity. In regard to customs officers and Income-tax Officers, I believe, they have filed writ petitions. I wonder whether there was a question of equality of opportunity intended at all. So far, these are odd cases which have come to light.

Mr. Chairman: Do you suggest amendment of Constitution?

Shri C. K. Daphtary: It is difficult to cover every possible case.

Mr. Chairman: Then you referred to the position that the rights are created in favour of someone else. If an action is treated *ab initio* an act, that creates the rights.

Shri C. K. Daphtary: Well, I agree with you. You look at it from a practical view point; a man acts in a higher post drawing a higher salary for ten years. And after a certain period the position is reversed and another man starts exercising his right over the other man. These are practical considerations. Theoretically I agree with you that what is void is void.

Mr. Chairman: Then the plea that the rights are being created notionally would not be correct.

Shri C. K. Daphtary: I agree.

Mr. Chairman: Somebody enjoys a certain position. That is all right. That is not the right that is created.

Shri C K. Daphtary: I do not think it is notional. I only say that this causes a great deal of hardship to someone else. Let me put it this way. Suppose I am promoted to a position where I get a salary of Rs. 3,000 instead of Rs. 1,500. The more you get the more you spend. And at the end of ten years someone else is promoted in place of me. But for him,

I would not have got this much salary. These are practical aspects.

Mr. Chairman: Somebody enjoyed for a specific period of ten years. I am not asking for a refund of what he has already drawn.

If a refund is asked for I can understand. I don't understand when someone comes after years and asks for equality of opportunity for the same post which the other man has enjoyed for ten years.

Shri C. K. Daphtary: May I mention the case of I.C.S. men? One ICS gentleman from Bengal was transferred here as a Secretary and acted as such for a long time .Then for various reasons which one need not probe into he was asked to revert, to his place in Bengal. He filed a writ and the matter was sufficiently delayed if I remember aright. For him only some months are left for passing the superannuation period. The principal argument in his case was not that he put in many years of service but he says that he has been holding this status for so long and so he could not go from here.

Mr. Chairman: We have seen the decisions in this case.

Shri C. K. Daphtary: The decision shows that to a reasonable extent things have occurred in the meantime which must have prompted to provide the other person not to lose the time. If it is by reason of his delay and negligence that must be done in each case. Of course the court must have satisfied itself that these things have been allowed to happen. And surely he ought to be told that he has allowed these things to happen and he has come to the court so late and so the court finds no reasonable excuse for his having come so late. For instance I know I am being superceded wrongly. And I am advised by the lawyer that this is entirely wrong and so I have to file a writ petition. I say 'never mind; let us see what happens.' And at the end of five years or so I file a writ. Well the court may well say that I have come so late.

Mr. Chairman: You said that the rights are created. They should be protected. Don't you think that this should not create rights on someone else's rights?

Shri C. K. Daphtary: The mere fact that some rights are created is not quite enough. They have been created under circumstances which you could have prevented by not having excessive delay or unreasonable delay. This should be a matter which is taken regard of in the operation of equity. You should balance the rights. You should know which is the better right?

Mr. Chairman: Then there should be certain fundamental rights which will really be continuing rights. In that case at least the question of delay would not have arisen.

Shri C. K. Daphtary: That depends upon what kind of rights that are exercised.

Shri Tenneti Viswanatham: It is a continuing right. The right to be promoted, when it is denied wrongly, is a continuing right.

Shri C. K. Daphtary: We will assume that.

Shri Tenneti Viswanatham: My assertion is not against the State and not against somebody.

I am looking into the position where my right has been established.

Shri C. K. Daphtary: When it is established, the court passes the order.

Shri Tenneti Viswanatham: The article with regard to the rights refers to fundamental rights which I can establish before a court, and once it is established, it is not only, as Justice Ayyangar has put it, it is not only the

right of the court to enforce it, but it is the duty of the court to enforce it....

Shri C. K. Daphtary: Yes:

Shri Tenneti Viswanatham: And that is why in Art. 32 they have added a further sub-clause, in which they said that the right to go to court is itself a fundamental right.

Once it is established, then it must go.

These limits cannot be applied. Ins't it?

Shri C. K. Daphtary: Yes. But that does not mean that in giving relief..

Shri Tenneti Viswanatham: The Bill is in a very limited sphere. There are quite a number of cases. You must be aware of those decisions more than all of us put together. In a number of cases they not only go into the merits, but at the same time they do that after so long....

We are not going into that. In a number of cases they put latches.

Shri C. K. Daphtary: Yes. We have got some cases, where they discussed the merits, but at the same time say that he has come after such and such period. These are all 226 cases.

Shri Tenneti Viswanatham: But a petition cannot be denied simply because he came at a particular stage of time. You may say that there must be a reasonable.....

Shri C. K. Daphtary: What is 'reasonable' varies from man to man, from case to case, from judges to judges.

Shri Tenneti Viswanatham: The concept of 'reasonableness' was conceived with reference to a particular judge in a particular court. The same thing cannot be applied where there are more judges than one and where there are more courts than one.....

Shri C. K. Daphtary: That is no argument, with respect.

Shri Tenneti Viswanatham: Even in Philosophy, Shankaracharya says reasonableness varies from man to man. There is no question of comparing these things.

The question is whether it is within the meaning of the Constitution. If it is outside the Constitution, it must be declared bad. And if, on the other hand, the Constitution is not effective, according to you and according to the law-makers, the Constitution must be changed. But so long as this Constitution is there, so long as Art. 32 is there, together with sub-clauses 1 and 2, it will not be reasonable for anybody to say that, although the Parliament cannot impose any limit of period on the Supreme Court.

Shri C. K. Daphtary: Leave aside what Mr. Justice Hydel has said. Article 226 is not a fundamental right. The court can say I can decline to hear you. You have got another remedy. Here the right to move is a fundamental right. The court must hear. Article 226 is discretionary. 32(ii) is to deprive the Supreme Court of a discretion which the High Court has got. The High Court could say as a matter of discretion as I have heard you but I will not give you; in fact it has gone so far that where a petition falsely stated certain facts with a view to mislead the court the court has refused leave and if the Supreme Court is to be in this position that if some of these statements are made in the petition we will hear you but we will deal with the merits of the matter and in dealing with the matter we will take into account the fact you have behaved dishonestly—I say—they can.

Shri Tenneti Viswanatham: Shri Hidayatullah's judgement is the deciding judgement. In his interpretation he says the legislature cannot do it

therefore, I shall myself do it. Is it proper?

Shri C. K. Daphtary: Leave aside that judgement.

Shri Tenneti Viswanathan: You say the person who is affected should immediately move. What is the immediacy? In some cases where they came within three months they said it is too much of delay whereas in another case 90 days may be considered reasonable. So far as India is concerned let us not leave these matters to suit reasonableness. If you want to apply the law of limitation Article 32(2) must be removed.

Shri C. K. Daphtary: If it is a question of choice I would have a period of limitation even if it is six years.

Shri Bhattacharyya: The Supreme Court's judgement has created the worry that it may limit the exercise of fundamental rights or the Supreme Court's inclination to enforce fundamental rights when approached by people who have suffered for having lost them. That is I believe the root from which this Bill has come up. You have stated that things may be said on both sides for maintenance of fundamental rights and also putting a limit on the possibility of getting relief from the Supreme Court in a case of fundamental rights. That brings us to the position that it may be possible to make some amendment in the Bill which might be acceptable to both sides and the Bill may be adopted unanimously. Supposing an amendment like this is proposed—the clause in the Bill is that no relief should be denied merely on the ground of delay. The word 'merely' is there. Supposing it is amended in this way that 'provided the delay is satisfactorily explained.' Would you have any difficulty in accepting such an amendment?

Shri C. K. Daphtary: Prima facie and on the spur of the moment I would say I would not have any difficulty if it is left to the court being satisfied that there is some reason why the delay took place.

Shri Bhattacharyya: In fact what the court has stated, we felt it requires further clarification. That must be properly clarified.

Shri C. K. Daphtary: It often happens now-a-days that judgement of the Supreme Court requires clarification from time to time.

Shri Bhattacharyya: In fact as in the course of the discussion we are having with personalities like yourself, in the same way this amendment of the Bill is being suggested or considered or coming up before us. So, if that is done, I believe so far as the ground of delay is concerned what we want to prevent is the court should not say that merely because there is delay we refuse to grant relief. As the mover of the Bill says that you have come to-day, had you come yesterday he would have granted relief. They should not summarily dismiss application for relief when the fundamental rights are effected. So, I want this clarification.

Shri C. K. Daphtary: I think no court merely goes on delays as simply a bear computation of time. Delay always involves a question whether there is a reason for delay. Under the Limitation Act, 3 years go by for certain things. For instance in the case of money, if no suit is filed within three years, the money is gone. But apart from certain items of the limitation, the question always is involved whether that delay is excusable or inexcusable.

Shri Bhattacharyya: You can contemplate a case. Supposing somebody's property is acquired and he is away from India for the time being and when he comes back after a long time after some years and when he comes his property had already been acquired. He goes to the Supreme Court and seeks relief under Article 32. There the court will not tell him

that simply because there is delay, we refuse to grant you relief. They have to entertain the case even if there was inordinate delay. The delay is satisfactorily explained.

Shri C. K. Daphtary: In fact in the Limitation Act there is a ground for his being away. You could conveniently come here after this much of time and therefore your delay is excusable.

Shri Bhattacharyya: When you speak of the Limitation Act, I may refer to a case when the British judges in the High Court said that the Limitation is a plea of dishonest people.

Shri Koushik: Mere delay does not result in dismissal. It is unreasonable delay to the satisfaction of the court which leads to dismissal. I want to know, are you sure that the Supreme Court in each case does find out or makes an attempt to find out that the delay that has been caused is rasonable, in excusable or properly explained and they do go into the question?

Shri C. K. Daphtary: They do. In fact in the income tax case the argument took two to three hours whether the delay was excusable or not excusable.

Shri Shiva Chandra Jha: You said if the suffering is real and then the court can bar a person from moving it. You gave the example of promotion. Certain officers were promoted and they were in that position for a long time. Because promoted officers were in position and if they are demoted, they will be losers as they had established themselves and their children were going in monetary problems and so on. Do you not mean that suffering in order to be real should be quantitatively measured, should be in monetary terms? If suffering is not quantitatively measured, that suffering is not real.

Shri C. K. Daphtary: Suffering is a suffering of a person effected by the wrongful act. What I said was you feel the pinch. I say well this has been done. I am suffering. What can I do? I come to know that. In that connection I mention it or I ought to come to know because after all today if some right of the man is infringed or I think it is infringed, or some money is taken away or property is taken away, I immediately go and consult the people. Is it right or is it wrong? If I do not come for five years or six years, is it not a reasonable inference to treat that really substantially you did not suffer?

Shri Shiva Chandra Jha: So you mean that substantially there is no method of measuring your suffering—quantitative measure as it can be shown in the case of promoted officers as on being demoted they will be losing certain amount of menoy. But again those people who were not promoted at that time, if they would have been promoted then within that period they would have been getting certain amount of money. They would have been better placed and all these things. So actually their happiness has been effected by not being promoted but because you do not have means to measure that happiness, their suffering is not a real suffering. Because you have the means to measure the suffering of the persons who have been demoted that suffering is the real suffering. Is it not so?

Shri C. K. Daphtary: I do not think that is right. The man who was not promoted suffers by not being promoted. If it was a real injury which is really felt, he would have moved in very good time. The fact that he does not move for seven years shows that he has not been injured as in the case of Income Tax Officer. It shows that he really does not think that he has suffered an injury. It is a technical legal injury.

Shri Shiva Chandra Jha: What is your criteria to judge the real suffering? Is it your criteria that they are losing certain amount which they are getting?

Shri C. K. Daphtary: I am talking of those officers who have been demoted.

Shri Shiva Chandra Jha: Assuming they do not move the court. They move after certain period. The State has no right to enforce the fundamental right in this case they were knowing in the beginning but they did not move.

Shri Shiva Chandra Jha: But the way you have measured their suffering, can it be measured in their case also that if they would have been promoted, their children would have better education and better off within a certain period? If you take the quantitative measure and if it is applied to these officers, then their loss could be quantitatively measured within a certain period. And if you take to practical suffering, then fundamental rights are applicable only to property rights which can be measured in monetary terms, and not the conceptual rights of expression, movement, etc.

Shri C. K. Daphtary: I think I have been misunderstood. I said with reference to delay as a disqualifying factor. Whether delay disqualifies in a particular case or not, and whether it is a good excuse. On that, I say that unless he can show some good reason for the delay, the court will say—"well, you were deprived of something, but you cannot have." It cannot be effective deprivation because you sat for so long, whereas in the case of promoted officers, who are thereby deprived, they are deprived of something they have got.

Shri Shiva Chandra Jha: You have said that our founding fathers lived in a different situation. The situation at present is different from what it was in the past. As you gave the instances, so many things are coming before the court—teachers, professors and others. These things were rather not imagined by the founding fathers at that time. The situation is different. Now, assuming that the sufferers did not come to the court in the beginning to get their fundamental rights enforced. After a certain period, they wake up and they move the court. At present, we are living in an ideal welfare state, more than it was 20 years ago. So in this set of changed situation, is it not the duty of the court to enforce those fundamental rights despite his being knowing and not moving in the beginning?

Shri C. K. Daphtary: That is not the concept of the welfare state. It cannot excuse all things.

Shri Srinibas Misra: It can be seen that neither our legislatures nor our courts are opposed to unsettling settled things, and various reasons can be cited. As far as I am aware, there are certain conditions for adjudicating upon the fundamental rights; perhaps, they say that all the remedies must be exhausted before they come to the court for enforcement of their fundamental rights. In the matter of services, which we are discussing now, supposing that something wrong is done to a Government servant. Then he has to go in appeal. Then, another memorial. This process takes five years, and during these five years something gets settled. Another chain of Government servants will be settled. Will you think that while in the process of exhausting the available remedies, he will also be denied the remedy in court regarding his fundamental rights because five years have lapsed?

Shri C. K. Daphtary: If a certain thing has been done to him, the Government servant makes a representation and goes in appeal and so on. That is perfectly a legitimate thing to do. And in fact, case have occurred where these very factors have been taken into account—perhaps, using delay. They realise that a Government servant does not immediately rush to court. It is only in the ultimate resort, he goes. Why, in the first Income-tax officers case, they went to the authorities and they represented.

And I think, Mr. Morarji Desai made certain statement in the House. And somebody else said something. And all that was taken into account.

Shri Srinibas Misra: Perhaps, you agree that in such cases, mere delay has not been allowed to defeat.

Shri C. K. Daphtary: No. This thing is always taken into account: in the case where a person pursues legitimate remedies even though he may be examined in those remedies.

Shri Srinibas Misra: The question of unsettling does not apply. The example of ICS officer. The things which have become settled, and his life is unsettled. That is not the criterion. The criterion is whether the delay was reasonable or unreasonable.

Shri C. K. Daphtary: That is right. Is it justified or unjustified?

Shri Srinibas Misra: Let us take another case. A person has been detained in jail for 6 years, without being conscious that he has a right to approach some court. If he comes after six years to the court for any *habeas corpus*, do you think that it will be quite all right for our courts to deny that right?

Shri C. K. Daphtary: No, personal liberty.....

Shri Srinibas Misra: Again we will come to the question that mere delay, as the Bill envisages, will not be allowed to deny this remedy regarding fundamental rights. If there is something else, that is another matter. Mere delay will not be allowed to deny fundamental rights.

Shri C. K. Daphtary: The analogy of the man in jail is not a correct analogy. It is a fundamental right. But personal liberty is put on a different footing.

Shri Srinibas Misra: Let us take another example. We have said that Art. 14 guarantees equality of treatment. But, in fact, we find that regarding court fee matters and some other matters there is no equality. Rs. 50,000 to a rich man is equal to Rs. 10 court fee to a poor man. A man cannot approach the court because of expenses. That is never considered by the court. Would you like that these cases must be provided for, mere delay—whatever may be the reason—will not deny the fundamental rights?

Shri C. K. Daphtary: If a man has not got enough money and cannot get in order to exercise a fundamental right, that is a good enough excuse.

Shri Srinibas Misra: But the courts have never considered this.

Shri C. K. Daphtary: I think, Sir, you are mistaken. Take a question where a man comes and says: "I have been asked to pay a certain amount to the court, I cannot pay". The court says, it is all right.

Shri Srinibas Misra: But so far as Advocate's fees are concerned, cyclostyling of copies etc. is concerned, he has to spend the money.

Shri C. K. Daphtary: I am not aware of that in my experience where a man came and said that he cannot file a writ because he did not have the money. If he said, I am certain, the court will say—all right.

Shri Srinibas Misra: You are aware that for failure of paying process fee, the writ applications have been dismissed and are being dismissed.

Shri C. K. Daphtary: That is a different proposition. That is a question of denial because of a fault.

Shri Srinibas Misra: There is a fundamental right to approach the Sup-

reme Court. But to approach the Supreme Court will have no meaning if the Supreme Court does not decide t on merit. Limitation is not a matter of merit. Therefore if the Supreme Court rejects an application regarding fundamental right because of inordinate delay, will that be really in consonance with Art. 32?

Shri C. K. Daphtary: I say, yes, Sir. Art. 32 says that right to approach is guaranteed, not that relief is guaranteed.

Shri Srinibas Misra: That does not mean that everything will be dismissed without going into merits. The meaning is that it must be decided on merit. The right to approach means a consideration on merit.

Shri C. K. Daphtary: It is not a question of delay as much a matter of the merits.

Shri Srinibas Misra: According to you it is said by the courts that these writ applications are discretionary. Reliefs are discretionary and to be granted by courts. If that be so, even if the bill is passed and the courts are somehow made not to reject applications merely on the ground of delay, how will it harm; if there is any laches, the court finds it and other grounds, negligence and other equitable disqualifications on which they can dismiss it. How will it affect the equitable jurisdiction. Equitable jurisdiction has got so many ingredients under which relief can be granted. Under the limitation, delay is one such thing. Suppose this is taken away that on the ground of delay, courts will not dismiss writ petitions, they can reject on the ground of laches.

Shri C. K. Daphtary: Well, Sir, I am only dealing with the question of delay. In judgement, they have said that there cannot be any waiver of a fundamental right; you cannot wave it. You cannot say that I have got a right and it is deemed to have waved. I say that apart from delay, I cannot think of any other equitable concept on which it could be refused.

Shri Srinibas Misra: Supposing, I have a doubt in my mind that even if this Bill is made into a law, even then we cannot prevent the courts from dsmissing writ applications on the ground of delay.

Shri C. K. Daphtary: Even if it is right in law—yes. They may say, you are negligent; other grounds will also be found there.

Shri Srinibas Misra: It may come under some other disqualification.

Shri C. K. Daphtary: At the moment, I cannot conceive of any other aspect of the matter.

Shri Srinibas Misra: For example, he had to go to some other court. He has gone to that court of law. This delay has been occasioned by going to the other court. They will say, you have not approached that court and many other things will become the cause of the delay.

Shri C. K. Daphtary: You must give credit to the Supreme Court for adhering to your fundamental right in Art. 32 as much as possible unless there are compulsive arguments which take them away.

Mr. Chairman: Mrs. Mukerjee, you may now ask any question, you want.

Smt. Mukherjee: Mr. Daphtary, you are a man of great eminence and experience. The only thing that really concerns us is whether the law as it stands would guarantee justice to the individual against the State. This Bill which is before us is in two parts, one relating to a writ petition in the Supreme Court and the second part deals with the High Courts. I think that most of us are not worried about as to what happens in the Supreme Court. We think, justice is granted in the Supreme Court, but we are not as sure of justice being given in the High Courts specially in some of the

States because of the conditions which are now obtaining in those States. So, I would like to know from you that the Bill as it stands, do you think that it would improve matters or do you think, it would confuse matters?

Shri C. K. Daphtary: Well, so far as the High Courts are concerned, about which you are now asking me, the ground of delay has always been a ground operating in the High Courts under Art. 226, because so far as in High Courts Art. 226 is concerned, it is not a guaranteed right. Because, so far as the High Court is concerned, Article 226 does not guarantee a right as Article 32 does. Different considerations would apply. A discretionary right and discretionary remedy has been all that is recognised, the difference being that it is not a guaranteed right; you can use it or leave it.

Smt. Mukherjee: So, would you suggest any amendment to the para?

Shri C. K. Daphtary: I would suggest that, so far as the High Courts are concerned, you leave Article 226 alone altogether; and so far as Article 32 is concerned, an amendment was suggested here, if I am right, that it should be made clear that it would be delay which is unjustifiable which alone could defeat a fundamental right.

Smt. Mukherjee: Yes I see you mean that provided in the writ petition he cannot explain satisfactorily why the delay has taken place, he should not be denied the right to file this petition.

Then, there is one other matter which is causing some doubt in my mind—this point you raised about "reasonable amount of time". I was going through this material which was supplied to us. In some cases it is 15 years; the privilege is upheld till 15 years in the Supreme Court. Now, there is a case again where it has been rejected for a delay of only 5-1|2 months. This is material supplied to us by the Law Ministry I think. So, what exactly is reasonable time? In some cases even for 60 days it has been rejected and when it was 15 years it has been upheld.

Shri C. K. Daphtary: It all depends on the facts of each case. There is no definition to "reasonable time".

Smt. Mukherjee: But between 60 days and 15 years there is a big time lag.

Shri C. K. Daphtary: You must see the facts of each case—why it is upheld or rejected.

Smt. Mukherjee: That is the only thing which brought some doubts to my mind—whether this interpretation of this term "reasonable" would be a reasonable interpretation.

Shri C. K. Daphtary: Certainly it is reasonable.

Smt. Mukherjee: You are satisfied with it?

Shri C. K. Daphtary: Yes.

Mr. Chairman: You pointed out repeatedly that under Article 226 delay is always taken into consideration, and that it is a question of the facts of the case because it is not guaranteed like Art. 32. But if you look to Article 226. the last but one line says that for the enforcement of any of the rights conferred by Part III, if the High Court dismisses it, remedy in the Supreme Court is open. So it will only mean that the party should have gone to the Supreme Court and not to the High Court.

Shri C. K. Daphtary: I really do not know why people, in the matter of fundamental rights, go to the High Court; but I can guess why. One reason is that many High Courts grant a stay and once a stay is granted everyone is happy. They go away

hoping and wait for three years after this stay whereas the Supreme Court probably would not have granted the stay. So, it is becoming a fashion to go to the High Court. Strictly Speaking, for an assertion of a fundamental right you should go to the Supreme Court.

Mr. Chairman: So it would only mean that if the party is not able to rush to Delhi his fundamental right would be denied.

Shri C. K. Daphtary: One forum has been set aside for the guaranteed fundamental rights. There is nothing to prevent a man from coming to the Supreme Court to claim his rights. If I may say so, Sir, some High Courts have taken the view (of course there is difference of opinion that if a 226 application involves a fundamental right, then it must be dealt with in the same manner as the Supreme Court would deal with it under Article 32. In the ordinary way, in a 226 application the Court says, there are so many questions of factor involved that is not right to bring it under Article 226 and as for a suit, some of the High Courts have held that this should not apply to a writ petition where a fundamental right is involved and that the Court is under duty to take evidence—not to refer a man to suit.

Mr. Chairman: Could I split it further and say that as far as rights conferred under Part III are concerned, delay should not be the reason for the High Courts to dismiss a petition, leaving aside any other factors. After all, when the party could go to the Supreme Court, why should he not go to the High Court also?

Shri C. K. Daphtary: I agree, but I think normally a proper High Court dealing with the question of delay deals with it on the footing that there is no excuse for it. It must necessarily follow that when this question of delay is raised, the Court must apply its mind to the question whether the delay is reasonable or unreasonable.

Mr. Chairman: But I think some of the High Courts have made it a rule, laying down 30 days or 90 days or something of the sort. Some of the High Courts have created rules as regards the limitation under Article 226 and I put this to you (because you said "Please leave Article 226 alone" whether it would not be necessary that in the matter of fundamental rights enshrined in Chapter III at least, limitation should not be laid down by the High Courts; that it is not proper?

Shri C. K. Daphtary: Well, I correct myself in that respect: but even then, there must be some limit—a reasonable excuse etc.

Mr. Chairman: So, it will be on par with Article 32?

Shri C. K. Daphtary: I agree.

Mr. Chairman: There is one more point. I have been saying that the fundamental rights are enshrined in the Constitution for the benefit of the individual because, after all, it is an unequal task the individual has to face with the State becoming more and more all-pervasive. For instance, payment is granted and even then it takes time for a person to collect his dues. Even where it is granted Government may create many problems for him. So, therefore, in such circumstances, because the money is not paid and the delay is not on his part, it should not be treated against that person.

Shri C. K. Daphtary: If he has been making efforts to get payment he would be given reasonable time. Supposing he files a suit, he would have to file it within three years. Why should a writ petition be filed after 30 years when it is a question of payment? It is meant to be an unlimited remedy. The other one provides a limited remedy.

Mr. Chairman: I thought it relates to a suit filed by an individual against

the State. And the States have now-a-days become much more all-pervasive.

