DISOBEDIENCE TO UNLAWFUL SUPERIOR ORDERS

JAYA PRAKASH NARAIN during his Bihar movement had called on army and police that they should not carry out the unlawful orders of the government. He was accused by the then ruling quarters of preaching indiscipline and sedition. During the internal Emergency proclaimed on 25 June 1975, it is now clear, excesses were committed by the police and other civil servants of the government under various unlawful orders from the superior authorities. Army was however, spared.

This raises a question of elemental importance for public servants : Is a government servant bound to comply with an unlawful superior order ?

Those who reply in "yes" generally give three arguments in their support.

1. If a government servant were not bound to obey all orders—lawful or otherwise—of his superiors, it would generate indiscipline in the services.

2. If a government servant defy the superior order he would be liable to punishment.

3. "How can a government servant know that a particular order is lawful or not ?" As he cannot know the lawfulness or otherwise of the superior order, he is concerned only with carrying that out.

These arguments *prima facie* appear to be sound but a deep analysis would show that they are without substance.

With regard to the discipline argument, no doubt discipline is essential in government services, nay every walk of life. If the government servants are indisciplined, no government can implement its policies and programmes. The army may refuse to defend the country from an external aggression or control internal disturbance ; and the police may refuse to maintain law and order.

But every government has to function by and under law. This is true even of monarchical and dictatorial regimes. Though the King or the dictator may be above law in the sense that he can make and unmake any law,[1] yet all the functionaries below have to abide by the law. In a democracy, rule by law is unexceptional.

---

1. Under the *Shastric* Hindu law the position was different. The king had no power to make law. This power was conferred by the *Shastras* on the ascetics. But with the passage of time, when the ascetics disappeared and the king became all in all in society, the Hindu king also rose above law. His command became law. In *Shri Govindlalji* v. *State of Rajasthan*, A.I.R. 1963 S.C. 1638, Gajendragadkar, J., (as he then was) held that a Hindu king possessed as much legislative, judicial, and executive sovereignty as any absolute monarch. A *firman* issued by him had the force of law.

Every official in the government thus has to act in accordance with law, and this limits his power as to the nature of the order he can issue to his subordinates. He cannot give any order which is unlawful. He can issue only those orders which are consistent with some law or the other. If he is given the freedom to issue order of any nature, lawful or unlawful, there would be no rule of law in the government. Such a government will be a government of arbitrariness of every official. If a superior can give an arbitrary order contrary to the law, and the subordinate is bound to carry it out, it will be a situation of lawlessness, and the rights of the individuals can be injured at the whim and capriciousness of an official. Such a situation may lead to mass abuse of governmental authority.

It is axiomatic that rights and duties correspond with each other, that is to say that if a person is entitled to some right then some other person is subjected to some corresponding duty and if he is not entitled to a right nobody is encumbered with a corresponding duty. From the application of this axiom to the situation that nobody in the government has a right to issue an unlawful order, it would naturally follow that his subordinates have no duty to carry out his unlawful orders.

In fact, when a superior gives an unlawful order to his subordinate the relationship of superior and subordinate between them ends there for the purposes of that order. The obvious reason is that the relationship between two individuals of superior and subordinate is created by some law. The law also defines the field within which they are bound by that relationship. Outside that field they like other free citizens are equal to each other. When an authority gives an unlawful order he places himself outside that field. The person who is his subordinate inside that field is no more his subordinate for the purposes of carrying out that unlawful order. If he does carry out that unlawful order he also steps outside the field of law and reduces himself to a private person (for the purposes of that order) from the level of a government servant. This obedience cannot be called the discipline of the public services by any stretch of logic.

In *Queen Empress* v. *Latifkhan*[2] Jardine, J., has rightly said that "The only superior is the law." Therefore, discipline in government service means "discipline to law" and not to the man who is in authority for the time being. When that man himself goes against the law disobedience to him cannot be called indiscipline in the eye of law.