Shri C. K. Daphtary: The difficulty has arisen because the people have taken to the recourse of writ petitions. Take the case of Banaras Bank. Here the question comes with regard to the recovery of money. The money has been paid by someone illegally under an illegal provision or rule. I can only file a suit. But, instead, you file a writ which is supposed to be more speedy. The suit takes a long time. If a writ is filed, he can wait for years together. But if he has to file a suit then that should be done within three years.

Mr. Chairman: I may put it this way. A suit is filed within time. The high court sleeps over it. And therefore the people want to go in for a writ. I know of such cases. The High Courts come in only because the amount is more than Rs. 25,000. If a man goes to the high court, the matter travels for years together. There it involved only a matter of law. Even then it does not come up for hearing.

Shri C. K. Daphtary: That is correct. Even the writ travels for years and years.

Mr. Chairman: When you say that the people have even come in writs, in such cases only the writs would have been a proper remedy.

Shri C. K. Daphtary: It may be. I shall put it this way. The writ is speedy and more efficacious. I can file a suit within three years. I file a writ instead. I could file a suit within three years. Why should I not file a writ after five years?

Mr. Chairman: Suppose I have to get money from someone. I have to file a suit within three years. I do not feel like filing a suit within three years but I file a writ after five years.

Shri Tenneti Viswanatham: Is the writ petition entertained? It is a money suit.

Shri C. K. Daphtary: I take it that we are talking here of writ against the Government.

Mr. Chairman: Yes, it is against the government and not against a party.

Shri Tenneti Viswanatham: You just now said that the people are rushing with the writ applications to the Supreme Court. Ordinarily the writ is not entertained. Take the case of civil courts. I am reading from the judgment of Justice Hidayatullah. Please see page 830. He says that this court does not take action in the cases covered by ordinary jurisdiction of the civil courts, that is to say, it does not conceive of criminal actions for the obtaining of writs. There is no point in saying that the people rush to the court with the writ petitions.

Shri C. K. Daphtary: Here I am talking about Art. 226.

Shri Tenneti Viswanatham: It is for enforcement of fundamental rights.

Shri C. K. Daphtary: Art. 226 is for a number of matters including the failure to exercise the statutory duties or for the wrongful exercise of duties.

Shri Tenneti Viswanatham: All these are primarily for the purpose of enforcement of fundamental rights under Part III of the Constitution. Where a remedy is available under Art. 226, this court refrains from taking action. That limitation is put under Art. 32.

Shri C. K. Daphtary: I follow the argument. If limitation is put here, that should apply to Art, 226 also. Unless I see the facts of the case, I am unable to comment on that.

Shri Tenneti Viswanatham: An engineer took up his case against the

Government. He waited until the Government finally passed an order against him. The court did not accept his ground. I will not be able to pick out the case. That is a case under Art. 226.

Shri C. K. Daphtary: You may be right in saying. Here is a case which shows that there should be some provision made under Art. 226. Anyway, may I have a copy of it?

Mr. Chairman: Surely. Thank you, Shri Daphtary.

(The witness then withdrew.)

MINUTES OF THE EVIDENCE GIVEN BEFORE THE SUB-COMMITTEE OF THE SELECT COMMITTEE ON THE CONSTITUTION (AMENDMENT) BILL, 1969 BY SHRI TENNETI VISWANATHAM, M. P.

Tuesday, the 8th September, 1970 from 10.00 to 13.00 hours and again from 15.00 to 16.30 hours in Council Hall, Bombay.

PRESENT

Shri D. K. Kunte—*Chairman.*

MEMBERS

2. Shri Shiva Chandra Jha
3. Shri K. M. Koushik
4. Shri Tenneti Viswanatham.

LEGISLATIVE COUNSEL

Shri A. K. Srinivasamurthy, *Deputy Legislative Counsel, Legislative Department, Ministry of Law.*

REPRESENTATIVE OF THE MINISTRY OF LAW

Shri Dalip Singh, *Deputy Legal Adviser.*

SECRETARIAT

Shri M. C. Chawla—*Deputy Secretary.*

WITNESSES EXAMINED

(i) Shri H. M. Seervai, Advocate General, Advocate General's Chamber, High Court, Bombay.

(ii) Shri N. A. Palkhivala, Senior Supreme Court Advocate, Bombay.

(i) Shri H. M. Seervai.

(*The witness was again called in and he took his seat.*)

Mr. Chairman: Mr. Seervai, I am glad that you have come to give evidence before the Committee. You may kindly note that the evidence that you give would be treated as public and is liable to be published, unless you specifically desire that all or any part of the evidence tendered by you is to be treated as confidential. Even though you might desire your evidence to be treated as confidential, such evidence is liable to be made available to the Members of Parliament.

SHRI H. M. Seervai: Yes.

Mr. Chairman: We have got your Memorandum. Have you got any thing more to say? Afterwards, the Members would like to put questions.

Shri H. M. Seervai: I am quite willing to give a general view of the fundamental rights as I see them. The sponsor of the Bill is inclined to think that if you allow delay to bar an enforcement of the fundamental rights then in some way, the fundamental rights are curtailed, to use the language of Mr. Justice Hegde. My view is that all rights carry with them obligations and our Constitution keeps public interest as high as private interest. It harmonises them.

You have a right of free speech. But you cannot defame anybody. You have a right to use property. But you cannot use it to create a public nuisance. So, all rights are subject to obligations. Then, there are statutory rights, contractual rights, customary rights, etc. Further, there are rights of appeal, rights to approach a court for revision, etc. They are all limited by periods of time. The period for an appeal or a revision is very small. The maximum period for an appeal is 90 days and the maximum period for a revision is 90 days. The reason is very simple that rights affect not only the parties who assert them, but also the parties against whom thy are asserted.

Let me give an example. Suppose I bring a suit against somebody. His rights are also affected. It is desirable that if an appeal is to be filed, it should be done quickly. The people should know their rights. The sooner they know the better it is. In any event, every side should know whether he has got his right or somebody is going in for appeal. You will find that a large number of matters are not appealed against so that if the period has expired, the people know that the matter ends there.

Articles 32 and 226 introduce on an extensive scale speedy and effective remedies principally against the State. The writs mentioned in articles 32 and 226 are in English law very well known things. In fact, in the Constituent Assembly, Dr. Ambedkar said that he did not know what could be added to those things, and, he said, they had worked for hundreds of years. These are for speedy and effective remedies.

There is one writ which I should wish to exclude from any question of limitation and that is the writ of *habeas corpus*. The writ of *habeas corpus* is a writ against illegal detention either by the State or by an individual. Now, an illegal detention is a continuous, day-to-day, act and nobody can claim the right to illegally detain a person or an individual on the plea that he did not go to court in time. So, the Supreme Court judgement does not touch *habeas corpus* at all because it is a crime to detain a person illegally. The writ *habeas corpus* is a class by itself. It is the most historical writ in England. Attempts were made to defeat it by shifting the person from one jail to another. It is the only case in which a judge in England was made liable to pay a fine of 500 pounds when the writ was wrongly refused. The *habeas corpus* both by its English origin and by its very nature is not matter which can be barred by time because nobody can claim the right to commit a crime. Let me therefore leave the *habeas corpus* for the time being.

We then come to the writs of *mandamus*, prohibition, *quo warranto* and *certiorari*. I would like very briefly to state what is the nature of those writs. *Mandamus* is directed to a public authority to compel the performance of a public duty which is obligatory. You will see that if a man's right to claim the performance of a public duty is involved, he should move pretty quickly because the public authority is entitled to know wheher it is enforceable against it or not, because a man may think he has a right but he may have none. Secondly, in India, a writ of

mandamus can be issued to prohibit a person from doing something which he is under an obligation not to do. That is an important difference between English law and Indian law. If you are going to prevent a public authority from acting, you must move pretty quickly because the public authority has to act or not to act and public interest is also involved. Suppose there is an acquisition for building a particular bridge. The whole project is going to be held up if you don't obtain a writ of *mandamus* in time. It happened actually in Bombay in regard to the acquisition for a bridge. There was a contract and the contract contained a provision that if construction was not completed in time, there was a right in Government to take over the total installations, all the machines, etc. and complete the project. The judge granted an injuction. Now, the injunction would have paralysed the working of the bridge, a public convenience, and the authorities approached to court to get it vacated, and it was vacated. Now, if he had gone to the High Court for the issue of a *mandamus* on the State and if he chose to do it two to three months after the Government had started acquisition proceeding the Government would have mentioned what the needs of the public were. He knows that his right is violated. And the court, on a balance of convenience, either grants an interim stay or the court may say that they won't grant him the interim stay. If the court is going to grant the interim stay it is of the utmost importance both to the party and to government that the writ should be decided speedily. That is the view taken in England for centuries. Justice requires that one should approach the court speedily.

The writ of *certiorari* lies against a judicial or quasi-judicial tribunal. To set aside an order passed by it on certain well recognised grounds of a Tribunal has passed an order, the party either accepts it or he does not accept it. Now it is a matter of judgment whether a suit or an appeal filed is wrong or not. For that the remedy is provided that you can come to a court and say that "this order is contrary to law or the Tribunal has acted on no grounds at all" If a high court decides wrongly that there is no right of *certiorari* against a subordinate court or at any rate against quasi-judicial tribunals, there the same principle applies that you are affected by an order. You will say that it is an illegal order and so it must be set aside. In the matter of writ of prohibition, it would fail if you are guilty of delay. In the writ of prohibition, you must approach the Court that the Tribunal has not decided the matter. Once the matter is decided then there is nothing to prohibit. So, from the nature of the writ of prohibition, it lies only as long as the Tribunal has assumed the jurisdiction wrongly in order to decide the case. Once it has decided and there is a judgment, your proper writ is a writ of certiorari.

There is one other writ which is enforced called the writ of *quo warranto*. You will see the extreme importance or urgency of it from the very nature of the writ. Suppose a man is elected as a Mayor of amunicipality. But, he was disqualified as a voter to stand for the office. But, he continues as a Mayor in the Municipal Corporation. And he holds an office for a year. Unless you move the court speedily by a writ called *quo warranto* and ask the court to decide whether he can hold the office at all the writ will fail. At that time he would have completed the term of office. So it is equally important that the Mayor should know whether he is an effective Mayor or not. It is equally necessary that the court should decide this question speedily because here the public rights are involved. If a person who is disqualified from acting as a Mayor continues to act as such this is some thing which the law does not aprove

of. So, these are the nature of the writs.

Now if you see Art. 226 you will find that it speakers about the enforcement not only of fundamental rights but also of other rights. Let me give you a simple illustration. Suppose taxes are imposed wrongly by an authority or a tax is imposed by a municipality contrary to the section which gives it the power. There may be a legitimate case for appeal. The law says that you shall not tax the person more than 6 per cent but you tax him at 8 per cent. Of course there is no total lack of power but there is lack of power to do a thing which you purported to do. In other words your action is considered *ultra vires*. And you go to a court asking it to restrain the municipality from imposing this tax. That may be done by any rate payer who may himself not be directly affected by the tax. If you consider that the writ jurisdiction exists for the enforcement of fundamental rights as well as other rights, then at once the question of delay or limitation comes in.

I would like to tell the Committee that in my view the Limitation Act ought to be amended so as to put a period of limitation for all writs except the *habeas corpus*. The period should be reasonably short—it may be 90 days or it may be six months. It is public mischief that different judges of different courts should be governed by different periods of time. I feel that the time should be fixed. In those days when the Chief Justice Mr. Chagla was presiding four to six weeks was considered to be reasonable time. In Allahabad courts, two years period was not taken to be a reasonable time. It is quite wrong that a citizen of India should be treated in one way in Bombay and in another way in another place. That there can be a period of limitation as clearly shown by the fact that in England, for the writs of *certiorari*, a period of six months has been provided subject to the power of the court which, in appropriate cases may extend the period. In my respectful submission there is no violation of fundamental rights if you ask a man to exercise his right within a reasonable time. You know that the court has power to condone the delay if it is satisfied that there is justification for such a delay. A long time back there was a case in which Mr. Justice Hidayatullah in his judgment said that no question of any minimum period or maximum period arose. By that what he means is that if there is a good cause for delay, the court will accept the excuse for delay. The court has to determine whether there is a good cause. The court constantly decides such cases. Section 5 of the Limitation Act gives that power in case of delay. The same power should be given to the court in this case also. There should be a short period. I think 90 days on the whole seems to be a most satisfactory period. In the revisionary or supervisory jurisdiction that power is given to the court to extend the time if it satisfied that there was a good cause for that. I have attached an article along with my memorandum. I find that absolutely no reason is given by Mr. Justice Hegde as to why the period of limitation should apply to contractual rights, to statutory rights and to constitutional rights but not to fundamental rights. What is the distinguishing feature? Let me put it in this way for your consideration. Article 19(1) (g) refers to the right to carry on profession, trade, occupation or business. Article 301 secures the freedom of inter-State trade and commerce. Originally it was in the chapter of fundamental rights. It was removed from the chapter of fundamental rights and put in a separate part and Mr. Krishnaswami Iyer said that it was quite absurd to say that a right was affected according as it is in one part or other. Violation of any constitutional right will be restrained by a court. In one sense for business today freedom of trade and commerce is even more important than the right to carry on trade and

commerce because very large business houses have, from the nature of the case, business all over India coverage. Their goods are sold in every State. If unreasonable restrictions are imposed in any form—you may refuse to clear the goods; issue directions to the Railways not to remove the goods—you must justify unless you show there is acute famine. I would submit all rights are conferred for the benefit of the individuals. The only exception that I can think of in the Indian Constitution is untouchability and slavery. For untouchability our Constitution provides that it is abolished and Parliament shall pass a law making it punishable for anybody to practise untouchability or to enforce it against persons described as untouchables. You will find that it is an interesting thing that the law passed by Parliament makes it a compoundable offence with the permission of the Magistrate. Even in respect of a fundamental right which is basically necessary because untouchable means a man is not human. Our Constitution proceeds on equality; untouchable is the negation of equality, negation of human values which the Constitution enshrines, yet the law passed by Parliament makes it a compoundable offence with the permission of the Magistrate so that a thing which on grounds of public policy is made a crime is yet made compoundable. In such a case you may say, "we will not allow a man to be treated as a untouchable whether he complains or not. We make it a crime." But barring such extreme injury to personal status which the Constitution prohibits and obliges Parliament to punish by a law there are no provisions which require the enforcement of fundamental rights by a public authority. I would like to say that people seem to think that equality is a very simple concept and if a right to equality is violated well, it is a clear cut case. But I wish to say that it is essentially a question of fact and degree and of the times and perfectly honest and competent people may differ whether equality has been violated or not. For if a law is not to violate equality there must be a reasonable classification. Who determines the reasonable classification? What is reasonable to one may appear unreasonable to another. So, when a citizen is affected by a law and he says to himself, does it violate right to equality he has no clear-cut answer. If he goes to a lawyer, I think, in nine out of ten cases the lawyer would not be able to say what finally the Supreme Court will decide.

The English and the American courts have gone by the concept of what is fair, just and morally right. That is the attitude which broadly speaking both a court and a Parliament or a legislature ought to take. There is Tilokchand Motichand case. If a man does not want to settle and says that a tax is void. I will pay nothing, he can enforce his right; but if he makes a settlement which he considers suitable for himself, to allow him two or three years later to say because the Supreme Court in any matter has declared the law void and I must get back my money is neither fair nor moral. You see how shameful it would have been to uphold the Motichand case. What did Motichand do? He collected sales tax which was not legal. The authorities said, "All right; you pay back to the people." And he replied, "No." It was clear fraudulent conduct. He went in appeal. The appellate court said, "we are not dealing with the merits of the case. We are dealing with the discretion exercised by the judge. We cannot say it is wrong." He never went to the Supreme Court. Years later, when in some other matter, the law was declared void, he said, "Now you give me back the money."

Is it the intention of fundamental rights that the State cannot recover a tax without the authority of law but a private individual can retain it? His claim was, "I have recovered it from my dealers. I refuse to pay. And yet Government must give me the money." There cannot be a

more immoral attitude than this. I am surprised the Supreme Court has in certain cases granted relief to people who have entered into solemn agreements under the law and then backed out of them.

This is the case. A private individual makes a claim to receive the money recovered by him as a tax to which the State is not entitled. When the question to pay back comes, his answer is, "No. Let them file a suit and do whatever they want." The suit will take years. Most of the people would be those who have paid Rs. 100 or Rs. 200 or whatever it is and they are not going to file a suit and incur expenses. It seems to me that we ought not to allow the high name of fundamental rights to protect essentially dishonest or a fraudulent conduct. Neither the English courts nor the American courts, and nor, I am happy to say, our own courts have, by and large, countenanced such a conduct. Because all these writs are meant in the interest of justice. If a judge finds that what a man is trying to do is basically unjust, the remedy under a writ must be refused.

Let me give you another case. A motor operator obtains a permit fraudulently. At the instance of his opponent, in appeal the order is quashed. It turns out that there was no right to an appeal. The Supreme Court, or it may be the High Court—I am not absolutely sure—gave a judgment saying, "There is no right to appeal". But if we upset the order under a writ, we will be giving encouragement to the fraud by which the man obtained the permit. Therefore, being satisfied that the order was obtained by fraud, we refused to grant any writ. I think, the conscience of the ordinary man would tell him that justice was done. The law is not so bad that man can commit a fraud and get away with it.

The fundamental rights are meant to protect honest and fair conduct. The executive may unreasonably restrict the rights. The legislature may pass laws which the Constitution does not permit. By all means, go ahead. But all that Motichands' case says is, since public interest is involved, you move the court, if you want, speedily because it is in your interest to know your right, where you stand, and it is more in the public interest that the Government and the State know where they stand.

Let me give an example of the Bombay Sales Tax Act as how a validating Act became necessary and what consequences would have ensued if the doctrine of recovering tax on a mistaken law was there. As you are aware, the Bombay High Court declared the sales tax invalid. The Supreme Court in the United Motors case held it was valid and deleted a particular section. A year and a half later, in the Bengal Immunity case, the United Motors case was held to be wrongly decided. All the States had collected crores of rupees. Their revenues had been geared up and it became necessary to pass a validating Act because the theory of recovering tax under a mistaken law might have completely upset the total budgets of all the States.

Our courts have taken a view that when you went on paying tax without protest, it was your job to find out whether it was legal or illegal and, if the Supreme Court found that it was legal and you felt that the judgment of the Supreme Court was wrong, you should have challenged the Supreme Court as it was done in the Bengal case and it was set right.

So, in my respectful submission, there is no reason why a fundamental right which is a very important right should not be asserted with speed, if you want the benefit of speedy remedy provided for it. Because if you file a suit, your rights may be

open to you but corresponding rights are open to other side also. For instance, in the example that I have given in my memorandum, the Government acquires land. It does it in contravention of article 31. Let us say the law under which it is done is supposed to be against the principle of natural justice. I know the law. Now, I let the whole factory go up. Such cases have happened. Then, I say, "I did not receive any notice. All this is illegal." And I file a writ petition. It could be refused. Surely, when one claims a fundamental right, those rights must be available to the other side also. Now, that factory has gone up. Crores of rupees have been spent. The people have been employed. The Government has given water connection, power connection, etc. Can I then say, "My land was illegally acquired and you give it back to me"? The courts have rightly taken a view that interests of justice are paramount. Justice requires justice to all, to the State as well as to the individual. Sometimes, the action of the State affects the private individuals because, if my property is acquired, it may be acquired for somebody else. That means that his fundamental right of the parts for whom the land was acquired has a fundamental right to retain the property. So, I would submit respectfully that the judgment is completely correct and the strongest proof that judgment is correct is shown by the application of *res judicata* to writ petitions.

Now, what does *res judicata* mean? It means that where two parties have litigated on a matter, then that decision binds them unless it is appealed against. Unless they appeal against the appellate decision that binds them, the decision of the final appellate court binds completely because it cannot be questioned. I would not like to mention the name of a distinguished lawyer in the Supreme Court or may be in the Federal Court who argued cases when the Zamindari Abolition Legislation came into being and who appeared for the zamindars taking one objection at a time. He said my point was very good, but it was rejected. I have thought out a new point in your case, and so it went on. On the same points first Mr. Justice Gajendragadkar said that constructive *res judicata* was a technical rule, but later he said it was also based on public policy. Surely it is not right for a man to challenge a law on five grounds on five successive petitions and hold up the other men's rights for an indefinite period of time. Let us say that big portion of land is required for the development of an industrial estate. You have entered into contracts for this purpose. The industrial estate is going to offer employment to many. Surely the fundamental right question does not arise at all. You will see what Mr. Justice Gajendragadkar said. To allow a person to be free from a constructive *res judicata* would mean applying that to every suit. The party in a suit could have taken the plea of enforcement of his rights in deciding the suit. In a suit obviously there is a process of delay and harassment. In India as in many other countries people go in for a litigation taking the weapon of delay and harassment. Once you go in for a litigation, every important Government's scheme of development will be held up for an indefinite period. The whole scheme itself could have been brought to a standstill by this simple process. Once a party comes to the court seeking for an injuction on the plea that his fundamental right is being violated, the court does not say that it cannot decide the case. Notice is required for a suit but no notice is required for a writ. It is true that the public interest requires justice to be done. Here no reasons have been given to the contrary as to why it should not be done. The fact of the matter is that the highest court of England and the U.S. have taken the same view as reasonable. What is being done meets with the judicial approval of the highest courts.

It meets with their approval on the ground of fairness and justice.

There is only one thing which I wish to say and that is about the ground mentioned by Mr. Justice Bachawat namely *injunction*. Injunction means that you prevent a person from exercising his rights. So, if I go to the court and say that Government is throwing me out of the property which has been requisitioned to me I should be given relief. The court will immediately give me an *interim* stay but at the same time the court expects me to say truthfully all the facts necessary for obtaining such an injunction. Suppose, in this case, I have suppressed the fact that I had told. I tell the Government that if it gave me six month's time, I would go away. The Government has waited for six months and asked me to go out at the end of six months. The court would say that I had misled it. Had it known that I had secured six month's time from Government and the Government did not act till the stipulated time, it would not have granted him the injunction. Whether the Government is right or wrong, the court would have dismissed the petition on the ground of lack of good faith in the administration of justice. In the Supreme Court, Mr. Justice Hegde joined in dismissing the writ petition because of false and misleading statements made before the court. The learned Judge says that it would be shocking for the petitioner to mislead the court. The court without going into the merits of it dismissed the petition. In my, respectful submission, such a dismissal is correct; it must not be forgotten that the protection of a man's rights does not entitle him to resort to dishonest or fraudulent tactics to obtain orders from a court. If this is permitted, justice is brought into a contempt and anything which bring justice into contempt does a gravest injury to the whole body politic. As I have said, justice is put on the forefront of our Constitution. As Mr. Justice Sikri said that there are certain fundamental provisions for the administration of justice which the court must follow unless the Constitution says that they must not do so. Take, for instance, the agreements by the princes—Covenants. No court can decide it. Similarly take the case of river water disputes. Under our Constitution, no court can decide such a dispute. But the normal principles of justice require that if a right is violated, one should go to the court. If the Constitution itself says that you cannot have that remedy, the court gives some other remedy. To that extent justice must yield place to the will of the people as embodied in the Constitution. But, there is absolutely nothing in Article 32 or in Art. 226 which precludes the court from applying the principles—settled principles—in the administration of justice like the Law of Limitation, Law of Registration etc., Suppose of document is not registered. Your right may depend upon it. Of course fundamental rights are there. Registration is a reasonable requirement of law, and so is procedure as laid down in the Civil Procedure. You cannot allow a person to violate that procedure. There is the well-settled procedure laid down in Civil Procedure Code, Evidence Act, Limitation Act and Registration Act. Also there is a Transfer of Property Act and other acts. These are the considerations which the court apply in administering justice. That seems to be broadly the position. Now I shall be able to answer any questions put to me. I have ventured to say with respect that no reasons have been given as to why a particular thing that applies to everybody—there are three types of rights, contractual, statutory and constitutional rights—should not be applied here?

There is only one thing which I wish to add. The Supreme Court said you cannot waive fundamental rights and they put it on a ground which is demonstrably incorrect. They said that American Constitution is only for purposes of defence and union.

In our Constitution, we have equality of opportunity, fraternity, etc. What the Supreme Court forgot, and it can be demonstrated is that when the Constitution of the U.S. was enacted in 1787 there were no fundamental rights. Fundamental rights were introduced two years later because several States were unwilling to ratify unless fundamental rights were put in. So George Washington said "it is all right; ratify it, and we promise that fundamental rights will be brought in later but the ratification need not be held up". Surely, a Constitution without fundamental rights would have a very different preamble from a Constitution with fundamental rights. That is the first mistake.

The second mistake is—and it seems to me a little surprising—that there was what is called a Declaration of Independence in the United States and the words of the Declaration are: We declare these truths to be self-evident that all men are created equal by the creator and that they are endowed with certain inalienable rights. So, you see that the Aemircan fundamental rights or the rights claimed by the people are not given by any Constituent Assembly or are not given by any body of men. They are given by God. In other words they invoked the natural order of things or the divine order. If these aspects had been presented to the Tribunal I am sure they would have taken a different view.

Mr. Chairman: Article 226 deals with the fundamental rights and other rights also but Article 32 deals with the fundamenetal rights. We talk only of fundamental rights initially. As you put it and rightly that the framers of the Constitution were very able jurists. They knew that in the matter of other rights there was law of limitation; they also knew that in English law there is law of limitation in certain circumstances also and yet they have never laid down anywhere in the Constitution that fundamental rights are limited by limitation. How that can be explained?