The legal position is not only this that government servant does not violate discipline by disobeying an unlawful order but on the contrary, by such disobedience, he observes and upholds discipline and saves the government from straying into the morass of indiscipline. Hence in the name of discipline it is obligatory on the part of every government servant

2. I.L.R. 20 Bom. 394 (1895).

to refuse to carry out deliberately and assertively an unlawful order of his superior.

In *Charan Das Narain Singh* v. *The State*[3] one Havildar Harnam Singh ordered his subordinate Charan Das to fire in the circumstances which the court held did not in law warrant such an order. The court held that the order of Harnam Singh was unlawful and observed : "In fact, his (of Charan Das) duty in the circumstances was to disobey any such absurd order which had not the slightest justification in law."[4]

Sir James F. Stephen, a great criminologist, also opined:

> The doctrine that a soldier is bound under all circumstances whatever to obey his superior officer would be fatal to military discipline itself, for it would justify the private shooting the colonel by the orders of the captain, or in deserting to the enemy on the field of battle on the order of his immediate superior.[5]

The second argument in favour of carrying out the unlawful order is that if the subordinate defies his superior he could be punished. It is based on a mistaken view of law. Law punishes only for those acts which are wrong. Wrong means the violation of another's right or the non-performance of one's duty. It is no right of any superior authority that his unlawful orders are to be carried out and again it is no duty of any government servant that he is to obey even an unlawful order. Law obliges him only to execute the lawful orders. Logically it is impossible for law to punish the disobedience of an unlawful order. Punishing the disobedience of an unlawful order would be suicidal for law itself. How can law make the unlawful order binding ?

The concrete provisions of the law relating to the armed services may be referred to here for proving the soundness of the above proposition.

Section 23 of the Police Act, 1861 provides : "It shall be the duty of every police officer, promptly to obey and execute all orders and warrants lawfully issued to him by any competent authority."[6] It is necessarily implied by this that a police officer has no duty to carry out an order issued unlawfully.

The Army Act, 1950 punishes the disobedience of only the lawful orders. Section 41 of that Act lays down :

> Any person subject to this Act who disobeys in such manner as to show wilful defiance of authority, any lawful command given

3. A.I.R. 1950 (East) Punj. 321.

4. *Id.* at 323, per Soni, J.

5. Stephen, 1 *A History of the Criminal Law of England* 205 (1883).

6. It is submitted here that 'lawfully' means that the orders and warrants must be lawful both substantially and procedurely. In *Hiralal* v. *Ramdulare*, A.I.R. 1935 Nag. 237, it was held that when s. 165 of the Code of Criminal Procedure, 1898, required the city inspector to issue any warrant of search to a subordinate officer in writing, the giving of such an order orally was not an order issued lawfully.

> personally by his superior in the execution of his office...shall on conviction by court martial be liable to suffer imprisonment....

Sections 41 and 64 of the Air Force Act, 1950 and section 47 of the Navy Act, 1957 also lay down exactly the same provision. Section 29 of the Police Act, 1861 also punishes the violation of only the lawful order.

When disobedience to the lawful orders only is made punishable, the necessary implication is that disobedience to an unlawful order cannot be visited with any punishment by law.

On the other hand if an official by his unlawful action injures an individual, he incurs liability under the law, and superior order is no defence. It has been held in a number of cases extending back to the last century that if a government servant does a wrong, he cannot be excused on the ground that he did it in obedience to an unlawful order of his superior. He is responsible for his act and liable to punishment.[7]

In *Queen Empress* v. *Subba Naik*[8] the station house officer ordered his constable to shoot at some reapers in the circumstances in which the court found that the order was not lawful. One reaper was killed. The court held that both the station house officer and the constable were guilty of murder and the constable was not protected in that he obeyed the orders of his superior as the order itself was unlawful.