Shri H. M. Seervai: I submit that in a Constitution you do not provide for things which are provided by ordinary substantive or procedural law. So, the Supreme Court was called upon to evolve its own procedure. For the High Court the existing law shall remain unless inconsistent with the Constitution. You assume substantive law would apply. In England judicial discretion is fettered only as regards one writ *i.e. habeas corpus* otherwise the rest must be promptly dealt with.

Mr. Chairman: The difficulty is that all the existing procedural laws do not provide any period of limitation for these fundamental rights. This was known to the framers of the Constitution.

Shri H. M. Seervai: The fundamental rights would come into effect only on the 26th January, 1950. So, no limitation Act could provide it before 1950. The Parliament may take one view or the other. I do not happen to be a Member of Parliament. I cannot speak with intimate knowledge of it. They may hold different views. One court may hold that two months' period is all right. It has been so held even in respect of fundamental rights. The Supreme Court held two months' period was all right even in respect of fundamental rights. Some other court may hold 3 month' period is all right; some others may hold 6 months' period is all right. Justice Sikri holds that 1 year is all right. There are different views.

Now, a situation is created as a result of these different pronouncements which bring the legislative power into play. A limitation Act can legitimately provide a period of limitation. The Constitution has said that such a right must be enforced. But they did not put it in the Constitution as to what would be the method, either by judicial discre-

tion or otherwise. I have shown different periods of limitations. If you will permit me to say so, it shows a shocking lack of uniformity. Would not Parliament want to deal with all citizens equally and prescribe the same period of time?

Mr. Chairman: Anyway, you leave it at that. That will be looked into. You yourself have also felt the need of the Limitation Act being amended because of different limitations laid down by different judges. You have said there is no uniformity. Till that happens, is it not true that there is no limitation?

Shri H. M. Seervai: No. There is an effective limitation. But it is a conflicting period because one High Court holds 2 months, another 4 months and still another 6 months, and so on. As I have pointed out, the jurisdiction under article 32 is clearly supervisory because *certiorari*, *mandamus* and *quo warranto* clearly come under supervisory jurisdiction which now belongs to the Supreme Court and the High Courts. The Supreme Court has referred to that period. But it says, "we cannot create a law of limitation. So, we must decide each case on its own merits." The reason why I suggest a uniform limitation is that the rule of law requires that all similar persons must be treated similarly. If the Parliament takes a view that "let each High Court have its own limitation period or let the Supreme Court have its own period, no matter how unsatisfactory that view may be", that is a different matter. But I personally think that that view could not be correct.

May I tell you in America in a Negro trial the period of limitation was as short as 3 days and that has been upheld by the Supreme Court by a majority. Wherever a Negro objected to the exclusion of a Negro from the Jury trial, at various times the courts in the United States overruled the objection. in the Supreme Court these judgements were reversed. In one case, a man knowing his right to object did not object. By a majority of 6 to 3, the Supreme Court held, "If you had raised the objection earlier, we could have helped you." There, the period was as short as 3 days.

I have suggested 90 days for revision and 90 days for appeal. I suggest a uniform period of limitation as a measure of fairness. Today, there are different periods according to the moods of judges and their discretion as to whether a longer period should be allowed or a shorter period should be allowed. Is that a very satisfactory state of affairs?

Mr. Chairman: Specially when the Constitution does not lay it down, would it not be wrong for the courts to restrict the exercise of that right in their own individual judgements or in their individual discretion?

Shri H. M. Seervai: They did not say that the courts shall give such directions as are necessary for the preservation of fundamental rights. I would respectfully call your attention to the judgement of the Calcutta High Court which I have quoted in my memorandum. Till you read that judgement, one does not quite understand what the article means. At p. 641, foot-note 34, (Seervai constitutional Law of India) I have given varying periods which the courts have adopted.

Cases dealing with delay did indicate that this was inherent. There are cases in which it has been held that delay may be a ground for refusing to entertain the application of a man when he comes to the court for relief. There are cases in which the party explains the delay and the court condones the delay. There is a fluctuating period of delay ranging from six months to two years or even four years. There is a grave drafting defect arising from the fact that when the draft Constitution was under consideration, amendments were suddenly moved in the Constituent Assembly. The drafting defect is that the Supreme Court, under sub-rule (2) shall have the power to

issue directions or orders or writs including the writs in the nature of a *habeas corpus*. What is meant by 'including the writs in the nature of'?

Mr. Chairman: They might have thought that there might be other remedies as well.

Shri H. M. Seervai: There might be. It is not possible to show them. I shall just tell you one or two things because that question was put to me by one judge in the President's reference, to which I gave an answer and I find no further discussions on it. Let us see the words 'orders, directions or writs'. Where do these words 'directions' 'orders' or 'writs' come from in India? Originally, the high courts had the right to grant writs in *habeas corpus* petitions. Section 491 of the Cr. P. C. calls it the "directions" in the nature of *habeas corpus*. Section 45 of the Specific Relief Act describes the *writ of mandamus* as "directions" in the nature of *mandamus*. In England, in 1928, leaving *habeas corpus* which was too sacred to be touched, the writs of *mandamus, certiorari*, prohibition, *quo warranto* were called all "orders" of *mandamus* prohibition and *certiorari*. Halsbury's Law of England will tell you this was only a charge of form. You will please refer to the standard book like the Hallsbury on law. There the procedure is a little simplified. In India you have directions. In England also you have the writ of *habeas corpus*. In order to make it clear, whether you call it direction, order or writ, one should deal with what are called wellknown writs. The judgment of the Calcutta High Court enables one to understand this article. In my view there is nothing which you can do in the nature of order or direction which you cannot do in writs. In India take the writ of *mandamus*. Under this a person can prohibit another person from doing a thing. The judge of the Calcutta High Court says that the orders of writs can be issued against any person for any purpose. Under Art. 226 of the Constitution, orders of writ can be issued against any person for any purpose. The argument was that the high court's jurisdiction became a universal jurisdiction. Look at the language. You can issue any order against any person for any purpose. You can restrain the Congress Committee from electing a particular committee. This was one of the cases before the Madras High Court presided over by eminent judges of the Madras High Court—Mr. Justice Rasmanahar and Mr. Justice Venkatarama Iyer. These were the very first judges who realised the correct reasoning given by the judges of the Calcutta High Court. The judgment of the Madras High Court followed the judgment of the Calcutta High Court in which a question was raised namely whether a writ can be issued against any person for any purpose.

Look at the writ of *habeas corpus* it lies against illegal detention against the jailor. He was the person against whom the writ was issued and the purpose for which the writ was issued as also the name was indicated therein. The writ of *certiorari* is issued against an inferior court or tribunal in respect of a judicial or quasi-judicial act but not against any person for any purpose. Prohibition also speaks about the same thing. *Quo warranto* is issued against the holder of an office calling upon him to show the authority holds his by office. Writ of *mandamus* is issued against the public authority for enforcement of a public duty either affirmatively for doing something or negatively for not doing something. The purpose for which and the person against whom the writs can be issued are all indicated by the name and by the historical content. Therefore, you do not have to state it. I know that an order or direction will not go any further once *mandamus* can be issued both affirmatively and negatively. There is Sec. 45 of the Specific Relief Act since 1892 or 1895. The writ of *mandamus* both affirmatively and negatively cannot be issued

if there is now conferceable public duty imposed on an officer. Illegal detention cannot be done by the writ of *mandamus*. I have analysed all the cases and the content of it. For what purpose and against whom the writ is issued are not prescribed in the rules of procedure. But, the High Court has been given powers to frame rules. The Supreme Court has framed their rules. They have applied the Civil procedure Code. They have said that as regards the writs, that shall be by way of petition. It shall be served in this way and the rules shall be in this way. The procedure is laid down in the Civil Procedure Code. The Constitution does not prescribe the procedure. Nor does the Constitution prescribe the rules under which the High courts or the Supreme Court exercise their powers. We draw an inference that there is a drafting change which would be required to be made in the Legislative Entry in List 3 relating to the Laws of Limitation by adding the words "for enforcement of rights" other than the Fundamental Rights. There is no exclusion. If you turn to list 3 and see entry 13 "Civil procedure, including all matters included in the Code of Civil Procedure at the commencement of this Constitution, limitation and arbitration." Now you get an appeal from writ application from the High Court because the Civil Procedure Code provides for an appeal and the appeal to the High Court will be governed by the period of limitation. So, they need not exclude. Limitation and Civil Procedure are not excluded even in a writ petition involving fundamental rights. The period of appeal is made applicable because the code of civil procedure applies. They have held that a writ petition can be amended because it is civil proceedings. In England they would not permit to amend the writ. Apart from *habeas corpus* all other writs are civil proceedings. In entry 13 there is a deliberate inclusion of "all matters included in the Code of Civil Procedure" so that nobody could argue that substantive right is not part of the civil procedure.

Now there are four judgements in Motichands case Mr. Justice Hidyatullah says 'no minimum and no maximum'. If you can explain a delay come after 12 years and if you cannot explain the delay you are out. Mr. Justice Sikri said "one year" because there will be negotiations, people will have to take time to consult lawyers. Mr. Justice Hegde said 'no limitation'. Mr. Justice Mitter and Mr. Justice Bachwat went on the analogy of the limitation and they said we will apply the analogy of a suit. It is not correct that the judges differ. They differ as to the period but they are all agreed that delay or stale claims must have.

Mr. Chairman: You see because of the Limitation Act one knows when limitations end because even High Court or the Supreme Court not having laid down very cogent rules as regards delay one does not know when delay begins. Therefore, to say that it would six years one could say it should be three years. In all that they are contemplating that it was the delay which ought not to have taken place.

Shri H. M. Seervai: I would give two answers. The first is that we cannot attribute to the framers of the Constitution a vision of how the Supreme Court would act when they had no means of knowing it. They assumed that the whole function of the Supreme Court is to integrate the law of various High Courts when they conflict and to evolve a uniform law. It has been done now finally by Mr. Justice Shah resolving the conflict that writ petitions are civil proceedings and the Civil Procedure Code applies. If Judges failed to agree I do not think that we would be justified in saying that the framers of the Constitution would have contemplated that unified law would fall because four different judgements

would result in uncertainty in the law.

Another thing which I wish to say is that you may be completely valid in saying that the people could not be left in the lurch as to what is the period of time. But one must not forget that these special remedies have very far-reaching public consequences. When all is said and done, today, the biggest litigant in every case is the State, not because it wishes to enter into it but it has to. The institution makes thought that every rule will be evolved or discretion will be uniformly exercised. But their expectations have failed. The obvious answer to that is to follow the example of the United States and of England and lay down rules of limitation. The experience has shown that judicial discretions have failed to resolve the problem. I would submit that the conclusions to be drawn from the failure of the judges to agree to the period of limitation only suggest the necessity of an affirmative law laying it down. Once you pass this Bill, it means there will be no period of limitation. May I respectfully put a question ? Should not a man know his rights? I say, this sort of conflicting judgments are opposed to the basic principle of law. An amendment of the Limitation Act after passing of this Bill will be void.

Mr. Chairman: Would you suggest that the Subordinate Legislation Committee of the Parliament should look into the rules framed by different High Courts and the Supreme Court rather than have such an amendment as regards the period of limitation?

Shri H. M. Seervai: If they prescribe a law of limitation, the Supreme Court has held it is void. you cannot limit a right by judicial discretion, as Justice Subba Rao pointed out.

I have mentioned in my reply that a limitation means that a legislative power is being exercised. Now, a judicial discretion is somewhat different. I ought to tell you one thing. All this discretion arises becauses of an injunction. In an injunction, it is essentially a matter of discretion. no person knows when an injunction will be granted or it will be refused. So, there are several matters of the most vital kind which must of necessity be left to the discretion of the judge in the hone that some well-settled principles will be laid down and, by and large, the courts have done so.

Mr. Chairman: I accept the position that an injunction on a particular petition might not be granted. but to decide arbitraily that we will not consider it because you have come on the 91st day is not the correct thing to do. The Bombay High Court did that. I put it that way.

Shri H. M. Seervai: It was not arbitrary that way. I will tell you that. The necessity of coming to the court arises because of Section 80 of the Civil Procedure Code. The judge said, "If you file a petition by way of writ, because a writ is not the substitute of a suit, if you want speedy remedy, we are willing to give you relief. But if you only want an ordinary remedy under the law, you can obtain an injunction by serving notice. Having the power to serve notice and to get an injunction at the end of 2-3 months, if you come to us after 5-6 months, why do you demand relief by way a writ?" That was not arbitrary.

Mr. Chairman: I would only make this observation that, knowing there is other remedy available, the framers of the Constitution included articles 32 and 226. That is all that could be said. We have heard you extensively about it.

Shri H. H. Seervai: I would only say that the same position obtains both in the United States and the United Kingdom and also in Australia. The remedy by suits obtains in all the countries. In all the countries, these writs are looked upon as speedy

remedies. And that means you must come to court with speed.

Mr. Chairman: There is one more point. You said that the framers of the Constitution might have expected a sort of amendment or an addition to the law of limitation. You yourself feel it is necessary. But it is not there. Secondly, while referring to the drafting of article 32, you were pleased to observe that the amendment has come in haste. One could argue this way that they thought that some writs other than the writs mentioned here were also possible. You have quoted instances where *mandamus* writs are of a negative nature also in India. Therefore, if one were to interpret that the framers of the Constitution did imagine certain other writs also, he would not be out of court.

Shri H. M. Seervai: He would be. Broadly, I would tell you why. Dr. Ambedkar's speech on that point is conflicting. He said, "What other writs can you think of? What other things can you add?".

Mr. Chairman: You know all those observations could not be quoted in a court of law. They will be helpful for interpreting it. That is all.

Shri H. M. Seervai: I would only say, when you try to be over-cautious, you add to the difficulties. To try to guard against a loophole which does not exist is to create a loophole where there is none.

Mr. Chairman: Might be. There is one thing more. Not only the framers of our Constitution but even 200 years or so back, in the United States also, they found the necessity of fundamental rights being guaranteed, meaning thereby that the State even then was all powerful, omnipotent and all that. Today, we find that the State, day by day, because of socialistic commitments and ideas, is becoming all-pervasive. When the State is becoming all-pervasive, against that, an individual citizen finds himself very insignificant. The fundamental rights have been enshrined in the Constitution to protect an individual. Therefore, the fundamental rights are a shackle on the feet of the State. But in the interest of an individual, the fundamental rights are necessary. when they are enshrined in the Constitution, to say that they could be circumvented, would it be germane to the spirit of the Constitution?

Shri H. M. Seervai: With great respect, I may say, every right conferred by the Constitution is a shackle on the feet of the State. We cannot distinguish fundamental rights from other constitutional rights.

Mr. Chairman: In the Golaknath case, the judgment was that the fundamental rights are not amendable. The right under, say, article 301 is amendable. But the fundamental rights are not amendable as long as the present law stands.

Shri H. M. Seervai: With great respect I should say that the Constituent Assembly can amend it. They have thrown out that.

Mr. Chairman: That was the suggestion made. That would not be judicial.

Shri H. M. Seervai: So far as Mr. Justice Hidayatullah was concerned it was expressly said in his judgement. I am quite clear in my mind and I have said it publicly that no court and nobody can ultimately, in a democracy, deny to the people what they want. If it leads to the unfortunate consequence which we have witnessed in Bengal we cannot help that. We ought not to be that much worried because what is being done by a reasonable period, namely ninety days, can as well be done within sixty days. What is being said is this. By all means allow this subject or the citizen in India to enforce his rights. Let him do that as long as the principles of justice allow him to do so. You are not threatening to take away that right of appeal when you lay

down a period of ninety days. Secondly, as you know, the judges in appropriate cases may extend it. You are removing that thing from the Executive. One of our eminent judges had told me that this was the position according to law unless there was cogent reason to change it. Whether the period should be 90 days or six months is a matter of legislative detail. If a particular period appears to be too small to several Legislators, it does not follow from that that a much longer period is called for in all the cases.

Mr. Chairman: Would it not appear to be incongruous taking the case of Bombay that this period of ninety days is too long? It need not be an adequate period. But, if it is beyond ninety days the presumption obviously would be that it will go against a petitioner till he tries to prove that the delay is justified.

Shri H. M. Seervai: In Bombay, it is a dead-letter if you are asking me about Bombay.

Mr. Chairman: I know. This is exactly the distinction that is sought to be made by certain rules framed by the High Courts. And such petitions are dismissed in *limine*. What is the ultimate result?

Shri H. M. Seervai: It is varying from judge to judge.

Mr. Chairman: Whether should an appeal lie against the Supreme Court?

Shri H. M. Seervai: So far as the Supreme Court is concerned, the answer is this. If you choose in the name of original jurisdiction of a final court, you are bound by it. That is the very reason why even in respect of fundamental rights, the high courts have been given the power to resort to the other remedy of appeal. As regards the incongruity, I would only say this that it must be artificial once a limit is laid down. When I was due to appear in my matriculation examination, there was age-limit. It was *pro-rata* a year earlier. The, limit being September, 1906, I could not have appeared, for I was born in December, 1906. Even a month or a day would have made the difference.

Mr. Chairman: One more point is this. You have made a distinction and rightly so about the *habeas corpus, res judicata* and other things, I think *habeas corpus* is a continuing right. There the question of delay never arises. If I go against the law I can be hauled up any time. Therefore there can be no delay in other cases. That is the distinction you are making.

Shri H. M. Seervai: There should be no delay.

Mr. Chairman: There may be delay in cases where the court felt that the party did not speedily come to the court. Let us distinguish between these two types of cases. There is a continuing right where the question of delay does not arise. He can come to the court at any time this being a continuing right.

Shri H. M. Seervai: I would like to say something that is historical in all the great Constitutions on which we have modelled broadly our Constitution. There is a distinction made between the personal liberty of a man or freedom of a man and other rights. You might have observed that in a court in England a counsel gets up and says, 'My lord, I move for the protection of the right of the Subject in this court.' In the *habeas corpus* you will find a distinction that is being made for it is a continuing right against the violation of which relief is sought. It would be important to note that in our country we distinguish very much between the freedom of an individual and the effect of other rights on him once we consider that that right is vital to a person.

Mr. Chairman: You know there is a judgement of the Supreme Court with regard to the putting a curb on the enforcement of rights through legislation?

Shri H. M. Seervai: In my respectful submission the judgement of the Supreme Court in the Golak Nath's case does not deal with the limitation. The judgement is to regulate the right; it is not to curtail it. For example, you have a right to go on the road and to drive a car. But you are compelled to obey the traffic signal and to observe the speed limit. Similarly, regulation of the rights is in public interest. But, that regulation does not deny the right. Whether it is three months or six months or whatever it may be, the period should be uniform throughout the country to enable an individual to come to the court to protect his fundamental rights. In America, for example, in a *trial* held by a jury—which is a fundamental right of the accused, the period of three days has been upheld as valid.

Mr. Chairman: I may bring to your notice one case (Shri Darya's case) and this was what Mr. Justice Hidayatullah says:

> "To put curbs in the way of enforcement of fundamental rights through legislation is bad."

Shri H. M. Seervai: I am aware of it. If you say that a man must come for a writ of *certiorari* in three days, let him give notice to this effect. If you regulate the right on the analogy either of delay or revision or by way of a longer period of six months or whichever period commands itself to the judgement of Parliament, it would only mean putting a curb thereby. In any event in Shri Deryao's case, application of *res judicata* comes in. On this there is not only one judgment—Moti Chand's case—but many. It has been followed from those judgements that this sort of regulation will not be treated as a deter on fundamental rights and no legislature can prescribe an unreasonably short period. If it does, I agree, that it may violate the fundamental right.

Mr. Chairman: The cases which you were referring to either because of waiver, *estoppel*, *res judicata* or constructive *res judicata* or otherwise would be decided on grounds other than delay.

Shri H. M. Seervai: The reason why such a distinction could not be made is that is true that limitation is different from waiver or consructive *res judicata* but it is at the basis of all public policy. Public policy underlies waiver, limitation and delay.

Mr. Chairman: Limitation not in all cases but only where it is laid down.

Shri H. M. Seervai: There is residuary article which steps in.

Mr. Chairman: Putting your view point to us you first of all stated that rights enjoy duties. While explaining your argument you referred to the fraudulent conduct but this is also something which is besides limitation. If the dishonest conduct of the applicant be found out then his petition will be dismissed on that ground but not on the ground of limitation.

Shri H. M. Seervai: I mentioned that dishonest and fraudulent conduct in the context of limitation because the case in Tilokchand Motichand involved both points. They would have given him relief because there is a series of judgements in which they have held if it is under a mistake of law you can get it back but in this case the majority held that there was no mistake of law and it was barred by limitaton.

Shri Konshik: You have suggested to prescribe a period of ninety days and give the power to extend the time. So, if you prescribe a period of limitation as 90 days even if he comes on the last day he need not explain the delay. Am I correct?

Shri H. M. Seervai: You are correct subject to one addition. That it is well settled even where the periods of limitation are prescribed if you want interim relief you must come

speedily. If you delay interim relief would be refused.

Shri Koushik: Even when he comes within 90 days.

Shri H. M. Seervai: His petition will not be dismissed but he will not get interim relief. Secondly, if you delay very long equity may arise against you.

Shri Koushik: Anything above 90 days.

Shri H. M. Seervai: He will have to explain if the provisions are made applicable.

Shri Koushik: Secondly, when a writ petition is filed and a decision is given against that, the aggrieved party has to go. There is limitation period. If for an appeal on a ordinary writ there is a period of limitation prescribed is it necessary that there should be a certain period of limitation for the original application itself?

Shri H. M. Seervai: I agree with your point that if periods of limitation when fundamental rights are decided by writ petitions in the High Courts can be laid down and must be observed there is no reason why for an original petition, a period cannot be prescribed.

Shri Koushik: Lastly, as I understood you to mean, all writs are in the form of injunctions. Am I correct?

Shri H. M. Seervai: No, Sir. All that I said was, in respect of writs, the reason for coming by way of a writ is that it affords cheap and easy remedy and it is expeditious because the requirement of a statutory notice is absent, the procedure is simplified, there is no oral evidence and the cases are decided on affidavits. So, somewhat dilatory procedure of a suit is avoided by a writ in most cases. In some cases, where oral evidence is taken, a writ and a suit are indistinguishable. A writ does not mean an injunction. But from the practical point of view, in 95 cases out 100 where a person comes with a writ, an injunction is prayed for as a matter of course and is, broadly speaking, granted. Because not to grant it is to defeat the purpose of it. There is invariably an application for an injunction and in almost all cases, it is granted.

Shri Koushik: You will agree with the proposition that the relief is not guaranteed. The relief depends on various other things. Even though there is a violation of fundamental rights, the relief which he should or should not get depends on various considerations and a violation of fundamental rights itself will not necessarily direct the court to give relief irrespective of other considerations like the things that you have mentioned.

Shri H. M. Seervai: I respectfully agree with you that the enforcement of fundamental rights is subject to other considerations. Broadly speaking, justice must, as the word itself indicates, produce a just result. Justice is briught into contempt when an honest man feels that it is not justice.

Shri Tenneti Viswanatham: Are you aware as to how many petitions are dismissed by the Supreme Court annually on the ground of delay only?

Shri H. M. Seervai: I am not.

Shri Tenneti Viswanatham: This is the list of petitions dismissed *in limine* on the ground of delay only:

1960	..	129
1961	..	126
1962	..	122
1963	..	79
1964	..	70
1965	..	99
1966	..	158
1967	..	113
1968		156
1969		192

These are the figures which you are not able to confirm. The Supreme Court itself was not able to tell us whether these were dismissed merely on the ground of delay. What can be other reasons?

Shri H. M. Seervai: There are many other reasons. A man's case may show that he has no legal right.

Shri Tenneti Viswanatham: The Supreme Court is given the power to make rules under article 145 with particular reference to the enforcement of petitions under Part III. Therefore, how does the statement which is made that the guaranteeing of fundamental rights requires qualification stand? The Supreme Court is given the power to regulate the procedure.

Shri H. M. Seervai: It is subject to any law made by Parliament. Therefore, the power of the Supreme Court is that of subordinate delegated legislation. The real power is that of Parliament to make rules of procedure.

Shri Tenneti Viswanatham: I am not on that aspect. Article 145(c) says:

> "Rules as to the proceedings in the Court for the enforcement of any of the rights conferred Part III."

Shri H. M. Seervai: These rules are subject to the rules of procedure. There is a provision relating to rules in regard to the enformement of fundamental rights. But those rules do not negative the general rule of law. You may kindly turn to the opening words of article 145. The real power in respect of this matter belongs to Parliament. But as long as Parliament does not exercise those powers, the Supreme Court can do so.

Shri Tenneti Viswanatham: You are right. But I am on another aspect of it. You have said in your memorandum that the guaranteeing of fundamental right does not mean throwing away all other procedures. Now, that requires qualification. The Constitution itself says not to throw away other procedures and that the Supreme Court will make some procedures.

Shri H. M. Seervai: No, no; that is rules as to the proceedings in the court. These are rules of procedure in Court, not rules of procedure governing Civil Procedure Code, etc. The Civil Procedure Code is a general Code which governs all procedures.

Shri Tenneti Viswanatham: What you say in your Memorandum is that a fundamental right does not mean that all rules of procedure, etc. should go to the winds. They are not thrown to the winds. On the other hand, the Supreme Court has been given the power to prescribe the rules of procedure for the disposal of petitions.

Shri H. M. Seervai: That is, rules of procedure in court, in regard to evidence, and all that.

Shri Tenneti Viswanatham: Now, with reference to the Supreme Court, I gave you the figures. It is not clear that the cases were dismissed on the ground of delay. Similarly we have got figures from all the High Courts. The High Courts also did not clearly say whether these were dismissed due to delay or due to other reasons.

In the Jubbalpore High Court, in M. P. State, there is a list of writ petitions which were all dismissed *in limine* on grounds of delay during the last 10 years. There is a long list. In 1968 nine petitions were dismissed merely on the ground of delay. I am trying to understand whether it is open to the court to dismiss the petitions under Art. 32 on the ground of delay. The Jubbulpore High Court has clearly stated that these things are happening in the courts. You say that there were other considerations also. My Bill has nothing to do with the other considerations. It has a very limited purpose. In view of the judgments cited by you in your book as also in your memorandum in which

you have mentioned several other grounds upon which these have been dismissed, I want to know what was weighing in the minds of the judges? When the question of delay comes in they start with a presumption according to me just as you say that there must be some limitation in these matters that public policy requires some limitation to be prescribed.

You are aware also that that cannot be done until Part III of the Constitution is amended. It is not my view but it is the view of the Chief Justice who has given a judgment in Tilok Chand's case. He says that perhaps prescribing any period of limitation will be against Art, 13(2). If you prescribe any period of limitation under 13(2), it may be ruled out.

Shri H. M. Seervai: With all respects to you and to the learned judge, assuming that the period was reasonable I would say that much discretion was left to the court.

Shri Tenneti Viswanatham: The question is whether petitions under Art. 32 can be dismissed merely on the ground of delay. What is the public policy behind it? You know the practice in England; you also know the practice in America. They are also having several cases. If there was a delay this was a ground upon which the petitions were dismissed. What the Chairman pointed out to you I would also like the point out to you. Our position is that a chance must be given to the person. If he comes to the court on the 91st day, the registration clerk might say that the court cannot entertain the petition as it was time barred. Our point is that he should be given a chance whether it is a case of estoppel, *res judicata* or whatever it may be, to explain the reason for the delay. And there should be no period of limitation for this. That is the reason why in Art. 32 they did not suggest any such thing. If you say that there should be limitation that would mean, one should move the court. Art. 32 gives the right to move the Court. This is guaranteed. what I say in the Bill is that the Supreme Court must entertain the petitions. But if, there are supervening rights they can reject it. How can the court say that this petition cannot be entertained unless the court goes into the merits of the case.

Shri H. M. Seervai: The rights prescribed under Art. 32 are permanent rights. Any regulation of the rights would mean operation of the Limitation Act. I only pointed out that there are rules of procedure; there are rules relating to registration; there are rules relating to waiver and estoppel. The Constitution does not state that the rights shall be barred; Nor does it say that the Civil Procedure Code or the principles of *res judicata* etc. can at all apply. But, when the court considers that, it ought to consider whether in the enforcement of rights they are asked to exercise the judical power. Suppose a person 'A' has lent Rs. 1 lakh to 'B'. If he comes after three years to the court and says that he wants to have a chance to prove that he had lent money, there a duty is put on the court that it shall be dismissed. Why? Because, rightly or wrongly, the Legislature has come to the conclusion that people must enforce their rights within a period prescribed. Here we are dealing with the Limitation Law.

Shri Tenneti Viswanatham: The question asked is on a different footing. The view was that these fundamental rights cannot be violated. It is for the party to prove that.

Shri H. M. Seervai: I have already said that there are very important rights—the right not to levy sales-tax on inter-State sales. That very important right was allowed by the Constitution. The Supreme Court had to strike it down.

Shri Tenneti Viswanatham: My question is: whether under Art. 32 the court can go into the merits of the case at all.

Shri H. M. Seervai: It would be futile to go into the merits if after

going into the case, they are going to say that it was barred by delay.

Shri Tenneti Viswanatham: That is why we say in some cases they went into the merits and then they said he may have a case but we are not going to give judgment because he came late.

Shri H. M. Seervai: Sometimes the judge says to himself, let me satisfy the party that I have gone into his grievance, and though it is barred by delay let him be satisfied that on the merits he is right. Sometimes courts allow parties to blow off steam but strictly speaking if the objection to the delay is raised like the objection of estoppel or *res judicata* it is saving judicial time, cost and money to the parties not to decide questions when the courts should not go into the merits.

Shri Tenneti Viswanatham: Under Article 32 you would not get a chance if you do not go into the merits of the case at all.

Shri H. M. Seervai: Limitation like estoppel and *res judicata* is one of the grounds which bars a suit or a proceeding in its inception.

Shri Tenneti Viswanatham: Limitation has nothing to do with the merits of the case whereas estoppel, waiver, etc. have got something to do with the merits of the case. Therefore, limitation is a different matter and has no relation to the fact. That is why we say under Article 32 limitation is not prescribed and if you prescribe any period of limitation it will become abridgement of the right. Under Article 32 if you prescribe period of limitation one need not go into the facts of the case. It is a rule of thumb of the clerk.

Shri H. M. Seervai: There are three things. First of all I know for a fact that where a discretion is given to a court no clerk exercises it. Secondly, there is no merit in saying that the judge does not go into the merits however wrong the judgment of the court in the previous suit. The matter may fail because the legal requirement is not satisfied as the rejection of a basic document of title because it is not registered or duly stamped. This is a case where on grounds of public policy a man's right is defeated. Nobody will go into the merits of the case.

Shri Tenneti Viswanatham: I agree to that extent. Delay is made a cause of rejecting an appeal. A citizen cannot go into those little matters. He should be given a chance to look into these matters. Right to go to the court is itself made a fundamental right. If that right to go to the court is barred that you cannot come after 90 days then what is the purpose of Article 32. This Bill is confined merely that a petition is not rejected on the ground that it is presented after a particular date.

Shri H. M. Seervai: My view of legal proceedings and judicial rights is so radically different from yours that there is no meeting ground. When you say that no period of limitation is to be put all it must not be forgotten that the State is an abstraction. It represents the public interest.

If you see the fundamental rights, the restriction of those rights in the public interest is a dominant concept in every right. There are no such limitations in America. If the State passes a law which violates the right of 10 individuals or 100 individuals or 1000 individuals but which is passed in the public interest because the law is generally for the public interest—the State does not take things to itself—or, say, for example, if the State acquires land in the public interest, and the party feels aggrieved by the exercise of that power and says that it violates the right of an individual under the Constitution, the Constitution does not prevent him from enforcing the right. But the Constitution does not say that irrespective of whatever may happen, whatever may be done in the land, you just come at whatever time you like and you can vindicate your right after 10 or 20 or even 50 years. The Constitution says nothing affirmative.

ly that there shall be no period of limitation. There is the right given to the person. But he must assert it within a reasonable time. What is wrong in that?

Shri Tenneti Viswanatham: There is nothing wrong; it is a commonsense point of view. We are looking to article 32 in the context in which it is placed. Wherever restrictions are to be placed, they are mentioned.

Shri H. M. Seervai: These are regulations as different from restrictions. I would only like to refer to the Automobile Motors case in Rajasthan where a majority judgment is that reasonable restrictions contemplated under article 304 do not include such regulation of rights as are required in trade and commerce, say, regulation of speed limit, observance of the rule of law, observance of traffic signals, etc. They are restrictions but they are not restrictions within the meaning of article 304.

Shri Tenneti Viswanatham: I agree with you.But so far as Part III is concerned, wherever the Constitution wanted to put restrictions, they are mentioned. But article 32 does not put any restriction.

Shri H. M. Seervai: Nor does the Constitution say that it can be barred by judicial discretion which is also a restriction.

Shri Tenneti Viswanatham: This Bill is limited to the question that the man should have a right to agitate his mind in the court. You are going into the merits of the case. My Bill is absolutely limited to that. He should be given a chance to go to the court and then the court can look into the case.

Shri H. M. Seervai: You say that wherever the Constitution wanted to put a restriction, the Constitution says so. I submit respectfully that that could not be quite correct because each one of these things is a restriction on the right of a man who files a suit. However a good case it may be, he may not be just heard. There are restrictions imposed in the public interest which the Supreme Court has confirmed in half a dozen judgments. The fundamental rights are governed by considerations of public policy. Therefore, every restriction of procedure, of rules, of evidence, of substantive law, can be applied to fundamental rights on grounds of public policy. But if you take the view that the right is absolute and the man must be heard no matter after how much time, there is no common ground. You may be right. But I do not think so. There is no basis on which we can argue. All argument implies that there should be a common ground. Merely to give a person the chance of being heard, irrespective of all the considerations of public policy, is a proposition with which I do not agree.

Shri Tenneti Viswanatham: You say that the right of an aggrieved person to go to a court is not a matter of public policy.

Shri H. M. Seervai: It is a right of the person to go to a court. That is a matter of public policy. But the public policy for hundreds of years, restricted by rules, has been evolved in the course of administration of justice.

Shri Tenneti Viswanatham: If your view is right, what is the meaning of clause (1) of article 32? Article 32 has clause (2) also. The clause (1) is dependent on clause (2) which is the substantive one. Under clause (2), the right to go to the Supreme Court is guaranteed. Why should there be clause (2) then?

Shri H. M. Seervai: There are two ways of looking at that. When that right is given, it must mean that the law purports to take it away, as the first preventive detention act becomes void violating a fundamental right.

Secondly, there could be a plea that this is a fundamental right, and that no legislation can take it away. But it can be amended. That is what

happened in the Golaknath case. It was held that that right cannot be taken away except by an amendment of the Constitution. Therefore, it shall not be questioned in any court. There is a conclusive declaration of barring jurisdiction of courts. This enables the people to feel that short of amending the Constitution, you cannot take it away. That is the objective of that right. Secondly, in the earlier judgments, under certain circumstances a court cannot refuse to grant a writ on the ground that it involved disputed questions of fact.

It is a matter which will involve evidence. Mr. Justice Das said in the first case that once you establish the fundamental right, no amount of technical objection can bar that right. In my view, Art, 226 and 32 dealing with fundamental rights stand on the same footing. The High Courts enforce the rights under Art. 226. And no law can taken away that power from them. You will find that before Golak Nath's case there were probably 100 other judgments by the Supreme Court which say that the powers under Art. 32 and 226 cannot be taken away except by amendment of the Constitution. That is why these are put in the Chapter called Fundamental Rights Chapter. Once you put them under Art. 226, I say that it is a power conferred in the Hgih Court And no legislation can take it away. Art. 226 cannot be amended by Parliament without the ratification by all the States. If you amend Art. 226, Art. 32 too should be amended.

Shri Tenneti Viswanatham: If that is so, then what is the objective of giving two paragraphs—first speaks about the guarantee and the second speaks about the remedy.

Shri H. M. Seervai: That is why Mr. Justice Hidayatullah says that the right is guaranteed but the remedy is not obligatory.

Shri Tenneti Viswanatham: My point is that if a man comes to the court under Art. 32, how can the court say that we cannot entertain the petition since it was timebarred.

Shri H. M. Seervai: I suppose you are not proposing any amendment to Art. 226.

Mr. Chairman: He has proposed amendments to both the articles.

Shri H. M Seervai: I am sorry.

Shri Tenneti Viswanatham: If a person appears before the court, it should hear him. That is all what the Bill seeks to do. It does not go beyond that. When there is such a huge difference of approach, I do not want to enter into a debate. I wanted to ask many questions but since the time is limited I do not want to ask questions.

Mr Chairman: I propose to call him again tomorrow.

Shri H. M. Seervai: I am quite willing to come if it really necessary.

Mr. Chairman: Tomorrow we shall call you only for a short time.

Shri Shiva Chandra Jha: You said that there should be limitation prescribed for all the writs except for *habeas corpus*. For *habeas corpus* there is no limitation. In other writs like mandamus, quo warranto etc. you want that limitations should be put. But there are varying judgments by different courts. I want to ask one question about 32(2). According to you, would it not be compatible that if this article 32(2) is amended, it should be seen that at least for *habeas corpus* there should be no time limit prescribed? Uuder the *habeas corpus* should a man not have the right to move the court if he was arrested and detained in a jail illegally? Should a time limit be prescribed for this also as for other writs?

Shri H. M. Seervai: Whether the Law Ministry agrees or not, the court has held a contrary view—I am speaking subject to correction by the Law

Ministry. At least I am not aware of a single *habeas corpus* petition being dismissed on the ground of delay. Every judgment must be read in the context in which it was delivered. The other writs are governed by Civil Procedure Code etc.

I would again repeat that so far as *habeas corpus* petitions are concerned, I am not aware of a single judgment having been dismissed on account of delay. I speak this subject to correction.

Shri Dalip Chand (Legal Counsel): *Habeas corpus* is a continuing right

Shri H. M. Seervai: That I have said.

Shri Shiva Chandra Jha: Is there any judgment rejecting any *habeas corpus* petitions on account of delay so far as you are concerned?

Shri H. M. Seervai: I am not certain about that.

Shri Shiva Chandra Jha: Do you agree that there should no time limit prescribed for presenting *habeas corpus* petitions? Are there cases that the *habeas corpus* petitions have been dismissed merely on account of delay?

Shri H. M. Seervai: If there are decisions you can nullify by an amendment.

Shri Shiva Chandra Jha: Then Article 32(ii) except for this purpose needs to be amended. All other writs in one form or the other are related to the concept of private property.

Shri H. M. Seervai: Cretiorari has nothing to do with private property; Mandamus may relate either to property or any other public duty.

Shri Shiva Chandra Jha: If the right to property as it is enshrined in the Constitution by the existence of that right the chances are justice in the true sense of *habeas corpus* may not be given to the individual or should be affected on certain individuals. So in order to make that concept of justice and personal liberty consistent with the ideal of *habeas corpus* would it be necessary to amend. Then the ordinary citizen would be getting that ideal of justice as in the case of *habeas corpus* if the right of property is amended in the Constitution.

Shri H. M. Seervai: Then *habeas corpus* is entirely different. It is a crime, if a private individual detains the other it is a serious crime.

Shri Shiva Chandra Jha: Assuming that other fatcors are given consideration and not only the time-limit factors. if this amendment is passed whether or not we will be going one step ahead in the ideal of individual freedom or fair justice.

Shri H. M. Seervai: In my view to go in that direction would not forward morality for public interest. If it did I would support wholeheartedly. I think it would be a regressive measure and to allow stale claims to be enforced either against the State or the persons on whose behalf the State acts would be a regressive measure and encouraging conduct contrary to public policy. Therefore, I should say it would not forward individual freedom and public good. It would gravely hurt the individual freedom.

Mr. Chairman: Thank you very much. We will meet again tomorrow at 10 O' clock.

(The witness then withdrew)

The Committee re-assembled after lunch at 3 P.M.

(ii) Shri N. A. Palkhivala, Senior Supreme Court Advocate, Bombay.

Shri N. A. Palkhivala

(The witness was called in and he took his seat).

Mr. Chairman: We are thankful to you for having agreed to give evidence before the Committee.

Before we begin, I would like to tell you that the evidence that you give would be treated as public and is liable to be published, unless you specifically desire that all or any part of the evidence tendered by you is to be treated as confidential. Even though you might desire your evidence to be treated as confidential, such evidence is liable to be made available to the Members of Parliament.

Shri N. A. Palkhivala: Yes.

Mr. Chairman: We have got your Memorandum. Would you like to say something in addition to what you have stated in your Memorandum?

Shri N. A. Palkhivala: Yes. The Bill seeks to amend both articles 32 and 226. So far as these articles stand at present, Justice Hegde has shown that there is a distinction between these two articles. One guarantees a fundamental right to move the Supreme Court and the other does not confer a fundamental right and that is why there is a difference in the phraseology. Article 32 says that the right to move the Supreme Court shall be guaranteed and this itself constitutes a fundamental right. That is what rightly led hon. Justice Hegde to say that if a right is guaranteed, there is no limitation in point of time on the right so guaranteed. How can anyone say, "I shall import into the article a limitation which is not there." Therefore, hon. Justice Hegde says, "In my opinion, you cannot put a limitation on a fundamental right unless Parliament itself has imposed that limitation." To me, this logic seems unassailable because, if the right is guaranteed and there is no limitation, you cannot import any limitation on point of time.

Now, talking just now about article 32, what happens very often is this. This is not merely a question relating to property or sales-tax or things like that. There are questions involving personal liberty, and the kind. A man may be detained for a year. He may be told, "Look, you have been convicted under this law." But can't the man say, "Set me at liberty."? It is one of the fundamental rights not to send a man to prison without a trial and conviction according to the procedure established by law.

The effect of article 32, according to Justice Hegde, is that merely on the ground of delay a good case on merits should not be dismissed. This is not to say that if a man is right, he is bound to get rendress later because, as a matter of waiting for several years, his right may get extinguished or others may have acted on the basis that he has chosen not to enforce his claim and this have changed his own position. In such a case, his right is lost as a result of lapse of time. He will not be able to enforce his right under such circumstances. But if the amendment which is proposed is effected, it will not mean that such lost rights are to be enforced. It will only mean that those rights which are not lost but which are still enforceable and which in justice and in fairness should be enforced will remain alive for enforcement.

I may mention another aspect of article 32. In one case, AIR 62, p. 1621, the Supreme Court has held that an order of assessment or an order levying a certain tax, etc. cannot be said to violate a fundamental right even if it is a wrong assessment. Therefore, I want to mention this that is not as if orders of assessments made by the Government under direct or indirect taxation laws will be enforced after the lapse of many years because such orders, even if they are erroneous, have been held not to constitute any violation of the fundamental rights. Therefore, the courts will not be flooded with applications under article 32 claiming sales-tax, income-tax and things like that because such erroneous

assessments have been held not in violation of fundamental rights.

Coming to article 226, it is true, as Justice Hegde himself mentioned in his judgment, article 226 does not give an absolute right. There is the discretion of the court. Normally, my first instinct was to say that the man may argue, "Let the High Court reject my petition on the ground of delay." But then, on further consideration, it struck me that if you have that position in the High Court and the other one in the Supreme Court, the people who are unable to go to the High Court will rush to the Supreme Court. You will be multiplying the work of the Supreme Court manyfold and you will be preventing matters from being legitimately adjudicated upon by the High Court which, in the first instance, should go to the High Court. After all, if it is the same fundamental right which you are asking the Supreme Court and the High Court to enforce, it stands to reason that, if there is no limitation for one court, there should be no limitation for the other. It will be a little anomalous if for the higher court there is no discretion and for a subordinate court there is discretion. Normally, it is the other way about. The higher the court, the higher the discretion. You will be reversing the normal process of judicial thinking and judicial hierarchy if you give discretion to the lower court and leave no discretion to the igher court. Therefore, I think, it would be better if the proposition of my learned friend Shri Tenneti Viswanatham is implemented that article 226 should be amended.

I have taken the liberty of making one suggestion at the end of my note. Since the High Court is empowered under article 226 to grant writs, directions and orders in matters which do not affect the fundamental rights and if you have the proposal in the present form, then even in cases where the fundamental rights are not enforced, the High Court will be powerless to reject an application on the ground of delay. That will not be a satisfactory state of affairs. Therefore, I have suggested that the amendment proposed should be recast so as to read as follows:-

> "(3) No remedy under this Article shall be denied by a High Court to any petitioner on the ground of delay in cases where the petition is for the enforcement of any of the rights conferred by Part III."

The result will be that where fundamental rights are not involved, the High Court will have the right to reject a petition on the ground of delay.

Mr. Chairman: This morning, we had another eminent witness who held a very contrary view. He said that a fundamental right like any other right, whether constitutional or legal or othewise, ought to be regulated. This right which is available under articles 32 and 226 is for a sort of speedy remedy as compared to other remedies. Is it not necessary that the person must come to the judicial court quickly for speedy remedy?

Shri N. A. Palkhivala: I would not say that this point of view is without substance. I would say there is considerable force in that point of view.

On balance, Sir, I think in a country like India—I am not talking of big cities where legal advice is available to the big corporations etc. but I am talking of the mofussil areas of India where no legal advice is available and the laws are getting so terribly complicated and administrative action is becoming so widespread—except ing a man in some suburban areas to be armed with the requisite knowledge in a short period of three or six months as to what his rights are is asking for too much from him. It is true that big corporations can come forward within two months or six

months with legal advice. I have seen quite a deal of cases in my experience involving both small people—poor people—and big people. I am not worried about the big people. I am worried about the poor people who take a good deal of time in correspondence with Government. Naturally they want to avoid going to the court. In 90% of the cases people lose their fundamental rights by coming late to the court after correspondence with Government for so long. Suppose they correspond with Government; they receive a communication from them saying that the matter is receiving their attention. In this process nine months pass by. If he comes after this period, the court says that he has come to them after 9 months' delay. Merely on the ground of delay their petitions are being dismissed. In the case of corporations they get legal advice. I have not seen cases of these big corporations being dismissed on account of delay since they have got competent legal advice. We should try to protect the small men to whom the competent advice is not abailable readily.

Mr. Chairman : You mentioned about the delay. Would it not therefore be a justifiable ground for him to go to the court and ask for a legislative amendment?

Shri N. A. Palkhivala: Suppose the court were to take the view that he has been wrongly advised to have correspondence with Government for three months. Later on if he comes before the court, he will be asked to explain the cause of delay. But he has no explanation for the delay.

Mr. Chairman: After all when there is a legitimate delay, the court can excuse that delay.

Shri N. A. Palkhivala: May I be permitted to say this? If the hon. Members will kindly read the judgments they will find that in a majority of the judgments, the judges say that there was no excuse for the delay. These are the circumstances which have intervened. Somehow the court takes the same view that the petition is dismissed for these reasons. How will they be able to test the correctness of this statement? The poor man has taken nine months to come before the court. I say that proper legal advice should be available to the poor man. Here comes the difficulty of testing the correctness of such a claim. In this case for example Mr. Justice Sikri did not agree with Mr. Justice Hegde who said that the court has discretion to reject a petition on the ground of delay, while Mr. Justice Sikri said that there was sufficient reason for the delay and so the man should be allowed. The other judge took the view that there was no excuse for the delay. If you look at the facts of the case you will find that the poor man has no legal advice. Taking the principles of delay, if I may mention this in a little in detail, all statutes like the Limitation Act etc. are taken from various Statutes where the courts have given it a certain interpretation and have followed the same interpretation. When it comes to the petitions dealing with fundamental rights, this is the problem. I have myself appeared in a number of cases in which a *bonafide* poor man is in correspondence with Government which has put him into difficulty. By correspondence with Government he tries to persuade the Government to his point of view. He feels that that remedy is a good enough remedy. He wants to avoid litigation on his own with Government. I am not exaggerating this. This is the situation today. And this is what is troubling me. I would normally have agreed with what the learned Advocate General told you this morning that you must leave this discretion to the court.

Mr. Chairman: Have you come across cases where any one of the agent of the Government has been in correspondence with another agent which has resulted in delay in coming to the court and the court in turn has rejected the petition?

Shri N. A. Palkhivala: It has happened several times—I am not saying this that this has happened deliberately. It may so happen that one arm of the Government does not know what the other arm of the Government is doing. Take the case of inter-state sales tax. The Supreme Court had put one interpretation that in the matter of inter-state sales, if they are effected in a certain manner, then the inter-state sales tax may be levied thereon. The Government of India while purchasing the goods from various dealers who have paid sales tax, passed on the amount to the respective State Governments. Then came this change in the law and as a result of the judicial pronouncement, the Government of India then started paying back the tax. The dealers said that they had paid the tax to the State Governments while the Central Government said that they had paid them to the State Governments. Then they started deducting this amount from the future bills payable to the dealers. They said in the meantime that they have asked the State Governments to give the dealers some rebate in their assessments. To this the State Governments said that they would not reopen the cases which have been completed. Then the Central Government said 'Look, what is the good of taking this attitude?' Is it fair to a citizen to take this attitude that since he has paid the amount to the State Government he does not have any money? Ultimately we filed two petitions in the High Court. They are still pending. One of the points taken by the Government is delay. It is true that we have delayed. Surely we are entitled to approach the Government to take a reasonable administrative decision. The climate being what it is to-day it becomes difficult even for an honest Government official to make a decision for fear of his being misunderstood. Therefore, all kinds of things are happening to-day. To create a better atmosphere one can of course do his very best, and then a Government official could take a decision without fear of his being misunderstood. You cannot prevent a citizen from approaching the court on the ground of reasonable delay. Otherwise you may say that it is rejected. What is happening now-a-days is that these people do not bother the Government to take a decision within a reasonable time because they are afraid they may not get administrative relief.

What I feel is that the people are now reluctant to avoid getting administrative relief at the hands of the Government for fear that they may lose.

Mr. Chairman: Has it come to your notice that in some cases because there is a plenty of rule-making power with Government, sometimes the rule itself might be declared *ultra vires*? Has such a case come to your notice? If so, what action have you taken to see that such people would be barred at that stage?