In *Chaman Lal* v. *Emperor*[9], Chaman Lal, the deputy superintendent of the new central jail, Multan, and Sawan Ram, the head warder of the jail, were accused of beating some prisoners mercilessly as a result of which two prisoners died. It was pleaded on behalf of Sawan Ram that he was acting under the orders of his superior officer Chaman Lal. The court held that all the accused had been in jail for some time and they must have known that merciless beating of the convicts was contrary to law and that it was no defence that Sawan Ram acted on the orders and out of fear of his superior officer.

Although it is generally thought that obedience to the superior officer is the quintessence of the military service yet the legal position of a soldier is that if he does an unlawful act he cannot plead the superior order in his defence. Here also discipline does not carry any special significance. The reason is obvious. Obedience to an unlawful order is not discipline, nay the real discipline lies in its disobedience.[10]

Dicey is also of the same view. He says "When a soldier is put on trial on a charge of crime, obedience to superior orders is not of itself

---

7. *Queen Empress* v. *Latifkhan*, *supra* note 2 ; *Queen Empress* v. *Subba Naik*, I.L.R. 21 Mad. 249 (1898) ; *Maung Pu* v. *Emperor*, 8 Cr. L.J. 68 (1908); *Emperor* v. *Wajid Hussain*, 11 Cr. L.J. 374 (1910). *Allah Rakhio* v. *Emperor*, 26 Cr. L.J. 142 (1926) ; *Hira Lal* v. *Ramdulare*, *supra* note 6 ; *Chaman Lal* v. *Emperor*, A.I.R. 1940 Lah. 210 ; *Mahmoodkhan* v. *Emperor*, 54 Cr. L.J. 888 (1942).

8. *Supra* note 7.

9. *Supra note 7.*

10. *Charan Das Narain Singh* v. *The State*, *supra* note 3.

a defence."[11] But he proceeds to say that a soldier disobeying unlawful superior order may be punished by the court-martial, which view does not seem to be correct. To quote him :

> This is a matter which requires explanation. A soldier is bound to obey any lawful order which he receives from his military superior. But a soldier cannot any more than a civilian avoid responsibility for breach of the law by pleading that he broke the law in *bona fide* obedience to the orders (say) of the Commander-in-Chief. Hence the position of a soldier is in theory and may be in practice a difficult one. He may, as it has been well said, be liable to be shot by a court-martial if he disobeys an order and to be hanged by a judge and jury if he obeys it.[12]

A similar opinion has been expressed by Rattigan, J., in *Niamat Khan* v. *The Empress*[13] as early as a century ago. He said :

> Thus in the case of a soldier, the Penal Code does not recognize the mere duty of blind obedience to the commands of a superior as sufficient to protect him from the penal consequences of his act. Difficult as the position may appear to be, the law requires that the soldier should exercise his own judgment and unless the actual circumstances are of such a character that he may have reasonably entertained the belief that the order was one which he was bound to obey, he will be responsible like any other sane person for his act, although he may have committed it under the erroneous supposition that his superior was by law authorized to issue the order....Such a construction of the law may indeed subject the soldier to military penalties, and, in certain cases, place him in the serious dilemma of either refusing to obey an order which he believed to be unjustifiable in fact, thereby rendering himself liable to military law, or by obeying it, to subject himself to the general criminal law of the land.[14]

The above view is based on the assumption that there is a contradiction between the civil law and the military law of a state; and the civil courts and the military courts may in the same fact situation apply different rules. This is not correct. It is a postulate of law that there is no contradiction in a legal system. This postulate is observed in the interpretation of the statutes.[15] If there is an apparent contradiction between this two legal provisions they should be so interpreted that one

---

11. A.V. Dicey, *Law of the Constitution* 302 (10th ed.).
12. *Id.* at 303.
13. 17 P.R. 29 (1883).
14. *Id.* at 39, quoted in the *Charan Das* case, *supra* note 3 at 323.
15. *Maxwell on the Interpretation of Statutes*, 187-198 (12th ed., by P. St. J. Langan, 1969).

does not go against the other. Applying this principle a subordinate ignoring the unlawful order of his superior may not be punished by the military authorities. Section 41 of the Indian Army Act makes it quite clear that a person shall be liable to punishment if he disobeys only the *lawful* orders.

Though there is no escape from punishment on the plea of the superior order, the punishment may be mitigated in its discretion by the court. This is due to the relative helplessness of the subordinate. It may be supposed that had he been quite free, he would not have done the illegal act.[16]

In *Queen Empress* v. *Subba Naik*,[17] a police constable fired at and mortally wounded a person on the order of his superior officer in the circumstances which the court found insufficient for ordering the firing. The court awarded ten years rigorous imprisonment to the officer who gave the unlawful order and seven years rigorous imprisonment to the constable who fired the fatal bullet.

In *Charan Das Narain Singh* v. *The State*,[18] an armed constable fired at and killed a person on the unlawful order of his superior officer. The sessions court sentenced him to transportation for life. But the Punjab High Court recommended to the Punjab government to reduce his sentence to three years rigorous imprisonment because the constable was a raw youth of twenty, he had been recently recruited to the armed service and he might have had an exaggerated notion of his duties or of the authority weilded by his superior officer.

The mitigation of the sentence ought to be based on some reasonable grounds like the age of the accused, experience, knowledge, the reluctance in obeying the unlawful order (for example where he does not carry out the unlawful order at the first instance but is pursuaded to act on it on repeated urgings), threat given to him in case he refused to carry out the order, the amount of force used by him, the heinousness of the crime, the active participation of the superior officer himself in doing the illegal act, *etc*.

Even under international law the position is that if a soldier violates the laws of war, he can be punished by the very state or his own state for the same,[19] and superior order is not a defence. After the World War II the victorious allied powers tried some German soldiers for committing crimes against humanity and war crimes by instituting an international

---

16. *Niamat Khan* v. *Empress*, *supra* note 13; *Queen Empress* v. *Latifkhan*, *supra* note 2; *Queen Empress* v. *Subba Naik*, *supra* note 7; *Emperor* v. *Wajid Hussain*, *supra* note 7; *Allah Rakhio* v. *Emperor*, *supra* note 7 ; *Chaman Lal* v. *Emperor*, *supra* note 7; *Charan Das Narain Singh* v. *The State*, *supra* note 3.

17. *Supra* note 7.

18. *Supra* note 3.

19. Gen. (1971) Ass. Res. No. 95 (L) of Dec. 11, 1946. See Oppenheim, II *International Law* 582.

military tribunal. [20] The accused argued in their defence that they were not personally responsible and punishable for the war crimes committed by them because they acted on the orders of their master Herr Hitler. The tribunal rejected their plea because article 8 of the Charter of the International Military Tribunal provided:

> The fact that the defendant acted pursuant to order of his government or of a superior shall not free him from responsibility but may be considered in mitigation of punishment if the Tribunal determines that justice so requires. [21]

It was also pleaded before the tribunal that the provision of the charter was itself obectionable, being a piece of *ex post facto* criminal law. The tribunal replied that the provision was in conformity with the law of all nations. In the words of the tribunal :

> That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defense to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment.[22]

"The general principles of law recognized by the civilized nations" are accepted as a source of international law by the Statute of the International Court of Justice.[23] That was the reason that the tribunal accepted the above provision of its charter as a rule of international law.