Shri N. A. Palkhivala: It does happen. Particularly in our country, due to the fault of nobody, the laws are not easily available. To give you an example of the Monopolies Act, it received the assent of the President in December 1969 and then rules were made and people like me could not get my gazette copy for three months. So, if you are going to give a citizen just six months, for three of those months he does not even know about the law. When he comes to know of it half of the limitation period is over. It is a matter to be considered in the context of the circumstances actually prevailing in our country.

Mr. Chairman: If it is said well other rights are barred by limitation why not limitation run in this case also.

Shri N. A. Palkhivala: This is a point with substance. But as against this view there are the other points to be considered. If the Constitution has made these rights fundamental the whole object is to segregate them from normal rights. That is why they are

fundamental and beyond the reach of the party in power. This very fact shows that the Constitution makers drew a sharp distinction between these rights and other rights.

Mr. Chairman: Some people say fundamental right is only the right to go to the court.

Shri N. A. Palkhivala: I submit, Sir, when the right is guaranteed the substance of the right is guaranteed and not the form. It is implicit in the right that the man who moves will be heard.

Mr. Chairman: Some persons are afraid that this may open flood gates of cases to the courts.

Shri N. A. Palkhivala: I do not think this theory is justified. Very often we act under an apprehension that people will take advantage but really speaking just imagine who is going to take a risk. Suppose a man can move a court in time then why should he delay? Secondly, the very number of petitions which have been rejected will show that the work of the courts will not increase by more than 10 per cent. at the most. Today there being no period of limitation it depends on the personality of the judge; but in a matter of fundamental rights is it advisable to leave it to the learned judge whether an appeal should be heard or not? By not having this provision you are leaving it to the personality of the judge whether or not a citizen should be heard on merit.

Mr. Chairman: One witness told us when the rules of registration or procedural rules can constitute as limitation of fundamental rights why not delay also operate as limitation.

Shri N. A. Palkhivala: Whereas those other rights are rights which are well-defined, clear-cut and are in connection with various procedures known to law, this 'delay' is a very nebulous concept. The question is whether this nebulous concept which varies with the Chancellor's foot should it be allowed to be in the way of the enforcement of fundamental rights. Where fundamental rights are not involved we are clear we will give full discretion to the court to decide. In practice I am not able to spot any public inconvenience or public hardship which would be caused as a result of this amendment.

Mr. Chairman: I refer to Rabindranath *v.* Union of India.

> "No relief should be given to petitioners who without any reasonable explanation approach this Court under Art. 32 after inordinate delay....If the Government has turned down one representation, the making of another representation on similar lines would not enable the petitioners to explain the delay."

Shri N. A. Palkhivala: A complete answer to the petition would have been that other rights have intenvened and you are stopped from making such a petition. Therefore, on the ground of estoppel, this judgment could be supported. But the question to be considered is whether on the ground of mere delay, you would say that the judgment is justified. It is true that some learned judges have taken this view. In fact, in the Tilokchand Motichand case, three judges took that view.

I think, you are trying to balance one injustice against another. Would greater injustice be caused by allowing delay as a bar to the enforcement of the fundamental right or would greater injustice be caused by removing that bar?

Shri Koushik: That means discretion.

Shri N. A. Palkhivala: I am talking of weighing one injustice as against another.

Shri Koushik: That is what we are doing. The course have a discretion to balance one injustice against another and give the judgment accordingly.

Don't you think you will be binding the courts by making this amendment?

Shri N. A. Palkhivala: You will be binding the courts and making delay no bar to the enforcement of the fundamental right. Today, if delay were to be explained in terms of the ignorance of the people, the poverty of the people, the difficulties of the people, etc., if delay were to be interpreted in those terms, I am not one of those who would say that you must press for it. But experience shows that in more than half the cases which come before the court, the party has not got proper advice.

Shri Koushik: I quite see that. I am not disagreeing with you there. Ours is an illiterate population. They do not know their rights; they take time; they have no money and all that. But the Supreme Court judges do exercise discretion. They must be more broad-minded rather than narrow-minded. There should be a broader concept.

Shri N. A. Palkhivala: I quite see the point.

Mr. Chairman: We were referring to certain rights being created through certain conduct. For instance, I would like to know whether an order of the Government which is bad in law *ab initio* is void or not. If any rights are created, how are those rights to be protected?

Shri N. A. Palkhivala: It is a question which the court would consider. If a plea of estoppel were raised, the court may take the view on the facts of the case that a certain order was bad *ab initio* and, therefore, even by sleeping over that order, no valid and enforceable right could be created in favour of somebody against the person who seeks relief from the court. If on the ground of delay, a case is not thrown out *in limine*. Such a thing can be found by the court. But the difficulty is that today it is thrown out on the ground of delay *in limine*.

Mr. Chairman: Would you suggest that he should be given a hearing? It should not be thrown out on the ground of delay that you have come late and, therefore, we will not entertain your application.

Shri N. A. Palkhivala: Yes. On merits, you can reject it.

Mr. Chairman: Would you suggest that it is a sort of a preliminary hearing for admission of the application?

Shri N. A. Palkhivala: It does happen in practice. It is like a preliminary hearing in all these matters. Even when a petition is not thrown out on the ground of delay, there is always a preliminary hearing. You have to find out if there is a *prima facie* case. If there is a *prima facie* case, the notice is issued. There will be a preliminary hearing. Then the cases are screened.

Mr. Chairman: Would you like the courts to grant remuneration to the person when the remedy impinges on the right of another person.

Shri N. A. Palkhivala: It will be better to leave this question to the court to decide on merits. The court can consider as to whether the man is entitled to any relief. That is at the discretion of the court. They will mould the relief to suit the requirements of the case. At this stage, we are at the initial or preliminary hearing stage where the question is whether the man should be heard at all.

Mr. Chairman: If one is exercising his right of freedom of speech, that should be protected. He should not allow the defamation to come in. Should not that right be protected?

Shri N. A. Palkhivala: That also will be on merits. This is not a question of bar on account of delay.

Shri Koushik: In your Memorandum, you have cited the case of a man being wrongly imprisoned and he comes to the court after 6 years and all that. That is not a correct anology. A man being worngly imprisoned is a

continuing offence. Everyday's imprisonment is illegal. Therefore, the question of delay does not arise at all. The anology that you have given is not a correct one. Don't you agree with me that that is not a happy anology with regard to the particular aspect we are considering now? In addition to that supposing out of 6 years' imprisonment, 4 years still remain. Here, no intervening rights are involved. In this case, don't you agree with me that this anology will not help us in solving the problem which we have got today?

Shri N. A. Palkhivala: The position is that so far as this particular case is concerned, the cause of action is wrongful conviction which by itself was an event which happened some years ago. A man says that the conviction violates my fundamental right. And the conviction is at a particular point of time. It is true that subsequent imprisonment is a continuing wrong committed against him. But when he challenges the conviction, he is challenging an event which happened at a particular point of time. Let me give another example. Suppose I am deprived of my property..

Shri Koushik: The property rights are different. That leads to so many complications. There cannot be anything like a petition after 10 years or whatever it is. Here, a man might come and say, "You have put me behind the bar for nine years. I have got the right to be set free now. This has been all illegal." Have you come across any such cases? My question is. Is this a valid argument in the present position?

Shri N. A. Palkhivala: I think, what the learned judge had in mind when he gave the anology was the fact that the man would be challenging his conviction and that conviction was an event which happened at one point of time.

Shri Koushik: Even assuming that conviction was made some years back which was illegal, if it was challenged in the court after eight years, don't you give that much credit to our Judges for deciding the case?

Shri N. A. Palkhivala: I give more credit.

Shri Koushik: I do not know whether you will agree with me if it means doing absolute injustice if a person is not allowed to come before the court after a long delay. If an individual suppose challenges before the judges after eight years that his conviction was illegal giving his arguments which are laughable. How can that be accepted? That is why I am putting this question to you.

Do you agree that in case of illegal confinement the only remedy to the individual is habeas corpus?

Shri N. A. Palkhivala: I was present all along when a case of this type was going on in the court. If it was an illegal detention, even if the individual came after eight years or so, the question of delay would have to be considered by the court. In other words the learned judge felt when the arguments came up that in such a case there was no question of delay at all.

Shri Koushik: Would you subscribe to the view of the learned judges when they rejected the application on account of delay?

Shri N. A. Palkhivala: If I may say so, the judgment is not correctly read. As a matter of fact, the judges exercised their discretion correctly and there is no doubt about that.

Shri Koushik: Do you agree therefore that in such cases of delays no amendment is called for?

Shri N. A. Palkhivala: It is true that our judges, whenever the party comes to the court for relief, they give that relief in their discretion.

Shri Koushik: Suppose one individual comes to the court after one year

or so. The court asks him to explain as to why he took more than one year to come to them. If the delay is explained satisfactorily, they condone that. It is for this purpose that there should be limitation prescribed. Am I correct?

Shri N. A. Palkhivala: What the learned judge was saying was that he must come within one year. As you rightly said that if the party comes within one year there is no question of explaining his delay. But, if he comes to the court after one year. then the question of explaining the delay comes in.

Shri Koushik: If a party comes beyond the prescribed period, he should show cause as to why he came so late. You have also stated that there were cases of long delay in making a petition. Do you agree that in certain cases, as Mr. Justice Hegde himself put it, the right might even have been lost by the individual because of this delay? He can enforce his right only within a reasonable time. If the case comes to the court, the court may even condone the delay if it was due to various other reasons beyond his control. Would you also agree that because of this delay several other intervening rights would accrue?

Shri N. A. Palkhivala: That might possibly accrue. Not only that, even the right to approach the court by the petitioner may get lost.

Shri Koushik: That position is clear. If the delay is on my part or because of my action, my right is lost, it creates intervening rights on others. Now if your amendment is accepted what does it mean? No remedy under this Article shall be denied by a high court judge to the petitioner on account of delay in cases where the petition is for the enforcement of any of the fundamental rights conferred by Chapter III. This is according to my reading. On the ground of delay you cannot dismiss the case at all. If the delay is explained then that is condoned by the court. You should have put in your amendment with this qualification 'unless that delay has led to the intervening rights on others.'

Shri N. A. Palkhivala: Let me be permitted to say that ultimately other rights are created in the intervening period. That may result in the loss of the petitioner's own right. On the ground of delay the court won't throw his petition out. On grounds of merits the petition may be lost.

Shri Koushik: So, in order to see that no intervening rights are created, an amendment is necessary.

Shri N. A. Palkhivala: There are two separate questions: one is,—should a petition be thrown out on the ground of delay? The other is after hearing the petition on merits the court can come to the conclusion that because of the grave delay on the part of the petitioner, certain other rights have intervened which have resulted in the petitioner losing his own right.

I have no objection to the amendment which you are suggesting. What I am suggesting is that in such cases, on the ground of delay alone, the petition will not be thrown out. On hearing the petition on merits the learned judges will say that, on merits and not on the ground of delay, we find that his right is lost as a result of his inactivity which has in turn led to the creation of rights in favour of others.

Shri Koushik: Therefore, what should be the position? Should we do as you have suggested or should we go as the Bill suggests? In any case, whatever might be the grounds, you should not throw the petition on account of delay. The man loses his right on account of various factors intervening. In any event should we put it this way or as the bill says? No petition can be dismissed even in spite of intervening rights coming up. Don't you think so?

Shri N. A. Palkhivala: There are two ways of looking at it—one is by

amending the Article. Even in a case where intervening rights have been created, the petitioner will have to be heard. If you allow the amendment in the present Bill as it is, then on the ground of delay that petition will have to be thrown out on merits resulting in the petitioner losing his right because of intervening rights that are being created. May be one judge may interpret it in some manner while the other judge may interpret in another manner. Therefore, if a compromise is to be effected, I may suggest my amendment this way:

226(3)

"No remedy under this Article shall be denied by a High Court to any petitioner on the ground of delay in cases where the petition is for the enforcement of any of the rights conferred by Part III. Unless as a result of the delay intervening rights have been created in favour of other partners." I am not against this view.

Shri Koushik: Therefore it has to be qualified by saying.....

Shri N. A. Palkhivala: I myself think such a qualification is unnecessary because in such a case on merit the court would reject the petition on the ground that the right of the petitioner itself has been lost as a result of the creation of other rights.

Shri Koushik: It should be such that people should have a proper hearing and at the same time it should not give a free hand to anybody coming after ten years. Such a conflict should not arise and the judges should not be put in a quandary. Don't you think it should be qualified.

Shri N. A. Palkhivala: I am in total agreement with point that in the event of the intervening rights being created as a result of the citizen's own action those intervening rights are entitled to respect and they may be construed as resulting in the loss of the petitioner's own right and if the hon'ble Members come to the conclusion that this particular point needs to be expressly safeguarded and dealt with by the amendment then the amendment may be recast.

Shri Koushik: In view of the unlimited scope which you want to give to this amendment namely no petition should be thrown out, can you explain why the framers of the Constitution did not think of this position and say that on account of delay nobody would be denied.

Shri Palkhivala: When they said in Article 32 that the fundamental right to move the Supreme Court is guaranteed it is implicit in that Article that merely on the ground of delay you will not throw out the petition. In the Constitution one does not say things in so many words all the time. One tries to be brief. Despite brevity ours is the longest Constitution. Certain things are to be read in the Constitution as a matter of necessary implication. I think Justice Hegde's approach is the right one. It is a necessary implication of Article 32(i) that the enforcement of fundamental rights cannot be denied merely on account of delay.

Shri Tenneti Viswanatham: If a wrong is done to me it is a continuing wrong unless set aside. The theory of continuing wrong will not help some of the rights as against others. The other thing is the theory of intervening rights. Everybody talks of intervening rights. By a wrong order of the Government how rights can be created. Some cases of Income Tax Officers went to the court how did the man get the right because they passed a wrong order, they violated my fundamental rights and, therefore, it cannot be said somebody else has appeared in between and got an intervening right. Suppose the order is passed today. Should I approach the court next day or when? How long am I supposed to be in inaction?

Suppose my superior officer has taken my cause and has taken the matter to the Central Board of Revenue and the Director there also

takes up my cause and some time elapses. Therefore, there is no question of inaction. The Supreme Court has held that it was an inaction. The question of intervening right has really no substance because the other person has not got the foundation of justice in his own right. If there is a real violation of the fundamental right, the man who is supposed to get an intervening right has no right. There is no foundation of justice in his own right.

Then, there is another thing. Suppose I am an officer. He is my favourite and I pass a wrong order and promote him. I do not allow another person to get promotin. I promote my favourite. Now, the other man says, "My fundamental right is violated." I turn round and tell him, "Here is an intervening right accruing to this man." Therefore, my quetsion is: Am I right in saying that creating an intervening right is a very wrong concept and it works greater injustice than you think. I can actually create intervening rights in favour of my favourites and suppress the legitimate rights of others.

Shri N. A. Palkhivala: My own view of the matter is that it is not necessary to bring in the concept of intervening rights in this Constitution Amendment Bill. There are two reasons for it. It is a matter of judicial interpretation as to whether it is an intervening right properly so-called. In other words, does it exist in law as a right or is it itself an alleged right which has no legal sanctity? In the case mentioned by the hon. Member, the court may say that these alleged intervening rights do not exist in law because they have no foundation in justice. So, the question is whether intervening rights exist in law as rights or are they merely a facade of rights which really have no legal substance.

Secondly, as to why it will be unnecessary to bring in that concept is that in a case where, as a matter of proper delegation, a genuine intervening right has been created, undoubtedly, the court has the power to reject it on merits, not on the ground of delay. The court can say that the right of the petitioner which at one stage existed has now, as a result of his own conduct, been lost because of various circumstances and events which have happened.

There may be cases where there may be genuine intervening rights. I may give you an example. Suppose my property has been acquired and it has been acquired under a void order. Suppose I take no action for years. I permit a big factory to come up where the investment has been to the tune of Rs. 3 crores or so. If I ask for the land to be given back to me after several years on the ground that the acquisition order was invalid, the court may well say, "It is true. You could have challenged the court. But for several years, you did nothing. In the meanwhile, another person to whom the land was allotted has built a vast structure investing crores of rupees. I hold that you have lost your right which you could have exercised in good time". This will be the position on the merits of the case which will be sustainable.

I am not here dealing with exhaustive categories of cases where intervening rights can be created or where they cannot be created. I am only saying that in some cases they could be created and, in some cases, they could not be created. That is a matter on merits to be dealt with by the courts.

Shri Shiva Chandra Jha: You have said that justice should be done to the common man. In our country, many people are living in mofussil areas and in the countryside. They are poor and illiterate. They cannot obtain proper legal advice. They are not aware of the fundamental rights even. So, if the period of limitation is put, they will not be able to move the courts, the High Courts and the Supreme Court. There will

be injustice. I would like to know whether it is not a fact that most of the petitions that are rejected on the ground of delay are pertaining to property rights, and that very few cases would be about individual liberty and things like that. Most of the cases would be relating to property disputes, big or small, and they are rejected on the ground of delay.

Shri N. A. Palkhivala: There are cases which deal with other fundamental rights also, like the right to carry on business, the right to freedom of speech, etc.

Shri Shiva Chandra Jha: But these cases are very few. Most of the cases relate to property rights.

Shri N. A. Palkhivala: I cannot say that. It is true that a sizeable portion would be property cases and equally a sizeable portion would be other cases.

Shri Shiva Chandra Jha: In regard to fundamental rights, there are two parts. One is concerning individual liberty, the right to form association, the freedom of speech and all that. The other part is concerning property rights. For safeguarding the right of individual liberty, the freedom of speech, and all that, there is a writ of *habeas corpus* for that matter. Whether he is a small man or a big man, he can seek that remedy. In any case, delay should not be a factor in rejecting it.

Another part is concerning the property rights. There are people holding big property and there are people holding small property. Most of the cases belong to the category of small people. By eliminating this delay factor in the matter of rejecting the cases, the small people get the facility of restoring the fundamental right to them. But in this blanket clearance of delay factor, the chances would be for the big people also to exploit the situation by which in our society of today there are certain other things which will be affected. Take, for instance, the bank nationalisation case.

Take the case of Bank Nationalisation. It was done for a social good from the point of view of public interest. And that matter was brought before the Supreme Court. And after the Supreme Court judgment, compensation amount had to be increased. Our point was that there should be no concentration of economic power in a few hands. There should be equality of justice. This opportunity was given to certain people to block the progress of other people. If a chance is given to the people then they would exploit that for their own purpose. In big property cases the people will get the opportunity to move the court. But what about the small people? If a certain amount of delay is involved to move the court, the court rejects that petition.

Can we not do something in this regard? Merely on account of delay a petition should not be rejected by the court. As far as bigger people are concerned it is all right. It should be left to the discretion of the court either to reject or accept the petitions.

Shri N. A. Palkhivala: With great respect to the hon. Member, I am speaking here as a witness. And this is my personal view. The hon. Member may differ from me. I think the distinction which is sought to be made is not between the big and small men or between the big and small corporations but between honest and dishonest cases. The big corporation may have an honest case but a small man may have a dishonest case. These have nothing to do with the wealth or concentration of economic power in a few hands. There should be a deserving case when a case comes up before the Court. There may be deserving cases involving Rs. 50 lakhs worth of property and there may also be thoroughly dishonest cases involving Rs. 2,000 worth of property. Quite a deal of good is sought to be done to the public. Take for example building a highway. It may be held up by small men who may be capable of presenting a petition in the court thereby holding up

the entire progress of a district. Therefore I am not inclined to agree with this view. You cannot distinguish between big and small people but you can distinguish between honest and dishonest people. What is necessary is a reasonable classification by reference to the size of property. That should be the objective of the amendment.

Shri Shiva Chandra Jha: Do you like this amendment? According to you a petitioner should be allowed to move the court whether he is a small property holder or a big property holder.

Shri N. A. Palkhivala: I would say that the amendment should apply equally to the two articles dealing with fundamental rights. The hon. Member mentioned the bank nationalisation case. Let me also mention one thing. Apart from the L.I.C. and the Unit Trust of India which are Government-owned Corporations in the public sector which have more than 90 per cent shares, at least in 12 out of the 14 nationalised banks shares were held by small men who do not hold more than Rs. 2000 to Rs. 3000 worth of investment in any company. In other words 90 per cent of the people were benefited as a result of larger compensation. I think the correct figure is 95 per cent. If you get the figures of shareholding in all these banks, you will find that 95 per cent of the shareholders are small men having a few shares only. In fact one hon. Minister wanted to mention this to me that the Tatas were holding the highest shares in the Central Bank. He was surprised to learn when I told him that we do not have even a quarter per cent of the share capital. It is a misconception to distinguish between small and big men. There are no big men or small men.

Shri Shiva Chandra Jha: Your point is that no distinction can be made between small and big men. For this purpose if an amendment to Art. 32 is made the big men would come into the picture. They would also get more opportunities for enforcing their fundamental rights. You cannot distinguish as between honest and dishonest men on the whole. Do you agree that the amendment is right or not?

Shri N. A. Palkhivala: As I said you are right. This is my view that there would be a few cases where on the ground of delay the petitions might be thrown out by the Court. As I said I am not saying anything in favour or against that. What I say is that it would be conducive to public interest to have this.

Mr. Chairman: Thank you very much.

(The witness then withdrew.)

MINUTES OF THE EVIDENCE GIVEN BEFORE THE SUB-COMMITTEE OF THE SELECT COMMITTEE ON THE CONSTITUTION (AMENDMENT) BILL, 1969 BY SHRI TENNETI VISWANATHAM, M. P.

Wednesday, the 9th September, 1970 at 10.00 to 13.00 hours in Council Hall, Bombay.

PRESENT

Shri D. K. Kunte—*Chairman.*

MEMBERS

2. Shri Shiva Chandra Jha

3. Shri Tenneti Viswanatham.

LEGISLATIVE COUNSEL

Shri A. K. Srinivasamurthy, *Deputy Legislative Counsel, Legislative Department, Ministry of Law.*

REPRESENTATIVE OF THE MINISTRY OF LAW

Shri Dalip Singh, *Deputy Legal Adviser.*

SECRETARIAT

Shri M. C. Chawla—*Deputy Secretary.*

WITNESS EXAMINED

Shri H. M. Seervai, Advocate General, Advocate General's Chamber, High Court, Bombay.

Shri H. M. Seervai.

(The witness was again called in and he took his seat.)

Mr. Chairman: Mr. Seervai, I hope, you must have looked into those questions.

Shri H. M. Seervai: Yes; in fact, I am glad you gave me these questions in advance.

The first question is whether fundamental rights can be described as of the greatest public importance. In my opinion, that is not so. Guaranteeing fundamental rights are, at any particular time, of great importance and of great value. But if people want to change or abrogate a fundamental right and the right to do is denied to them, then and then alone would such a right cause any mischief.

In America, the right to possess or sell liquor was taken away by the Eighteenth Amendment of the Constitution because the majority of the people wanted prohibition. When the majority of the people did not want prohibition, the Eighteenth Amendment was repealed by the Twenty-first Amendment. So, if by the requisite majority a particular thing is desired, the whole object of a provision for amendment in the Constitution is that no particular right should

in course of time become, to put it mildly, undesirable.

The strongest proof of it is to be found in the majority judgment of the Supreme Court in the Golaknath case when they held that the First, the Fourth and the Seventeenth Amendments were necessary to effect a social change. They left it untouched. That is my answer to the first point.

Mr. Chairman: Is it because they did not want to upset what was done under these Amendments?

Shri H. M. Seervai: That is one reason. But they said that all the changes which could reasonably be contemplated by the Directives of State policy have been brought about What more can be changed?

The second point raised is that the observations in paragraph 3 of my Memorandum as regards the public interest and restrictions in public interest should be confined to article 19 only. That is not the position. I would request you to go through the article and you will see that public interest is a dominating concept in the whole Chapter on Fundamental Rights, by and large. If you will turn to article 22, you will find that the rights conferred by the clauses (1) and (2) are restricted by clause (3) to any person who is arrested or detained under the law of Preventive Detention in the public interest. The reference to public interest is made in clause (6) which says:

> "Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose."

Now, let us go to articles 25 and 26. These articles confer the most valued rights. According to some people, these could be the most valued rights, the freedom of religion and conscience. But the opening parts of articles 25 and 26 show that public interest is a dominant concept. The opening words are:

> "Subject to public order...."

The word "public interest" is not used. But the concept is there. The wording is:

> "Subject to public order, morality and health and to the other provisions of this part6"

Article 26 also says:

> "Subject to public order...."

Therefore, both articles 25 and 26 bring in the concept of public interest.

Let me give you one graphic example. The people are afraid of religious rights being taken away from them. But the actual experience shows that under certain circumstances a religious right which is the most valued right must for the time being be denied. You will go far enough to avoid hurting anybody's religous feelings and it is against normal decency to insult somebody else's religion. Suppose some enemy troops occupy a temple or a mosque and resort to firing on the city. Will you or will you not want to destroy that temple or that mosque? In order that your freedom of religion may survive from the enemy attack, it becomes necessary to do so.

A most famous incident occurred during the second world war. One of the most sacred Christian monasteries in Rome was occupied by Nazis and, regretfully, the Allies were forced to destroy it.

No right can be absolute. Let me tell you something which happened in Bombay itself. There is a graveyard of persons owing religous allegiance to Mullanji Sahib. He is a spiritual head of Muslims and, according to the religous theory, he is an incarnation of the Prophet. The prayer at the grave-yard is a part of their religion, as it is part of many

other religions. Now, the Santa Cruz airport is situated near it. The coming into existence of the Boeings made it unsafe for the high monuments on the grave-yard and there was a danger to the worshippers. So, the grave-yard was acquired. That was challenged as violating the rights of religion.