Another international military tribunal tried the Japanese war criminals at Tokyo. There also the defence of the superior order was turned down. The U. N. General Assembly also has approved the provisions of the Nuremberg Charter in this respect.[24]

Several countries have enacted in their municipal law provisions which prohibit soldiers from committing war-crimes by violating international law. The soldiers of those countries which have not made such a provision in their municipal law are also subject to international law. The reason is obvious. No state can make or unmake international law unilaterally by framing its own municipal law according to its own intents and purposes. The soldiers of the latter countries however stand on the horns of dilemma. If such a soldier obeys superior orders contrary to international law he becomes punishable under international law, but if he disobeys he

---

20. International Military Tribunal (Nuremberg) Judgment and Sentences, 41 *A.J.I.L.* 172 (1947).

21. 39 *Supp. A.J.I.L.* 260 (1945).

22. *Supra* note 20 at 221.

23. Art. 38 (1). The International Court of Justice, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply : (*c*) the general principles of law reorgnised by civilized nations.

24. *Supra* note 19.

could be punished under the municipal law. It is submitted that the municipal law of every state should be in accord with international law in this matter.

It is the duty of every government servant to inform and guide his superior that an order of the latter is (if it is so) inconsistent with somelaw and that should be withdrawn. Even a clerk at a lower rung of the administrative hierarchy has a duty to note in the file that in his opinion the order of the superior is opposed to the law. The making of such an observation is neither indiscipline nor punishable because this is indeed the most faithful discharge of his duty by the subordinate. The higher we rise in the ladder of the administrative structure the more pressing becomes this duty of the government servant in this regard.

The third argument in favour of obeying an unlawful order is that every subordinate cannot know the legality or otherwise of the order. If he is given time to obtain information so that he may study or consult a lawyer in the matter it would be injurious to administrative efficiency.

The jurisprudential position is that ignorance of law is no excuse. Though somewhat arbitrary,[25] this position is basic to the administration of law. Law is to be applied irrespective of the fact that a person knows it or not.And on its breach a person, who is ignorant of it or who cannot even be supposed to know it, is as much guilty and punishable as a man who has the rules of law at his finger's ends. Hence, the subordinate who acts on the unlawful order of his superior will be hauled up before law notwithstanding the fact that he did not know the illegal nature of the order.

As a practical matter also it can be said that government servants have ample knowledge of their legal rights and duties. At the time of their appointment they are tested in subjects which relate to their work. While working in their office or posts they, by virtue of their experience, come to learn a lot about their legal status. Further, at some levels the government servants are expected and required to possess wide and deep knowledge of law. They have to assist to a sizeable extent in the making and unmaking of laws. They can count at the tips or their fingers the provisions of law or can readily get them by a few references.

Frequently, the contents of the order themselves speak out its legal character and nature. For example, if an officer of any unit of the armed forces orders his soldiers to surround and bombard the *Rashtrapati Bhavan*, arrest the President or kill him, the illegality of the order would be self-evident to each and every member of the unit. Such examples can be multiplied *ad infinitum*. Rare would be the examples of orders which require any intensive and extensive study to determine their legality. In such cases the government servant is put in a difficult position. If the order is lawful, its defiance will be punishable by the government, but if it is otherwise its obedience will subject him to punishment by the courts at the instance of the aggrieved individual. The government servant has to run a risk

25. *Salmond on Jurisprudence* 395-96 (12th ed., by Fitzgerald, 1975).

on such occasions. If we wish to maintain the rule of law we cannot allow a government servant to submit to any and every order—lawful or unlawful—of his superior. In other words, he has to be subjected to the occasional risks when the orders are of doubtful legality. Rule of law is to be preferred to any risk of internal disciplinary action against the government servant in such a case. It is by all calculations a lesser evil. If there is no rule of law life, liberty and property of all the citizens would be endangered.

The argument of efficiency in support of the proposition that a subordinate has to comply with the superior order even though illegal is not a cogent one. Only a few decisions of the government are meant for immediate implementation. Generally the government decisions have to pass through a zig-zag way from clerk to the secretary before reaching their destination. The governmental efficiency and promptness are valuable in themselves but certainly not at the cost of freedoms of the citizens which can be ensured only by the rule of law. If at all any injury is caused to the administrative efficiency that would be many times more tolerable than the absence of the rule of law. Rule of law is to be cherished as a fundamental norm of the political and legal philosophy and is to be followed by every government.

It would not be irrelevant to raise the problem here whether a government servant is bound to obey a lawful but immoral order of his superior. The question naturally arises because in many cases there is divergence between law and morality. It is submitted that every lawful order is binding on the government servants. The fact that it is not based on morality is no defence for its disobedience in a court of law. It is quite possible that a government servant may feel that in the interest of social good he should not carry out an unjust though a legal order. In such a case he should have the courage to resign from government service rather than disregard the order. Though a lawful order may not be based on morality, yet its defiance itself is immoral as compliance with law is in the interest of society. It would not be proper on the part of morality to generate disrespect for law. Resignation by a government servant in such a case preserves on the one hand, discipline in government service and, on the other, keeps morality beyond reproach.

It is submitted that law should help the conscientious person. It may be provided that if any person resigns on the ground of conscientious or moral objection to any lawful order, he should be readily permitted to do so and not subjected to any kind of punishment. It is in the interest of the stability of law to make such a provision. Law gets stability not only from the external force at its back, but the true secret of its stability is the support and submission it gets from the good citizenry. If law is oppressive of the good citizenry, people would rise against it. [26] The refusal of permi-

26. Wyzanski, C.J., of the U.S. Distt. Court of Massachusettes has rightly observed in *United States* v. *Sisson* thus :

ssion to resign to the conscientious objectors or the infliction of any kind of punishment on them is a suppression of good citizenry.

The above discussion yields the following conclusions :

(*a*) Obedience to an unlawful order is not discipline.
(*b*) Disobedience to an unlawful order is, on the contrary, discipline.
(*c*) Disobedience to an unlawful order is not punishable under law.
(*d*) Obedience to an unlawful order is, on the contrary, punishable under law.
(*e*) Ignorance of law is no defence for obeying an unlawful order.
(*f*) It is the function of the government servant to resist or object to the unlawful order of the superior.
(*g*) A government servant cannot, while in service disobey a lawful order even though it is immoral.

Loknayak Jaya Prakash Narain was just reminding the members of army and police of their duty under the law when he appealed to them to refuse to carry out the unlawful orders of the government. He had, perhaps, the premonitions that those who were seated in power might flout the Constitution and law of the land and might use army and police against the people in violation of the provisions of law to serve their personal and selfish ends. He felt it necessary to tell them their duty in unmistakable terms lest they cherish any misgiving on this issue.

Apprehensions of *Loknayak* came true. It is now clear that during the internal Emergency the men in power used government servants for various illegal acts. The latter played the servile role of the most slavish type. May be, it was not clear to many of them that they had no duty to obey the unlawful orders; or may be, they carried out unlawful orders out of fear for themselves; or they found it otherwise profitable to play at their masters' tune. Whatever be the reason they had under the law an obligation to refuse the implementation of unlawful orders. Had this happened the people would have been saved of the misery and harrassment which they suffered on account of illegal orders. It is the solemn responsibility of every government servant not to abide by the unlawful superior orders and thereby contribute to the rule of law.

*R. C. Nagpal**

When the State through its laws seeks to override reasonable moral commitments it makes a dangerously uncharacteristic choice. The law grows from the deposits of morality. Law and morality are, in turn, debtors and creditors of each other. The law cannot be adequately enforced by the courts alone, or by courts supported merely by the police and the military. The true secret of legal might lies in the habit of conscientious men disciplining themselves to obey the law they respect without the necessity of judicial and administrative orders. When the law treats a reasonable conscientious act as a crime, it subverts its own power. It invites civil disobedience. It impairs the very habits which nourish and preserve the law.

See Kenneth Kipnis, *Philosophical Issues in Law : Cases and Material* 162 (1977).

*LL.M., Lecturer in Law, University of Lucknow.