While we did something to respect the rights of religion, we got people to agree that the monument should be reduced to a very small size. The railings should be only one foot with a notice that at times when the planes fly, the persons are not to worship as there is danger to life. The Union of India agreed that this was a fair thing to do. It was done. But, if Jumbo jets come in then are you going to shift the whole aerodrome from Santa Cruz? I put it to the Mullanji Saheb that since he claimed a great of spiritual power which had been upheld by the Court also, whether he could find out some other remedy that in case of emergency the sacred grave might be put at another place for which the Government would willingly agree and give that free of charge. Now can we have absolute right of religion in this? I have given these two instances. In one case - Union of India versus State of Maharashtra - they went to the extent of giving advice that if you try to push the rights of religion thus far and confront the court with a problem of choosing between the removal of the grave to another place or shifting the Santa Cruz aerodrome you will fail. Therefore, ordinary human decency is against the people violating the religion. But the people will go far to avoid the hardship. The public interest suggests a network of aerial and landing communications which make it necessary to shift this grave. But, if the people persist to brush this aside and if the Supreme Court says that it cannot be done—you cannot shift the Santa Cruz Airport—would you not amend the Article? We are living in a State where by the law of the land rights can be protected. The State must survive. Will you or will you not agree in the situation which I mentioned to you that the public interest must take precedence over any other right however valuable and precious? This is about Art. 25 and 26.

Now we come to Art. 28. You will see that the first two sub articles (1) and (2) confer a right on a religious denomination. But, in sub-article (3) it does not use the words 'public interest' as indicated by its term. A religous institution is run by a religious denomination. It does not mean that the persons not belonging to that denomination should be compulsorily made to attend to the religious service unless you consent to that. If a religious community imparts education for its own community and if the institution receives public help, then the persons in that denomination should not be compelled to join the service unless they voluntarily accept that. In my view sub-article (3) clearly is based on protection of the public interest.

Now we come to Art. 30-the rights of minorities to establish and administer educational institutions. Now you will see that the word is 'administer'. The Kerala Education Bill case and the other case show that the right to administer does not carry the right to maladminister and in the public interest, maladministration can be prevented even in respect of a minority institution. So, if you find that the teachers do not get their salaries, you may constitute an authority to whom payments are to be made who will pay the teachers. Though it is part of the right of the management, if you find that there is mismanagement which is against the interest of education, then public interest requires that the right to manage should not carry the right to mismanage and that has been established by the Kerala Education Bill Case and the subsequent case which followed it. Though the public interest is not mentioned expressly

in the Article judicial determination shows that in the public interest, you can prevent maladministration when education is in public interest. You can only further the interest of education but you cannot maladminister. In the language circular in Bombay you may teach in Hebrew medium but you cannot teach in English. This was not in the interest of education, and so that was struck down by the Court.

Now we come to Art. 31. Art. 31 deals with property and the sub-article 2 is most important. It provides for payment of compensation if a property is acquired for a public purpose. If you will see sub-article 5(b) and sub-sub article (ii) you will find that nothing in clause (2) shall affect the provisions by any law which the State may hereafter make for the promotion of public health or the prevention of danger to life or to property. Let me put it this way to you. Yellow fever — an epidemic — breaks out in an area. First you quarantine the whole area and then you can requisition a building wherein you can house the people who are suffering from the yellow fever. They have to be segregated. Let me also put to you another example. Take Chandni Chowk in Delhi. A fire starts in a shop. If you do not, pulldown that shop and destroy that the fire will spread and destroy the whole of Chandni Chowk. You might remember the great fire of London. It could have destroyed the other property had not adequate precautions been taken. Similarly take the case of plague. The quarantine regulations warrant inoculation in the interest of public health to prevent the danger of this disease being spread to other areas. You can destroy or protect the property-not wantonly-for a specified public interest. The whole of article 31(a) and (b) introduced by way of amendment is in public interest. There should be no concentration of lands in a few hands. You might remember that Raja Kameshwar Singh possessed lands yielding a rent of Rs. 18 lakhs in a district. Why should he have so much of lands? So, Art. 31(a) and (b) are clearly in the public interest. Then we go to Article 33 which was strongly emphasised by Mr. Justice Das in his dissenting judgement. It is in connection with discharge of duties and the maintenance of discipline in the defence forces which is of vital importance. You can say there should be no trade union in the Army or all the fundemental rights relating to services can be abrogated. Again public interest comes in because not only does public interest restrict a right but a right can be abrogated.

Article 34 is again an Article which deals with public interest.

Article 35 refers to two Articles which are obviously enacted on grounds of public policy and to protect public interest—abolition of forced labour and untouchability and require the Parliament to punish a violation of those rights.

Is there any doubt that the whole chapter of fundamental rights has regard to the public interest. Society exists for it and a great English judge speaking of *habeas corpus* which in England is as sacred as anything can be—a judge can be fined for it—said: in times of war above the liberty of the subject is the safety of the country.

Directives of State policy put the public good over private right beyond doubt. They are not justiceable in court but you must respect the directives; they are fundamental in the governance of the country. They are fundamental in nature but from the financial and other points of view you cannot say that people must be compelled to give primary education because you may not have the buildings: you may not have the teachers but since it is a directive of policy, and in arranging your priority you must see as far as possible that

teachers are trained and primary and higher secondary education is made free and compulsory.

Then the next question is my statement is wrong and it is said that the six months period is only fixed by the rules of the Supreme Court of England. I am glad this question has been put to me. My answer to that is that my statement is correct. I did not base my statement on the rule of the Supreme Court in England. I mentioned that rule only to show that a rule imposing a period of limitation for *certiorari* is not held to run counter to the nature of the writ.

I refer you to p. 586 of the book entitled "Judicial Review of Administrative Action" by S.A. de Smith. I quote:

> "Applications for *mandamus*, like applications for *certiorari* must be made to the divisional court of the Queen's Bench Division in terms of time. In most respects, the procedure governing applications for *mandamus* is the same as that which governs applications for *certiorari*. But there are a few rules peculiar to *mandamus*.
>
> There is no express limitation of time for bringing the application except in relation to applications for orders of *mandamus* to be adressed to Quarter Sessions to hear an appeal, but unless the application is made within a reasonable time after the right to apply has arisen, the court will in its discretion refuse the application. The periods of delay which have caused the courts to exercise their discretion against applicants have ranged from 65 years to a few weeks. The more compelling are the reasons for seeking expeditious resolution of the issue, the more reluctant will the courts be to countenance even a short delay in instituting proceedings."

Turning to *certiorari*, I refer to pp. 434-435 — I quote:

> "The right to *certiorari* or prohibition may be lost by acquiesance or implied waiver. Acquiesance means participation in proceedings without taking objection to the jurisdiction of the tribunal once the facts giving ground for raising the obection are fully known. It may take the form of failing to object to the statutory qualification of a member of the tribunal or even appealing to a higher tribunal against the decision of the tribunal of first instance without raising the question of jurisdiction.
>
> One who is guilty of unreasonable delay in applying for *certiorari* or prohibition may lose his remedy even though he did not acquiese in the original assumtion or exercise of jurisdiction. If an application for *certiorari* is delayed for more than six months, the leave of the court to extend the time for making application must be obtained. If an application for prohibition is unduly delayed, there may be nothing left to prohibit and the right to a prohibition will then be irretrievably lost.
>
> But even where these time-limits have not been exceeded, an unreasonable delay by the applicant in instituting proceedings may lead the court to exercise its discretion against him. What is unreasonable delay will depend upon the facts of each particular case."

Now, turning to p. 441, it says:

> "There is no time-limit for an application for prohibition though the application may be refused on the grounds of undue delay and will be refused if nothing remains to prohibit. An application for leave to apply for *certiorari* must be brought not later than six months after the making

of the order that is to be impugned."

I wish to say that in England the position seems to be that six months is the time-limit but it does not mean that, if you come at the on the last-day of six months, you will get the writ. That is what the foot-note says. Here is foot-note 40, p. 441 which says:

"In the case of an order on appeal to Quarter Sessions, the time runs from the date on which the order of Quarter Sessions is made. But in other cases, it runs from the date when the original order is made. The court may refuse an application on the grounds of unreasonable delay although the six months period has not expired."

So, six months period is laid down. But it does not mean that if you come nearly at the end of six months, you will get relief. The court may say that you will not get the relief.

In this connection, I would like you to refer to "Halsbury's Laws of England", Vol. II, Third Edition, pp. 72-73. This is about *certiorari*. It says:

"The leave will not be granted to apply for an order of *certiorari* to remove any judgment, order, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceedings or such shorted period as may be prescribed by any enactment. The time may be extended. But the court will require a strong case to go behind the provisions of the rule"

Now, comes an important sentence which reads as follows:

"Moreover, an application for leave may within the prescribed period be refused on the ground that there has been undue delay?

The case is given in foot-note (i), that is R.V. Glamorgan Appeal Tribunal, Ex parte Fricker (1919). 115, L.T. 930, p. 932.

So, the rule is merely for the guidance of the court. If you prescribe the rule, a very strick case must be made out for complying with the rule. If there is a law of limitation, one will have to comply with the rule. It does not mean that the court is bound to grant you relief. On merits of your case, the court may say 'yes, you should have come before us within six months. But having regard to the nature of the case, you have come late. Now we accept this petition.'

My submission is that in respect of these rights, the remedy is to move the court speedily. But if you come late and if you give a valid explanation which is reasonable, there will be no difficulty in extending the time. The court can extend the time considering the nature of the case. My suggestion is that there should be a period of limitation but it should be left to the discretion of the judge to extend it for sufficient cause or reason to be stated in writing. As I told the hon. members if you need an interim stay or injunction, as we call it, and if you come late in both the ordinary civil proceedings as well as in the writ proceedings the court will refuse to entertain your petition. Sometimes you cannot even go to the court. The court cannot restrain a decision if it is taken already. Here there is nothing to restrain by the court. The opportunity given to the public remedy goes to show that the remedy must be speedy. Suppose a man loses his case. He did not appeal. He finds years later that somebody else going direct to the Supreme Court and obtaining a stay. Acting on the analogy of Law of Limitation, surely the suit is barred for enforcement of fundamental rights. Can we extend the relief under the ordinary Civil Procedure Code under which he comes before the court? That is the ground. And my statement is correct and is supported by leading applicable to Art. 32 and 226. The Halsbury.

As regards the relevance of *res-judicata* it is said that my reference

to it is not relevant to the discussion on the law of Limitation being made application to Art. 32 and 226. The relevance of *res judicata* is this. One view is that Art. 32 confers an absolute right and no rule of law or procedure which applies to ordinary rights can apply to fundamental rights. If this view were correct—in my opinion it is not correct—no amount of delay can bar enforcement of fundamental rights conferred by Art. 32. Equally, no other rule of law can bar that right. *Res judicata* and *constructive res judicata* are the rule of law based on public policy. If a person having filed a writ petition in the High. Court challenging the law 'X' as violating his fundamental rights does not appeal against the dismissal of his petition on merits, the matter will be res pudicata and his fundamental right to move the Sureme Court for the enforcement of his right will be defeated by the plea of *res judicata*. In other words, he cannot assert affectively his fundamental right. Similarly, if a person makes a false and misleading statement in a petition and obtains an *ex parte* injunction or stay, the court will dismiss the application after hearing without going into the merits because he has violated the rule of law. hat a person obtaining an *ex parte* order must show the utmost good faith to the court. Art. 32 petitions have been dismissed on this ground and Mr. Justice Hegde who dissented in Moti Chand's case was a part to such dismissal. So, the relevance is that a rule of law is based on public policy. The laws relating to laches or Limi ation are statutorily recognised. laws. These may lead to a certain amount of discretion by the court. It is still a rule of law as expressed by Mr. Justice Hidyatullah the court will not countenance even a short delay in instituting a proceeding. The laws are necessary in the public interest. The urgency is great; the period of limitation is shorter. It used to be, I think, 20 days for an appeal on the original side. May be, it may be 30 days for an appeal to the Supreme Court. Take the case of recovery of loan. If you do not file an action on stay or negotiable instrument, it is possible that the instrument itself may be destroyed. You may differ from me. There should be a uniform period for all these things. I am of opinion that when the rules based on public policy can defeat the fundamental rights why should not the law of Limitation, based on public policy (as *res judicata* is based on public policy) not defeat the fundamental rights?

Question No. 5 is that waiver applies only to contracts. That is not correct. I draw your attention in this connection to Halsbury volume 36; 3rd edition; page 444; para 673—Waiver|certiorari|contracts.

Then we get the whole line of American cases. It is not disputed that every fundamental right—(I leave aside slavery because that is abolished and it is a crime) has been held to be such that it can be waived because it is a right conferred on an individual and it is for the individual to say whether he will waive it or not unless you see from the internal contents of a provision that it is not merely an individual right. Take the example from our Constitution of throwing open temples to Harizans or untouchables . It is not merely an individual right. Untouchability is prohibited.

There are two or three rights which are clearly in the public interest—abolition of forced labour, untouchability and as a corollary throwing open of Hindu temples. Apart from such provisions there is nothing in the rights which otherwise exist which cannot be waived. For rights of property particularly are rights which affect an individual If an order acquiring my land is unconstitutional, but the compensation offered to me by agreement is more than what I can get in the market for it, it is for me to decide whether I should object to the compensation or not.

Reference was made yesterday to the 14th Amendment—abolition of slavery. For this amendment the reason was simple. There were Southern States, which ran on slavery whereas the Northern States did not. The founding fathers said, if we are going to raise a hornet's nest on slavery we will not get together. Then they said we are going to work a free Constitution and somehow or other the matter will solve itself. It practically did but for an unwise intervention of the Supreme court of the United States. Time will have made slavery disappear, but the judges of the Supreme Court said that "a slave was property and you could not lawfully abolish slavery." Then there was no alternative. As regards equality both majority and minority judgments held that it would be waived in the matter of the utmost importance, that is, the right of fair trial by a jury in systematically excluding Negro when a Negro is being tried. In America, the trial by jury which consists of 12 persons is a fundamental right. Rightly or wrongly, till recent times, the jury was considered to be a great bulwark of personal liberty. Even till today a number of eminent writers and judges like Simon and others say that 12 honest men must find you guilty. Otherwise, you do not suffer. No technicality of the law, no defect in giving reasons, can stand in the way because the jury gives no reason. They just decide whether the man is guilty or not. You cannot ask them why. Therefore, we are dealing with vital rights, a right to a jury and a right to equality in the composition of the jury.

I would like to refer to the Constitutional Law of India, pp. 180-181, sub-para 2(iii). The answer to judicial intervention on slavery was one of the bloodiest civil wars in the word. This illustrates the point that I am making. The judgment of the Supreme Court was that a slave could not be freed except on payment of full compensation to the slaveowner. It is a right of property. Can you say that the fundamental right to property cannot be abolished? Again, Supreme Court said that equality meant that you could seggregate Negro in schools, in public buses, etc., from the whites. Let us assume the Constitution had enacted what judicial pronouncements said, and that the equality claure had provided that separate but equal treatment of the whites and blacks shall not be a violation of equality. Now, the Supreme Court says that there is something basicaly wrong in seggregating and that equality does not permit it. Would that remain unchanged? The disabilty of the blacks confers some kind of personal status and privileges on the whites. Equality ultimately covers both the slave and the slave-owner. It covers both the whites and the blacks. Therefore, you have the precise wording of our article. It would be quite wrong to say that eminent American judges did not understand what public policy was. So, my submission is that wherever there is a waiver of a right which is for the benefit of an individual it is open to him if he considers his interests are better served, to say that he should be permitted to waive them except in cases involving public interest or policy. Now, I wish to make a point on this waiver because the view taken is that you cannot waive statutory rights. I have showed you that. I would show that the Supreme Court itself recognised that you could waive even a constitutional right, but not a fundamental right. In Basha-swarnath case, Justice Bhagwati held that fundamental rights are sacrosant, that it will be a sacrilege to whittle them down, and that nothing can be added into fundamental rights and nothing can be subtracted. This is what he says in 1959, Supplement 1, the Supreme Court Reports at p. 563:

"Constitutional rights may or may not be waived as stated in the textbooks, and not the decisions of the United States Supreme Court...."

According to him, the fundamental rights cannot be touched. And tne only reason given was that the preamble of the American Constitution shows totally different objectives.

As you know, the American Constitution is a short one. It can be read in just 25 minutes. Our Constitution would take the better part of a day and a half to read. We are now dealing with an article (Article 14) which we have bodily taken from the American Constitution. If there is an article in which the Supreme Court, rightly, has taken over the entire doctrine of classification, it is this article. Is it suggested that it did not occur to the judges of the United States for more than 200 years that public policy is involved? And yet in matters of vital importance, they held that equality clause could be waived. Both the majority and the Chief Justice Mr. Das appeared to have assumed that the American position in relation to jury trials did not relate to the equality clause of 14th Amendment. This assumption is not correct. A systematic and arbitrary exclusion of Negroes from Grand Body of Juries because of their race cannot constitute a denial to a Negro charged with a crime of the equal protection of the laws guaranteed by the 14th amendment. And three cases have been given in the footnote 25. These decisions also show that where the objection of grand body of jury is on the ground of violation of the equality clause of the 14th amendment the point has been raised in the trial court. The U.S. Supreme Court reversing the judgment of the court has repeatedly upheld the objection. In this context the question was asked: Can the denial of the equal protection clause of the 14th amendment involving selection of a jury by systematically excluding the Negroes be denied or waived by a Negro accused?

Both the majority and minority judgments of the U.S. Supreme Court held that it can be waived. The majority felt that on the facts of the case before them the accused had sufficient opportunity to know what his constitutional right was with regard to the equtlity clause or the due process clause of the 14th amendment. But, the minority held in the words of Mr. Justice Black. "Since the adoption of the 14th amendment this court has consistently held that the systematic exclusion of Ngroes from grand body cannot constitute the jury according to equality clause of the fourteenth amendment of the Constitution. The court by their majority judgement said that the petitioner had a reasonable opportunity to challenge the composition of the grand jury in that kingdom but failed to do so thereby waiving the constitutional and statutory rights. They considered the trial as fair by the Grand Jury without going into the facts of the case. I think that the record shows that there was no reasonable opportunity afforded to the petitioners Michael and Barron—this clearly establishes that the constitutional right to the equal protection of the laws can be waived and it further shows that a period as short as three days was considered by the majority of the court reasonable for the assertion of his constitutional right by the accused". It is submitted that the principle accepted both by the majority and the minority judges of the U.S. Supreme Court is clearly right. It would be manifestly unjust to allow an accused person who was aware of his right to challenge a jury on the ground of discrimination of law to take the chance of verdict in his favour; and where the verdict goes against him he should trun round and say that the whole proceedings were in violation of his constitutional rights which were not capable of being waived. The decisions of the U.S.

Supreme Court dealing with the juries constituted in violation of the equal protection clause of the 14th Amendment are in line with the other decisions of that clause.

Thus, it has been held that the constitutional guarantee of equal rights and privileges are applicable to only those persons whose rights are affected and they cannot be taken advantage of by them. There is another reference to American Jurisprudence, First Edition, Volume XI, page 757. Can a person complain of the possible unequal operation of a statute which applies to him less favourably situated as he is? Our Supreme Court has accepted the America decision as correct. The Indian decision on the equality clause shows that the right of equality is conferred for the benefit of the individual and he alone is entitled to that right. Let me give you one other case which has arisen in America in a jury trial. In a jury of 12, an accused was tried. The case had gone on for 20 days. One of the Jurars suffered a heart attack. And the judges told the accused that if he insisted on his right as he was entitled to insist on that right they would adjourn the case or dissove the jury and order a fresh jury. But that it was open to him to go on with the jury of 11. He was asked to consider the matter carefully. If he decided to go on, then they would go on. If he decided not to go on, then they would not go on. The accused's councel also fully explained to his client accused that that was the position. The accused and the counsel then told the court that they had fully considered the matter and that they were willing to go on with the present number of 11 juries. The judge referred it to the Counsel as to whether he had explained that to the accused. The Counsel explained that to the accused and the accused understood what was being done. He later told the Judge that he had agreed with the Counsel. The client fully understood that. Ultimately the verdict of guilty was returned. Can he challenge it on the ground that his fundamental right cannot be waived? To say so would be an injustice to the accused himself because the three week's trial cost money. The witness was aware at that time that a witness might not be available. Thereafter, the witnesses would have to spend money to get those witnesses and a different jury might have to be constituted which would lead to waste of money. If he did not object, can he turn round and say that he could not waive his right no matter whatever hardship it causes him or whatever inconvenience that causes him? or whatever injustice that causes him? He is not going to pay for the second counsel for these 21 days. So, he cannot waive his right. The jury is for his protection. The law requires 12 for the constitution of grand jury. When we talk of rights of property or rights of liberty we are thinking in human and not in divine terms. A man may say, this is good for me and I should know. So, the original decision of the American Court showed that they took the view that one cannot waive a right in a trial by a jury of 12. Later on, the Supreme Court reversed it and said that surely if a man could defeat the provision relating to the jury trial by pleading guilty in which case the court might try with a jury of 11 instead of 12 and since it is for his protection if with the full knowledge of his right he choses to go on. Speaking for myself I see no argument against this line of action. There is nothing sacred in personal rights except rights like working one self into slavery. It seems to me incredible that if our Constitution and its preamble, is to put it mildly, on a little lower pedestal than the U.S. because there is no preventive detention in the U.S. and fundamental rights, as I have told you are given by God, and the very language of Article 14 has been taken by us from U.S. it seems to me impossible to say that the American judges did not understand public policy for two hundred years and we do.

There is one more point. It is said by Mr. Justice Subba Rao that we are a nascent democracy and people

are ignorant and illiterate. That we are a young democracy does not mean that we should encourage dishonesty and injustice. I agree that in a country where people are illiterate you may require stricter proof of waiver—gave the facts been fully explained to him—but it is not the ignorant and illiterate who come to the Supreme Court on cases of waiver of fundemental rights. It is when you are dealing with licences, quotas, trade permits, import and export that a question of waiver of fundemental rights arises.

I submit that we must not use quasi-religious words about fundemental rights. I exercise the freedom of speech, of opinion and I respect the same right in others. They are valuable rights but they have to be limited in the larger interests and the rights conferred on an individual may be exercised at his will or not. Every day courts ask parties to settle amongst themselves matters involving fundemental rights. I submit this doctrine of waiver is meant to ensure fairplay. That if a man knowing his rights and interests takes a particular course with his eyes open he may not be permitted on technical grounds that under the Constitution it cannot be done because to do so is only to encourage dishonesty and fraud.

The next question is: Are not the fundemental rights for the benefit of individuals and restrictions thereon in the public interest?

The point is there is no right given first and something substracted from it afterwards. It is a limited right. There are judgments which have stated but the analysis of Article 19 is following freedom—but allow him impose this and the other. So, the rights there are absolute in terms: No law shall be enacted abridging the freedom of speech. Now, prohibition is absent. The right being absolute, the court has to see whether you can alow it to be waived.

As I have shown in my book, the most outrageous things can be said about the judges in America without anybody being able to take action at all unless you see an imminent danger to the State. For example, there was a cartoon of a judge published in some papers showing him as a villainous-looking man who has barred the gates of justice against the poor and who is letting in the rich. The jurges of the United State courts committed him for contempt and the United States Supreme Court reversed it saying, "No harm is done." In India, a labour leader or a non-labour leader cannot send a telegram to the judge on a pending matter warning him of great consequences following any judgment. In America, it is permissible. That is because the right of freedom of speech is absolute in its terms.

Here, look at the right of freedom of speech. It says, nothing shall prevent the State from making a law relating to defamation, contempt of court, blasphemy. etc. So, what is given to us is not a right of free speech absolutely, as in America. It is a limited right subject to the law of libel, to the law of sedition, etc. It is not correct to say that something belongs to the public and something belongs to the Individual because when "A" libels "B", and both are individuals, the restriction in favour of the libelled is as much as in favour of the person who indulges in libel. Similar is the case in regard to sedition, an offence against the State, and in regard to blasphemy. So, all such rights are given in a limited sense. An orderly peaceful procession is protected. But the moment, you break the law and take to throwing bombs, then you are not protected. So, your right is a limited right. This is the answer to that.

As regards (9), I submit it is not uncaonstitutional for a legislature to say that on the ground of delay, *certiorari* right shall be barred subject to one exception that the period of delay must be reasonable and not unreasonable. In my view, it is constitutional and it has been so held by the Supreme Court of the United States which has fundamental rights like ours.

As regards (10), it is said that much water has flown down the bridge. I do not quite understand what it means. But I may be permitted to say that when I gave by explanation, it was then in the notes. When the Supreme Court began to talk of directions and orders after the explanation was given as in the Calcutta case no part of the arguments survived. The judge has explained the meaning of article 226. I would invite your attention to article 226. Now, on the amendability of article 32 taking away the power of judges, serious questions will arise. But leaving that apart, article 226 is very important and its correct meaning is a matter of vital consequence.

Article 226 reads as follows:—

> "Notwithstanding anything in Article 32, every High Court shall have power.....to issue to any person or authority, including in appropriate cases any Government, within those territories directions, orders of 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."

So, the power is to issue to any person for any purpose any of these writs.

In the very early days of the Constitution, before a very strong Bench of the Madras High Court, a man came and said, "Please restrict my neighbour from cutting down my trees; please restrict the Congress sub-committee from electing so and so as the Chairman" and all that. If you use the words literally, the High Court has the power to issue a writ to any person or any authority for any purpose. Is that the meaning of Article 226? The judges with a strong hold of the system of laws said, "We cannot do it." All these writs are mentioned here. Surely, to accept this construction, it would mean that the Civil Procedure Code is abrogated. The Criminal Procedure Code will be abrogated. We will become a court dealing with every matter. The whole hierarchy of courts is destroyed. That cannot be. Therefore, we say, these are special remedies, not meant to supersede ordinary remedies either by petition or by other procedures.

Then came the Bengal judgment and, speaking for myself, I am not aware that it has been overruled. If it has been, I stand corrected. But I would still say that the decision is right. To the best of my knowledge, right upto the time of 1965, it was not overruled. What he said was that before we interpret the words "to any person" and "for any purpose"—let us not worry about orders or directions because that is a little controversial—let us see: Can a writ be issued against any person for any purpose? And then, he proceeded to point out the purposes and the persons and he made the whole thing crystal clear. Surely, that is the meaning which we are going to give to writs. We cannot give a different meaning to orders and directions. Again, speaking for myself, I believe, I have given the correct explanation for the words "orders and directions". In England, except for *habeas corpus* which is a writ, all others are orders and directions. In India too, all the famous writs were replaced by direction. A *habeas corpus* was replaced by directions. Whether you call it a direction in the nature of a *habeas corpus* or an order in the nature of a *habeas corpus* or a writ of *habeas corpus*, we intend the same idea to be conveyed.

So, in my submission though much water has flowed down the bridge since then, no water has really touched either that judgment as far as I know or in any event the correctness of the reasons. The Calcutta case enables you to understand the total significance of the very wide term 'to any person or authority and for any purpose'. It means this. An accused under *habeas corpus* can ask for that right.

The essential principles of prerogative writs have been so laid down that according to Mr. Justice Mukherjee in an earlier judgment we are not to go by the technicality of the English Law but by the basic principles unlerlying the grant of writs. In regard to writs in India I have fashioned upon that sentence, and dealt with English law separately from the Indian law. Mr. Justice Mukherjee says that we have to follow the broad principles and not what the British Laws say. If I mix up the Indian and English cases there would have been confusion. And so let us first deal with the exposition of the English Law and then deal with the Indian law and see how far the fundamental rights and the provisions of the written Constitution are followed. As regards Q. No. 13, the majority judgments proceeded on the ground of public policy. That is true of the judgment of Mr. Justice Sikri. This is expressly true of the judgment of Mr. Justice Bhachawat. Mr. Justice Mitter went by the analogy of the Law of Limitation. As regard Mr. Justice Hidayatullah, it is difficult to say that it is not a public policy. It is not possible to say affirmatively that it is public policy. He goes on the simple nature of the writs and he says that having regard to nature of the writs, utmost expedition is necessary because writs are not meant to take the place of ordinary legal proceedings. So, it would not be truthfully said that it is necessarily public policy. In the very nature of the writs Mr. Justice Sikri felt this necessary for the administration of justice. One other justice advocated that the relief for the administration of justice must apply. Mr. Justice Mitter based his judgment on the analogy of Law of Limitation. This is the answer to question No. 13.

As regards Question No. 14, it cannot be answered with a straight 'Yes' or 'No'. The language of Article 32, sub-article (2) to which Mr. Justice Hidayatullah referred "shall have the power to issue directions or order or writs including writs in the nature of *habeas corpus*". It does not expresly say that it must be granted. Nor can we say that the power is such that the duty to exercise discretion in all cases arises. If it is not discretion, it means a duty to exercise in all cases must prevail. But I think that on the whole as regards Article 32 and fundamental rights, the matter has been put in this way that where a violation of fundamental rights is involved, in England you cannot present a petition. If you do so it will be rejected. So, if it is discretionary in England the answer is 'no'. In India there is a special provision which is contained in the constitution. Under the Civil Procedure regulations if the judgments of the Supreme Court and the High Courts are delibered, it does not follow from that that it limits the powers of the Constitution. I think that it would be correct to say that it is not discretionary to the extent that it is in England because, in England, certain objections are taken to a writ being granted by a court. It is discretionary in the sense that a man cannot say in England that he is entitled to a writ. A man misleading the court will be thrown out on the ground that he had misled the court. A man who has agitated on a matter before a competent court can be thrown out on the plea that his claim barred by *res judicata*. In that sense it is discretionary. By and large technalities of the law will be brushed aside. But, where there are matters of substance, the court has to come to the conclusion that it would be unfair or unjust to exercise its power. To that extent that power can be exercised and it is discretionary. So the answer is a qualified answer. On subsequent rights intervening under Article 32 and 226 my submission is that they are relevant because if you could have prevented the rights from arising but you stood by, then in the ordinary law of the land, you will not be permitted to assert that right. Let me put it this way. If I say that the land is mine and my neighbour, under the mistaken belief that it is his, builds a house on it, I cannot get

back the land. I may have to pay fully for the house, since I stood by and let him build. So, the rights of third parties intervening as a result of your action or inaction always become relevant. But for a particular provision in our Constitution which says that the satisfaction of any judgement is charged on the consolidated fund the legislature has just refused to appropriate money. I am only pointing out that a court must have power to enforce its orders. In my view the rights of third parties are extremely important in writs because the writs deal with rights.

As regards Question No. 16 the judgements have said that *unexplained* delay is fatal. When you give the power to a judge to extend the time prescribed by a law of limitation, you one enabling him to hear the petition. I would suggest the amendment is robbed of its basic content. The amendment says it shall not be thrown out on the ground of delay. This says it shall not be thrown out on the ground of unexplained delay. I personally think that one never amends Constitution for no apparent purposes. As and when explained delay is rejected by the court then a question — a serious question — of amending the Constitution would arise.

As regards Question No. 17 I agree with you fully and I would say that it is not in the public interest and in conformity with the public policy that the Constitution should be amended lightly but I wish to guard myself against a possible mis-conception of that answer. The question is we have committed ourselves to a free democratic government and we have expressedly provided very deep safeguards against and light-hearted amendments. People seem to think that a Constituent Assembly will protect your rights better than the present provisions of the Constitution. That is a fallacy because a Constituent Assembly can be set-up by Parliament and Parliament will have to devise its procedure. See, what has happened in Rajya Sabha to show the inbuilt safeguard under the Constitution. I would say Constitution should not be amended lightheartedly but the procedure for amending the Constitution tries to guard against it. It is an accident of history that for the first three elections a great political party having rendered great services to the country secured such a large majority that any amendment which they wanted could be put through but that in a democracy you cannot over-rule. So, it should be done after deliberation, it should not be done by a simple majority and it should be done by a body composed as the Lok Sabha and Rajya Sabha.

The answer to Q. No. 19 is 'yes' In my view any High Court will excuse delay once it is satisfactory explained.

As regards Q. No. 21 if the man seeking relief has impinged on the rights of others to his disadvantage by his inactivity then the Court must consider where the balance of justice lies. If justice does not lie in favour of the petitioner and other rights are intervened the court should refuse.

Question No. 22 is the same.

I have already explainted the answer to Question No. 23. Free speech does not mean free speech. It means subject to the law of public morals. The word 'free' in the context of 'free speech' does not mean 'free' it means "express your idea subject to certain laws. If you transgress the law you pay the penalty."

Mr. Chairman: The Question 24 is already answered.

Shri Tenneti Viswanatham: I would like to put a few questions You have cited the England practice as also the United States practice, where the petitions are allowed if there is

a reasonable delay. The United States have a written Constitution. But it does not contain an article like Article 32. England has no written Constitution, and, therefore, the Supreme Court there goes, more or less, according to their dictates or consience or public policy. But here the case is different. All the case law has been cited. All the arguments that have been cited are based upon a different approach there, that is, both U.K. and U.S.A. stand on different footing altogether as against India where there is Article 32(1). It may be that at the time of framing the Constitution, the Constitution makers may have found out the practice in England and America and even then they introduced this Article here. Does it not make a wide difference?

Shri H. M. Seervai: It does make a difference in the sense it being a guaranteed fundamental right. Article 226 is on a different footing.....

Shri Tenneti Viswanatham: But it deals with guaranteeing a fundamental right.

Shri H. M. Seervai: But there is a difference. Article 32 deals with guaranteeing a fundamental right and is, itself, a fundamental right. Article 226 deals in part deals with fundamental rights. But the right to approach the court is not itself a fundamental right. Therefore, Article 32 is on a higher footing than Article 226.

Now, Article 32 need not introduce a totally new law in it though it introduces a new guarantee of a fundamental right. All the Charters of the High Courts of Madras, Bombay and Calcutta gave the power to the High Courts of Madras, Bombay and Calcutta to issue writs. So, the nature of the writs and the exercise of their jurisdiction was known. The framers of the Constitution were not introducing a procedure which was novel or new. It was a procedure which had been exercised by the courts in the country. But the occasions for its exercise were not many. The principle on which it was to be exercised were known. Therefore, since 1860, the High Courts of Bombay, Calcutta and Madras had the power and the jurisdiction. If for over 110 years a certain jurisdiction was exercised, I would say, it is a reasonable approach for judges and lawyers to say that this should remain the same except to the extent that if it is altered. So, when we are dealing with a right which itself is a fundamental right, we should do justice and adopt a general principle of writs which are going to ensure justice and which the technical rules of procedure would defeat.

My view is that it does make a difference. But it does not make a difference by wiping out the discretion to be exercised on the grounds of public policy.

Shri Tenneti Viswanatham: Not Not on the grounds of public policy. It is also a matter of public policy to allow a petition. You say that the judges and the Constitution makers were aware of the implications of introducing various procedures as adopted in America and England. Now, if a case came up immediately after the Constitution, in 1950 or 1951, the tendency would be to rely more on the practices which were prevailing in England and America at that time than when the case arose in 1970. I am making an assumption.

Shri H. M. Seervai: I would broadly agree with you with this modification that in the matter of interpretation, we are trying to understand the minds of those who framed the Constitution. It is not so much the tendency of the judges and their knowledge which is relevant here.

Shri Tenneti Viswanatham: But But we borrowed these things from other Constitutions and, naturally, broad principles are accepted by us in the iterpretation of Article 32.

Shri H. M. Seervai: As I said before, the High Courts of Bombay, Calcutta and Madras have exercised jurisdiction for more than 100 years.

Shri Tenneti Viswanatham: Therefore, the Constitution makers new that and they introduced Article 32(1).

Shri H. M. Seervai: They put in that article specific writs by name. The general basic principles were known. It is fair to assume that those principles involved technicalities of procedure which are not essential to the nature of the writs as defined.

Shri Tenneti Viswanatham. In 1950, this is the observation of Justice Shastri in Romesh Thappar's case:

> "Article 32 provides a "guaranteed" remedy for the enforcement of those rights, and this remedial right is itself made a fundamental right by being included in Part III. This Court is thus constituted the protector and guarantor of fundamental rights, and it cannot, consistently with the responsibility so laid upon it, refuse to entertain applications seeking protection against infringements of such rights.'

I suppose you accept the position.

Shri H. M. Seervai: I accept the position that the Supreme Court is the guardian of the fundamental rights and it cannot refuse to exercise that power on the grounds that I shall explain when we come to the amendment.

Shri Tenneti Viswanatham: In one case it has been held that the court is constituted as a protector and it cannot refuse to entertain applications seeking protection against the infringement of such rights.

Shri H. M. Seervai: Let us see the context and the facts of the case in which this statement has been made. It is a well-settled principle of interpretation of judgments that they must be related to the facts of the case in which the observation has been made. May I know the context in which this observation was made as also the name of the case?

Shri Tenneti Viswanatham: This is case of Romesh Thappar *versus* the State of Madras.

Shri H. M. Seervai: It was meant to show that the courts did not decide in a spirit of a crusade against government. But, if Government passed a law not permitted by the Constitution then, no matter what inconvenience it is to government the court must protect the people.

Shri Tenneti Viswanatham: It has been stated so.

Shri H. M. Seervai: I have no complaint against the general proposition. Public inconvenience is by itself not a ground for not enforcing the fundamental rights before the Supreme Court. The Court is constituted as a guardian of the fundamental rights. If the State says that it is inconvenient to it, we are not concerned with that.

Shri Tenneti Viswanatham: The wording is 'consistent with the responsibilities so laid down it cannot refuse to entertan applications seeking protection against infringement of such fundamental rights', Then there is another case also. This is what Mr. Justice Shastri says: The Supreme Court has the role of a sentinal. 'It was the duty of the Court to plainly lay down in the Constitution to determine the constitutionality of the Statute on the ground of contravention of a fundamental right. If it becomes its duty. I am asking whether it can also be its duty to say that you have come late or you are unreasonably late and so we refuse to entertain your application.

Shri H. M. Seervai: You will see that from any practical point of view if a

statute is unconstitutional and if it affects the public, then this unconstitutional act will not be brought in because as the court knows that it would be open to it to say that in so far as you are claiming the rights, there is no right.

Shri Tenneti Viswanatham: We are not going into the merits of the case.

Shri H. M. Seervai: What I wanted to say was this. Article 32 does not give the meaning for the right to defend the rights. Suppose the law does not affect me but it affects him.

I cannot go to the Supreme Court for declaring the Act as void. The moment you say that, the fact that a man's rights are affected is relevant.

Shri Tenneti Viswanatham. You are quite right. We have not gone into that. There is another case—Basappa *versus* Nagappa in which Mr. Justice Mukerjee pointed out that the jurisdiction of the Supreme Court under Article 32 or the High Court under Art. 226 of the Constitution was in fact wider than the jursidiction of an English Court to issue the 'prorogative writs'. There is no distinctions made in Art. 32 and 226 in both the cases. He further says that these two articles not only apply to the writs but also empowers the court to issue directions or orders or writs including the writs in the nature of the prorogative writs. I suppose you will agree to this view.

Shri H. M. Seervai: I do not agree. I say that their attention has not been drawn to the legislative history of India and England as to why the words 'orders and directions' have come. If anybody says that attention has been drawn to these I shall revise my judgments.

Shri Tenneti Viswanatham: In an earlier case Kochunni *vs.* State of Madras, the court held that once you approach it to establish the fundamental right it will give appropriate relief including declaration which was not available in the prerogative writ jurisdiction in England. That has been much wider

Shri H. M. Seervai: There are misconceptions in the minds of the judges. Declaration has come more and more into prominence. Declaration was followed by an injunction. I appeared before the court in Bombay in one case. In this particular case the court held the order as void and said that they could not give any relief because the time has expired. We are deciding this case because this question crops up every year. Next time when this happens at the preliminary stage we will grant an interim injunction and give relief except in a case of recurring writ. When the order is wrong and it has been declared as void then at the stage of admission of the petition, we will give interim relief.

Shri Tenneti Viswanatham: In another case the court held that it would be failing in its duty as the custodian and protector of the fundamental rights to refuse the petition and give relief under Article 32 involving questions of facts upon which consideration the court would be flooded with petitions under Art. 32.

Shri H. M. Seervai: I am unable to understand that without knowing the facts of the case. In the first case it was urged before the Court that this involved questions of facts. The Judge merely says—I repeat those words—that once it is established that something violates a man's fundamental right, we cannot allow technical objection like the disputed questions of fact from granting relief. We can first hear the paries on appearance and then put further questions if he feels that it is necessary. We follow the example of Bombay and Calcutta and take oral evidence. We cannot refuse it on any technical grounds. He says that he agrees with the facts. But, then we may be flooded with applications. I agree with this observation cent per cent.

Shri Tenneti Viswanatham: Once an individual has gone to the court there will be many others who would come with their stale claims. What is the stale claim for?

Shri H. M. Seervai: It is a difficult thing to answer as to what is meant by the stale claim unless I know the context in which this observation is made. If you come after 12 years the patent will have expired and the action for infringement will fail. What is meant —the basic idea—is that it is a public mischief that challegning public actions and public statutes should be delayed so long that, in between rights have been created.

Shri Tenneti Viswanatham: It was said that courts will be flooded with appeals if this amendment is carried. Should they be rejected only on that ground. What is a stale claim. I think it should be gone into and the petitioner should be given the privilege.

Shri H. M. Seervai: I agree with you that the mere fact that the courts would be flooded with claims—if nothing else was involved—is no answer. I think the basic idea under-lying the discretion for rejecting a stale claim is that it is most unsatisfactory that rights should be adjudicated upon months or years after they have beeen violated because in between people will have acted to their prejudice. Therefore, the idea really is that a stale claim is against public policy; it requires the violation of rights and their enforcement should be—within the legislative judgment—speedily brought about.

Shri Tenneti Viswanatham: I refer to two cases of the Supreme Court. One case was that a man came late and his explanation was the Chief Engineer of my Department was pursuing the case with the Government and therefore, I came late after the Government refused. The Supreme Court said 'no' you are late. The second case is of Income Tax Officers case. Their the case was that the promotions were held *ultra-vires* of the Constitution. Smoe people went to the court and the Supreme Court for the relief. When the others went they said your claims cannot be sustained. In these two cases do you think that the Supreme Court was justified in rejecting.

Shri H. M. Seervai: All that I can say is that I have considerable experience of these service matters which come to court. I think two things are involved and in my view if I were advising the civil servants who did not go for the court is: first of all ask them to file a representative petition because a representative petition challenging the same order lies. Secondly, even if they did not want to conduct the litigation they file an appeal and tell the court will they abide by the decision of the Supreme Court. If some people take action and the remainging forty or fifty just want to sit on the fence....

Shri Tenneti Viswanatham: It is not a question of sitting on the fence. Although everybody has a right there is the question of dis-pleasure and they take great caution. It is a question of fighting between unequal parties.

Supposing our Supreme Court passes a rule under its rule-making power that your writ petition will be admitted even if it is beyond six months as English Supreme Court has done and some of our High Courts are making such a rule do you think it will be held valid by the Supreme Court if somebody goes to the Supreme Court?

Shri H. M. Seervai: The Supreme Court will say that, ordinarily, it shall be filed within six months. The authorities say that the judge has the power to extend the time.

Shri Tenneti Viswanatham: Suppose the same rule is adopted by the courts here. This is a hypothetical question. Would the Supreme Court hold it as valid?

Shri H. M. Seervai: The Supreme Court may hold it as valid. If it is with discretion to the judge to extend the time on the merits of a case. I think, it will be valid.

Shri Tenneti Viswanatham : What about the remark of the Chief Justice Hidyatullah in Tilokchand case that if we put a legislative curb on article 32, it may be struck down?

Shri H. M. Seervai: If there is a legislative curb and it says 10 days or whatever it is and gives no discretion to the judge, it may be struck down.

Shri Tenneti Viswanatham: So, if this rule is adopted, it will be quite valid.

Shri H. M. Seervai: I should say, without the Limitation Act....

Shri Tenneti Viswanatham: Suppose the Limitation Act is amended. Has it got the power to amend Article 32(1)?

Shri H. M. Seervai: It does not purport to amend it. It only regulates the period subject to the discretion of the courts.

Shri Tenneti Viswanatham: You may please compare your statement with the remark made by Chief Justice Hidyatullah.

Shri H. M. Seervai: I am inclined to think that he struck a note of caution against arbitraray and improper abridigement of fundamental right by legislation. But if it takes the form of a reasonable period of limitation, given full discretion both to the Supreme Court and the High Courts to extend the period, I think, it will be valid. I think, that is the import of it.

Shri Shiv Chandra Jha: Are there any criteria of guiding principles on which the farmers of the Constitution declared that these rights are fundamental rights? Either in India or in the United States or anywhere else, are there any criteria or principles on which you say that these rights are fundamental? What makes a right fundamental and what does not make a right fundamental?

Shri H. M. Seervai: You will have noticed from the discussion in the Constituent Assembly that different persons accepted or compromised about fundamental rights for different reasons. A person may accept religious rights for one reason and another may accept for another reason. It is practically impossible to say what are the criteria. I can say this that, generally, the outlook of the persons who dominated in the Constituent Assembly was liberal, democratic and humanitarian. But on the social objectives, there was a very sharp difference. So they compromised by putting certain things in the Directives of State Policy, leaving it for the future to work them out. It is not possible to say. for instance that the abolition of untouchability is necessarily based on a philosophy. It may be based on political considerations that in the world outside, it will look shocking that democratic people could treat anybody in their own land as less than a human. So there can be political considerations also.

I agree that they were broadly liberal, humanitarian and democratic in the parliamentary sense that we have a parliamentary form of Government. After all, the elected representatives, representing the people, have no temptation to abuse power.

Shri Shiva Chandra Jha: You say that they were liberal, democratic and humanitarian. So were the framers of the American Constitution.

Shri H. M. Seervai: No. They were mortally afraid of democracy. In fact, in their view, the greatest tyrant was a free democratic people. If you read the writings of the framers of the American Constitution, you will find the one thing which they dreaded was universal suffrage.

Shri Shiva Chandra Jha: For example, Jafferson was in favour of democracy and universal suffrage. He was a liberal and a humanitarian. It is because of him that a Bill of Rights Chapter was added to the Constitution.

Shri H. M. Seervai: I think, he was a very distinguished Members of the Constituent Assembly.

Shri Shiva Chandra Jha: Don't you think Jafferson was a democrat and a humanitarian?

Shri H. M. Seervai: I am only saying that the framers of the Constitution were, by and large, afraid of democracy.

Shri Shiva Chandra Jha: You say that the framers of the Constitution were not humanitarians.

Shri H. M. Seervai: I do not say they were not humanitarians. They thought that the masses will destroy humanitarian values.

Shri Shiva Chandra Jha: Anyhow, you say that the framers of the Indian Constitution were liberal, democratic and humanitarian. Is there anything common in between these two Constitutions?

Shri H. M. Seervai: There is a common principle in which the American Constitution makes certain rights as fundamental. It was not the practice in written Constitution to bring in certain safeguards. For certain rights, there is a grave doubt in America.

Shri Shiva Chandra Jha: We have our own Constitution and America has their own Constitution. American Constitution is the backbone on Human Rights.

Shri H. M. Seervai: They took everything from the Bill of Rights. The Bill of Rights is not written. At that time Marshal C. J. said that this was the supreme law and this was a matter of great debate. The philosophy of Art. 32 and the philosophy of Art. 226 is clear. The English courts do not go on the basis of the the Declaration of Abstract rights. We learnt a lesson from England. England had enforced the Bill of Rights. Habeas corpus, mandamus, certiorari etc. are not abstract rights. We are making them effective by making law. These are enforced by law which is well recognised by English Law.

Shri Shiva Chandra Jha: Whether written or unwritten, eventually the makers of the British Constituion eventually copied from the Human Rights for which they had been fighting for a long time. It was only afterwards that they got these rights. Do you agree with my point or not?

Shri H. M. Seervai: It is very difficult to compare three different centuries.

Shri Shiva Chandra Jha: You said that fundamental rights can be changed by majority.

Shri H. M. Seervai: I did not say that.

Shri Shiva Chandra Jha: By majority I mean that in a constitutional matter it can be done only by change in Article. Can you say that by changing Art. 32 and 226 we can make much progress in India. For instance, you quoted American practice. There is absolute freedom. I do not want to go into that. Do you know that during the Second World War the Americans were in the concentrated camps. At that time there was already a revolt. You said that in the public interest the fundamental rights can be curtailed?

Mr. Chairman: Mr. Jha I suppose now you are asking him questions.

Shri H. M. Seervai: With regard to the question my answer is that there is not a single book which says that Sovereign Parliament or legislative body cannot amend it. If you cannot amend it you will forcibly subvert

it. Let me put it this way. Suppose on two successive elections you go on the question of protection of linguistic provisions or on rights of equality in public service. On this the government is returned with 75 per cent mojority in the States as well as at the centre. What is to be done?

Mr. Chairman: We discussed this in the Select Committee. It was stated that this would lead to a revolution.

Shri Shiva Chandra Jha: My last question is this. That is with regard to delay factor. Whether it is reasonable or not my feeling is that delay should be eliminated in the public interest. Do you agree with this view?

Shri H. M. Seervai: I shall answer that question. I said a little while ago that there are various judgments. They did not show that they have refused relief. One of the things to be taken into account is what is reasonable delay. A man who is ignorant and that illiterate would take a longer time than what a literate person has done. I have a strong feeling that it is highly articulate and wealthy propertied class not the poor and the ignorant who make the bargains they do not want to keep who talk of the poor people ignorant of their rights.

Mr. Chairman: Thank you very much.

(The witness then withdrew)

PROCEEDINGS OF THE SITTING OF THE SELECT COMMITTEE ON THE CONSTITUTION (AMENDMENT) BILL, 1969 BY SHRI TENNETI VISWANATHAM, M.P.

Monday, the 12th October, 1970 at 11.00 hours

PRESENT

Shri D. K. Kunte—*Chairman.*

MEMBERS

2. Shri C. K. Bhattacharyya
3. Shri Kanwar Lal Gupta
4. Shri Shiva Chandra Jha
5. Shri K. M. Koushik
6. Shri K. Hanumanthaiya
7. Shri S. N. Misra
8. Shrimati Sharda Mukerjee
9. Shri Ibrahim Sulaiman Sait
10. Shri Tenneti Viswanatham.

LEGISLATIVE COUNSEL

Shri A. K. Srinivasamurthy, *Deputy Legislative Counsel, Legislative Department, Ministry of Law.*

REPRESENTATIVE OF THE MINISTRY OF LAW

Shri Dalip Singh, *Deputy Legal Adviser.*

SECRETARIAT

Shri M. C. Chawla—*Deputy Secretary.*

Mr. Chairman: Let us now hear the minister.

Shri K. Hanumanthaiya: I have seen the Bill. I have my own views on the judicial system as such. The opinions I express emanate from the ideas I have formed on the whole judicial system. The cost and the delay are the well known defects of the judicial system. We have been trying to highlight them but none of us have tackled them so far. We had occasion to examine the writ petitions in the Administrative Reforms Commission. In our Report on Personnel Administration we have dealt with in in a way. Some of us were also members of the Constituent Assembly. The constitutional background was the working of British Government and its bureaucratic methods curtailing the rights of the citizens. Therefore, we were over anxious to guarantee that the restriction should be minimum, and liberty extended to the maximum extent possible. Now, after 20 years, in many areas, liberty has been converted into license, conventions have been thrown to winds and indiscipline is the order of the day. Even as the background of Bri-

tish imperialism determined the shape of our rights and responsibilities in the Constitution, we have to take the existing background before we frame any laws or amend any laws, or Constitution.

The writ petitions as applied to the Government servants have been so abused that the Administrative Reforms Commission thought very seriously of taking away this jurisdiction from the High Courts. We suggested the constitution of Tribunals which may consist of High Court Judges and senior people so that these petitions may be disposed of quickly and expeditiously. Now there are writ petitions pending for years between the Government servant and the Government to which certain other Government servants are party defendants. And the amounts spent on litigation exceed their salary and emoluments in some cases and especially when they go to the Supreme Court. The system of Supreme Court litigation is the worst example of not only the cost but also the delay. You have to employ two sets of advocate. If a man goes to the Supreme Court, his case will be pending for years and years and he will be ruined. And in between, the animosity produced between Government servant and Government servant in the office will be such that it demoralises the services. This is the trend.

The other day Mr. A. N. Mulla introduced the Bill to enlarge the jurisdiction of the Supreme Court so as to make certain cases in addition to the death sentence cases appealable to the Supreme Court from the High Court. There was a seminar held at the instance of the Home Ministry and the Home Minister inaugurated it. I, as the Chairman of the ARC, was invited to deliver the valedictory address. Some Supreme Court Judges also attended it. They were very sure that the Supreme Court should be made an ordinary court of appeal, making cases to accumulate. It may not then be able to expeditiously deal with more basic cases pertaining to the Constitution and disputes between the States. Our anxiety to safeguard individual rights should not be such as to make the Supreme Court an ordinary court of appeal. It was not the purpose of the Constitution to make it such a court of appeal. That is the opinion expressed not by me, but by the Supreme Court Judges.

Therefore, I feel impelled to say that I am not in favour of the Bill sponsored by my good friend Mr. Tenneti Viswanatham. Any extension of the jurisdiction is feeding the already worsened evil. There is the all round growing evil of cost and delay. If you take the statistics of all the High Courts and Supreme Court regarding writ jurisdiction, you will find that the number is so reat that you do not know what to do. I would request the Committee to examine the statistics of writ petitions pending and to judge whether additional powers given to the Supreme Court would ultimately work out for the good of the people or not. This indefinite relaxation of time for admission and the hearing of writ petitions would merely add to the existing bad state of affairs. This is my view in short.

Shri Tenneti Viswanatham: I have got the greatest respect for the Law Minister, but let me say this in defence of my Bill. Firstly, this is not trying to expand the area of the operation of the Supreme Court or of the High Court. That is the first point. The heaviness of work of the Supreme Court cannot be a ground. In fact in one of the cases when the argument was raised that if the petitions are not barred on account of delay, the files of the High Courts would increase, the Judge immediately remarked that it cannot be a ground for consideration. There are other means of reducing the files.

In fact, I was one of those who recommended judicial tribunals to be attached to the various departments, so that the service people will not be

driven always to go to a High Court or the Supreme Court through writ petitions. This is a thing which I advanced in a Report on L.I.C. administration under his aegis of the Law Minister, and I am glad that he is in favour of those tribunals. When once those tribunals are appointed, the number of writ petitions by the Government servants would decrease. That is, of course, one aspect.

The purpose of my Bill is limited. There is a guarantee under Article 32. It has two clauses. The first sub-clause says that the right to move the Supreme Court by appropriate proceedings for the enforcement of the rights given under this part itself is guaranteed. The second sub-clause says that the Supreme Court has got the powers to issue directions or orders or writs etc.

Now we have got a list from various High Courts on petitions dismissed in *limine*. When Jabbalpore High Court gave the list of cases which were dismissed on the ground of delay in *limine*, Madras High Court has said that it takes lot of time and, therefore, they are not going to enter into this. The Supreme Court and other High Courts have simply given the number of petitions dismissed in *limine* without saying about the ground of dismissal. It only means that in self-defence, they do not want to make a search into these things and they do not want to tell the public how they are dismissed. They have got the information and they have withheld it. I can easily presume that evidently the conclusion is against them. It means that they or most of them are dismissals the petitions on the ground of delay.

The question is that the right is guranteed and as Justice Das has put it, when once it is established that a fundamental right has been violated, it is the duty of the court to give a remedy. Therefore, what I said is that if there is a remedy available, if there is a right which is enforceable, when once it is established that it was violated, the court has got to look into it. It cannot say that you must have got a right, but because you have come late, your case canot be considered. My purpose is to ask the court to entertain the application.

There are some 400 judges in the various High Courts and there are some 11-12 judges in the Supreme Court. If it entertain a petition is left to the discretion of these judges, it would mean individual discretion of 400 judges in 400 different cases in differet ways. I was not a Member of the Constituent Assembly, but they were very wise men in this particular matter who introduced clause (1) of Art. 32. They said that there is only one Supreme Court and there must be a supreme remedy. The remedy must be open to everybody. If a citizen's right is violated, he must get a hearing at the Supreme Court. All that I say is the the court must hear it and if there is a remedy available, they must not deny it on the ground that the petitioner has come after a particular stated or unstated period.

Now there is one point. The court said in some cases that if the delay is explained, they may admit it. It means that the delay should be explained to the satisfaction of the judges. The petitions may go to the different judges. That means several criteria time to time from court to court from Judge to Judge one High Court is not an apealate court over the other High, and therefore, they will have different criteria and the Supreme Court might have a different criterion.

They are dismissig so many applications on account of delay. What I submit is that the Supreme Court must be told that the right is guaranted under the Constitution and it cannot deal with petitions under Art. 32 in the manner they have been doing.

That is all that I say. I repeat once again that when the Jabbalpore High Court could give the cases dismissed *in limine* on account of delay, why the others could not. They do not give the information, so my inference is against them. Majority of the cases dismissed *in limine* must be on the ground of delay. I want the Law Minister to apreciate this. Therefore, I want the Law Minister to appreciate this view. All that I want is that the petitioner, whose fundamental right is guaranteed, should not be told when he goes to the Court "You have come late. You may have a good case, but we won't look into it". My purpose is very limited. It does not enlarge the area of jurisdiction and it does not detract from the jurisdiction of the Supreme Court. For the present, these are my remarks.

Shri K. Hanumantaiya: The High Court and the Supreme Court should have discretion to judge whether the delay is one of bonafide character or whether the delay is unjustified. This discretion must be left with the Courts; that is my view. If you take away their discretion to judge the bonafide character of a petition relating to time, we would be imposing a mechanical rule of admittting every kind of petition. Therefore, this discretion has to be exercised, and reasons given. Reasons are being given by the Supreme Court. The area of discretion is very limited to the Courts. We cannot cover all cases—alike bonafide and otherwise—Discretion must be allowed to operate.

Shri Tenneti Viswanatham: I had not touched on this point of discretion and I am glad you reminded me. Now, where does this Court get this discretion from? Prior to our Independence, our Courts were representatives of the King. There was no law to bind or restrict the King. So, as his representatives, these High Courts had inherent power wherever the law did not provide any particular power. But now, in India, there is no inherent power. Our power is derived only from the Constitution. The Court cannot have discretion as this is not guaranteed by the Constitution. The High Court has powers derived only from the Constitution and anything which is inconsistent with whatever is contained in this Constitution is itself void. That is what Article 13 says. Now, jurisdiction can be given under the Constitution, but jurisdiction under the Constitution is not discretion. Whether a petitioner has come late or not a Judge cannot have discretion apart from the power under the Constitution. He get it only from the Constitution and so, if any discretion to reject it is to be given, it has to be derived from the Constitution. Now, the Constitution is very clear. They knew that the British Judges and the American Judges were throwing out some petitions on grounds of delay and they did not want that such a thing should happen in India. And, therefore, for the first time, they have re-written the fundamental rights in letters and they said that these rights are guaranteed. Therefore, when a right is guaranteed, the discretion of the Court is cut off. They cannot say "You have come late"; they have no discretion to say so. On the other hand, if any time limit is given and it is to be extended, then they get discretion just as they get it under the Limitation Act. But when the Constituation has not given any discretion, they cannot have it in this manner.

Shri K. Hanumantaiya: The Constitution does give discretion in some areas. It is impossible to frame a Constitution covering all contingencies of huamn affairs. For example, when the Constitution bifurcates the Lists of the States and the Union, the residuary area is given to the Centre. Therefore, to say that everything should be clearly stated in the Constitution, giving no room for exercising discretion, is not a position that can be taken. But I would plead that the discretion already vested in

the High Courts and the Supreme Court in the matter of these petitions may continue. For the last 20 years writ petitions have been filed and the question of delay has been discussed. Therefore, is a case law. I feel that since facts differ from case to case, it is impossible to provide uniform applicable rule for all types of cases. An area as discretion would be necessary in the interests of justice.

My second point is that the Supreme Court itself (I find from the papers) is not thinking of prescribing ..rules. They have not yet done so.

Mr. Chairman: I may mention for your benefit that the Chief Justice has remarked that the prescription of such rules would be *ultra vires* the Constitution.

Shri K. Hanumanthaiya: I did not know that. But I am confident that this discretion of Courts would be allowed to operate.

Shri S. N. Misra: It appears to me that there is difference between the practical experience in the Bar and its theoritical experience. Excuse me for saying so. We are having some practical difficulties and to get over these difficulties, this amendment has to be provided. What the Courts have started doing is—one Court wanted to dismiss a petition when it was only 61 days, other Courts wanted to prescribe only 90 days for limitation. Some of my own writ petitions were dismissed. In all cases, it was barred by time. It is a fundamental guarantee given, and you cannot even prescribe a limitation. You cannot prescribe a limitation and, therefore any limitation prescribing the time by which you should move the High court or Supreme Court will be ultra vires the Constitution. That is the practical difficulty. We are not enlarging the jurisdiction of this amendment. We are only saying that the Court should apply its mind in dealing with this matter. I cannot give you the exact figures, but no less than five to ten cases are dismissed every day without assigning any reasons. Having not applied their mind fully they will only say that it is dismissed. After all, this is a guarantee which has been given to the people under the Constitution and therefore it is our duty to see that that guarantee is fulfilled. If you are afraid of large number of cases coming in, you appoint more judges but there is no justification to say that a legitimate amendment should not come in. There cannot be any limitation as far as the right of the people in moving the court is concerned. Consider the petition on merits and then dismiss it. I think there is no justification in keeping the people shut out for upholding their fundamental rights. After all this is a very ligitimate amendment which my honourable friend has brought forward.

Shrimati Sharda Mukerjee: We are thankful to the hon. Minister of Law for having come here and explained to us about the Bill. The law is getting day by day complicated. Something must be done in this regard. Take the case of Property Law or Law of inheritance. Everyday it is changing. You should not put any limitation on the fundamental rights. This is a basic right of an individual. And we, as Members of Parliament, have to safeguard this right. This right can be safeguarded only in a court of law. If the Government feels that due to backlog of work as a result of a number of cases piling up, let the Government appoint more number of judges. The Company Law and the Income-tax Law are getting complicated day by day. On the one hand you make the laws more and more complicated and on the other you deny the right of justice to an individual.

As far as I am concerned, I cannot agree with the proposition put forward by the hon. Minister that due to increase of work in the courts we

should not support this Bill. On the other hand if he feels that the discretion of the high court is so irrevocable that we may consider and see whether this Bill can be supported in that regard. If there was delay due to negligence on the part of an individual, we can look in to it. I do not think that there is an justification for denying the right of getting an individual's fundamental rights vindicated in a court of law.

Shri Kanwarlal Gupta: I want to understand the problem properly. I am sorry I was a bit late. Suppose if you accept the amendment, what will be its result? Excepting the increase in work, is there anything else?

Mr. Chairman: That is all he said.

Shri K. M. Koushik: There is a blanket power of discretion vested in the high court judges which very often they use it as the Law Minister himself has pointed out. In order to lessen the work this has been found to be a shortcut way. Such a blanket power of discretion of the judges may not be very good at all. On the contrary, such a blanket power may make the litigant to go to the court and challenge that. That, I think, is not a desirable thing. As has been submitted several times many innocent people's property rights have gradually been curbed. There are of course other matters of policy that also come up. It is therefore necessary that in these circumstances, we should devise a way out and we should see that this Bill is passed in such a manner which will certainly restrict the unlimited power of discretion of the judges. And at the same time we should see that we curtail the right of the litigant to come to the court of law after several years. In the meantime intervening rights of others may also come up.

So, taking all these things into consideration, I would say that if the Bill, as proposed, is put in this manner, namely, that no writ petitio nunder Art. 32(1) or under Art. 226 is thrown out merely on the ground of delay, I think, that would serve both the purposes. That is all what I want to submit.

Shri Shiva Chandra Jha: The arguments advanced by the hon. Law Minister are not convincing to me. He started with the historical British background when India was under the British Rule. At that time our liberties were curtailed. When Constitution was being framed, efforts were made to see to it that at least the liberties are guaranteed to the citizens of India. From this point of view, these Articles, as other Articles, were imported into our Constitution. At the same time, the hon. Law Minister has stated that in reality the liberty has become a licence. In other words there have been many cases of enforcement of these liberties as guaranteed by the Constitution in actual practice after independence. So, in reality you accept that their liberties are limited. What is the way out from this? The only remedy is as suggested in the Bill. The Bill will be one more step to broaden the concept that is already put in the Constitution. India is an undeveloped country. We are backward educationally. As already stated by the hon. Member, Shrimati Sharda Mukerjee, the people do not know their rights not because of negligence but because of their uneducatedness; they are not political-conscious. After some time they will know that. Now there is a delay in moving the Supreme Court or other high courts in connection with enforcement of their fundamental rights. Why should they be barred from that justice?

As far as fundamental rights that are guaranteed in the Constitution are concerned, in the proposed Bill, the Supreme Court or the High Courts have got discretionary powers. You know how these powers are used not only by the courts but also by the Governors. There are chances of these discretionary powers being misused. We have to keep ourselves away from

the Supreme Court. We know that the discretionary power itself is conditioned or influenced by certain factors. But on grounds of delay, if the petition is rejected and the Indian citizen is deprived of his fundamental right, it is not very good. That is not to be welcomed. I am in favour of the Bill and I support it.

Shri C. K. Bhattacharyya: Mr. Chairman, I am sorry I came a little late. The hon. Minister has made certain observations. In those observations he has said that the adoption of the amendment proposed by Shri Viswanatham will lead to the increase of work in the court. I do not doubt the correctness of what the hon. Minister has said. It will certainly be increased. But at the same time I feel whether the capacity of our courts of the present day is just in keeping with the requirements of the work that they have to do in dealing with the cases. I was thinking of the Calcutta High Court—the High Court which has produced very great judges. In the pre-Independence period, or even before that, before Bihar was separate, the Calcutta High Court, I believe, had a total of 15 judges and with these 15 judges the High Court exercised its jurisdiction over Bengal, Bihar, Orissa and Assam. The fifteen judges were quite enough to deal with all the cases arising from what are now more than three provinces. Now, Assam has gone out, Bihar has gone out, Orissa has gone out, and Bengal has now been reduced to one-third of it, but the number of High Court judges is going up and up and the cases are remaining undisposed. So the problem of increase of work, I believe, cannot be solely attributed to the adoption of the amendment which has been proposed. That should be probed and found out elsewhere.

I am reminded of the example of a British District Judge. This District Judge went out to find out the cases pending in the courts of the junior judges under him. In the court of one judge he found that the number of cases was rather large. He asked the judge why so many cases were pending before him. The judge said, "Sir, what can I do? After all, I have to do justice. Therefore, these cases required examination". And I do not vouchsafe for the correctness, but the saying goes that the supervisory judge observed, "Who has asked you to do justice? You are here to dispose of cases."

So, instead of the possibility of adding to the number of cases to be dealt with by our present-day judges, the merit of the proposition presented before the committee in the Bill deserves consideration. And in the interest of the people being able to enjoy the fundamental rights as prescribed in the Constitution, I am of the opinion that this proposal ought to be accepted and the Constitution amended as suggested.

Shri Ebrahim Sulaiman Sait: Mr. Chairman, I have heard the Law Minister with great patience, but I would say that I do not agree with him, when he says that just because there will be lot of load in the courts and there should be a time-limit. You will deprive a person from just getting justice because of delay and it will go against the fundamental rights of citizens also. No doubt, these days justice is very much delayed. But steps should be taken to see that cases are disposed of at every stage and justice is done to people as early as possible. I would say that delay should not be the only criterion to dismisss the appeal. If there is some delay, there is no justification that delay alone should deprive a person from justice being done to him under the rights guaranteed by the Constitution.

Shri Kanwar Lal Gupta: I think the view taken by the Minister is one extreme because to say that you do not want writ petitions because it will increase the work is not a good argument. But at the same time there is another aspect suppose you permit the writ petitions after 10

years, 20 years that will also create complications. So, some *via media* may be found out in the sense as suggested by Mr. Koushik. Suppose there is negligence on the part of the claimant in that case the court may dismiss the writ petition but otherwise the petition should not be dismissed only on the matter of delay.

Mr. Chairman: The Committee had the benefit of hearing eminent jurists like Palkhiwala, Shri Seervai and others. Shri Seervai was totally against while S|Shri Seetalwad and Daphtry accepted certain relevance in the amendment proposed. They felt that in the wording of Article 32 and 226 there is lacunae and found it was really necessary that the wording of 32 and 226 should be different. Even Mr. Seervai wanting no amendment found out that Article 226 was more restrictive than Article 32. Mr. Palkhiwala aruged that in a free country the rights of individuals are wide but at the same time there is another aspect that today the State is becoming so supreme that the individual freedom is so insignificant and have no protection of law. The power of the executive is like steam-roller. Therefore, the legal protection of the judiciary that is made available under Article 32 it has got be guarded.

As regards the point regarding the work of the courts increasing I would like the survey to be made by the Law Department whether work has increased in proportion with the statutes placed on the statute book or not. To my mind the work has not really increased to the tune of statutes put on the statutes book. Earlier the State was concerned only for maintaining law and order but today State is entering into every field—what dress I should wear, how many children I should have, etc. During the British period at least when a Bill was published it was published and sent to the law courts where the lawyers and others discussed it. Today it happens that we get notice of a Bill in the morning and dispense away with the rules of procedure, take it up for discussion in the afternoon and pass it in the evening. Therefore, if at all the work in the courts has increased it is because we leaders have found it worthwhile increasing statutes on the statute book. Under the circumstances, I would like the Law Minister to enlighten whether the work has increased in proportion to the statutes put on the statute book.

Then as regards the point regarding discretion of the judges, today encroach upon the discretion of the judges at all. The reasons for delay should be looked into. As a matter of fact if we remember aright on the previous occasion it was pointed out there were number of cases where inspite of the fact that delay was four to five years even then justice had been done. Therefore, it only means that in those cases the judge did recognise that the delay was legitimate. So, therefore, this is exactly the point whether the delay is legitimate? That has got to be examined. If the delay is legitimate, how will it be examined?

There is no condonation of delay as far as the Fundamental Rights are concerned. In cases which have been supplied by the Ministry of Law where delay has not been barred to Fundamental Right being exercised, it also shows that there are a number of cases where the delay was unavoidable. If the delay is unavoidable, who is to judge? How is it to be judged?

Shri Kanwar Lal Gupta in his points has said that in case a person comes very late, it might be that something had happened in between and, therefore, new positions are created. This delay does not clarify those positions at all. If there is negligence on the part of the party concerned, the Petition could be dismissed. Then one point which he made—as regard to the Government having passed the order Gov-

ernment is also expected to apply its mind. If it has passed an order and created problem for it, I do not know whether one should go along with it.

The first Bill which the Fourth Lok Sabha considered was ordinance passed to set aside the decision of the Supreme Court in regard to land acquisition, passed in 1894 not imagining the circumstances in which lands are being acquired to-day or acquired during the last few years. There have been strong decisions of the High Courts wherein actions of the State Governments and Central Government have been heavily criticised. Now, the last decision came was that the Land Acquisition Act is one process. In that one process it was found out that certain lands were notified for a number of years. Part of it has been taken—say one thousand acres out of five thousand acres. Rest of the land was again denotified. It was again notified when required. For that also we are to be blamed. We converted that ordinance into law. That was the first time when I came to Lok Sabha. Every one except the Minister spoke against the Bill—activity of the land acquiring Department—and yet because of the majority ordinance was converted into law. I asked for Division. I said I want to put again on the record. This is something which has got to be taken note of. I believe we have placed many statutes on the Statute Book. We are creating complications.

Let me ensure the Law Minister that this Committee does not want to carry on anything which discourages the judges. But where the statute of the Constitution lays down a particular position, where there is limitation placed on the judges, on the President, Governor or an individual, they must be bound by that.

The evidence of Shri Seervai was on limited ground. He wanted to say that this was in Britain. He wanted to say that there is limitation on writs under statute. Therefore, it should apply to all the writs. If that was the position. One does not know whether the framers of the Constitution were not aware. They were aware. Shri Seervai wanted the Constitution to be amended. Our right to writ should be further limited. Therefore, the limitation should be laid down.

He was of the opinion that fundamental Right could also be amended.

Shri Seervai, while opposing the Bill and supporting the existing position, he was of the opinion that existing position is anomalous.

These points have got to be taken into consideration.

The last point which I would like to say is that it is the duty of the State, especially when it is the Welfare State to protect the rights of the individual at any cost. If there are many statutes on the statute book, as a matter of fact rub out a number of statutes so that there is simple rule.

Now there will be pedestrian rule as also how the vehicle should run and at what speed, with the result if a pedestrian is killed, does very little justice to who was in the wrong.

We have taken the situation as the framers of the law have studied. We have put them on the statute book. Therefore, we have to take into consideration the position that we have. We are not suffering at all. This is the situation created not by lay man like Vishwanatham but by Government deliberating Bills before the House to add to the statute book. Shri Vishwanatham has tried to tell the judges, do not get dis-satisfied with the position, bear with it and look at it on merits and you can also dispose of it. It relates to the situation created by the Government themselves—large number of statutes on the statute book.

Shri Kanwar Lal Gupta: On the points raised by the Members, will you say something?

Shri K. Hanumanthaiya: There are very many arguments including that of the Chairman which are general propositions with which I have no quarrel. If he says that the majority is made by whips and legislation is passed in haste, it may be true or untrue. Every Government works that way. Therefore, that is not an argument which will weigh in the legal field. The Parliamentary system works in that way. Even if other parties come into power, they will work in the same way. Therefore, I do not deal with these general propositions. The crux of the problem is that there is no difference of opinion regarding the fundamental rights which we are discussing; those rights are guaranteed. The observations are all accepted propositions. There is no difference at all. Whether the delay should not at all be a reason for rejection is the limited question. I am not able to see the point of this Bill. I will tell you frankly. The courts have been liberal in interpreting the delay in the matter of admission and adjudication of these petitions. There are some cases where even 15 years delay was condoned.

Mr. Chairman: I might mention that the evidence does not support this argument. 'The judges have been liberal'. There is no evidence. It is on the contrary. It only proves that even that delay was a legitimate delay. But it does not prove the liberality of the judge.

Shri K. Hanumanthaiya: In a court of law, decided cases will be taken into consideration. There is no question of evidence being adduced on that point. There need not be evidence on that point. For the last 20 years courts have exercised direction.

We must leave it to the courts to judge the nature of the delay and period of delay which will justify a court to admit or not to admit a writ petition. To say that each court will decide in its own way or each judge will decide in his own way is not a sound argument. If that argument is to be logically followed, there must be only one court and only one person. We do not go to that extreme position of misconstruing every proposition that is made. The Government is satisfied that the judicial system in this matter is liberal enough. It is considering in each case what is delay which is excusable. We would like to leave it at that, instead of amending the Constitution itself for an imaginary grievance. That is all I say.

Mr. Chairman: We will meet tomorrow at 11 a.m. There are a number of amendments by Shri C. K. Bhattacharyya.

(The Committee then adjourned).

GMGIPND—LS I—3433 (E) LS—14-1- 71—1170.