

THE COMMAND AND CONTROL MODEL FOR GOOD GOVERNANCE OF PUBLIC TRUSTS
— AN EVALUATION OF THE BOMBAY TYPE OF REGULATORY REGIME¹

Prof. P. Ishwara Bhat²

Introduction

The patterns of regulatory regimes vary with the rigour of their enforcement methods. Community participation model harps on the effort of consensus building and voluntary action mechanism. Economic incentive model tries to win through facilitating comforts. In contrast, the Command and Control model (CAC) lays down normative standards and sternly enforces them through sanctions.³ The Bombay Public Trusts Act, 1950, (BPTA) and its genre appears to employ the CAC model.

CAC envisages use of hierarchic relation between the regulator and the regulated for effectuation of the legal commands through strict legalism.⁴ Its categorical do's and don'ts have educative, normative and disciplinary impact. It does not totally rule out use of participative and incentive approaches. It has either monolithic or hierarchical type of agency or a well knit network for implementation of policy. Persuasion, guidance, supervision, persuasion, inspection, adjudication, review and implementation of decision are the functions which keep CAC bristling with activities. Robustness of its functioning depends on its institutional efficacy to integrate various facets of its functioning. Asserting jurisdiction upon the subjects of its governance through the process of registration or licensing is the starting point of CAC's regulatory regime, and ensuring compliance with law is its mission. However, the weakness of the CAC is that it might underplay people's participation, decentralized

decision making and incentives for compliance, and get alienated from social functions because of its rigidity and lack of sensitivity. Further, the regulator's superior official position might breed red-tapism, bureaucratic opaqueness, and delay. There is also apprehension of marginalizing the indefinite and fluctuating class of beneficiaries like devotees, schoolchildren, parents, wards or inmates and trustees instead of supporting Public Trust's (PT) social service activities. CAC model needs to countervail the vulnerability of PT to free rider's arrogances, frauds, indifferences and callous approaches by combining the law's creativity and equity's concern for justice.

The present paper attempts to survey the CAC model of the BPTA and its genre, and examine whether its disciplinarian approach or bureaucratization in the purpose compliance function suffocates free air of social innovation and participation; whether it accommodates adequate diversity that is required of a multicultural society; does it allow the endowments to act as instruments of human right defense, especially for education, health and food security by ensuring good governance; and whether the safeguard systems against abuse of Charity Commissioner's (CC) power are effective and pragmatic. Since the institution of public trust thrives on the trustworthy conduct of the trustees and satisfaction of social expectations by fair management of future as opposed to distrust, the policy on these matters need to promote these objectives. Trusts presuppose cooperative living, moral economy,

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²Vice Chancellor, the West Bengal National University of Juridical Sciences, Kolkata.

³While CAC is employed in ensuring efficacy of economic enterprises, its extensive application can be found in the sphere of environmental law where step-to-step controls attempt to avoid abuses and environmental degradation. <http://www.britannica.com/topic/command-and-control-legislation> visited on 12/6/15.

⁴"The concept of control implies that the controlling officer must be in a position to dominate the affairs of its subordinate. It is unless otherwise defined would be synonymous with superintendence, management or authority to direct, restrict or regulate. It is exercised by a superior authority in exercise of its supervisory power." Per Sinha J in *Prasar Bharti Vs. Amarjeet Singh* AIR 2007 SC 1269; as per section 3 of BPTA, the CC shall superintend the administration of PT. Chapter VI has the heading 'Control'.

and active social capital.⁵ They grow from donor's hope, community's confidence, emotion of assured expectation and commitment to help others.⁶ Their support to socio-cultural life of the society, welfare justice and human rights is huge. Keeping them active, healthy and free from abuse is a legal and moral responsibility.

After a brief peep into history, this paper analyses the reach of the law by looking to the definition of public trust and related concepts. The composition, powers and functions of, and controls over Charity Commissionerate, which is the kingpin of control mechanism, will be examined. The legal space provided for participation of persons interested in the PT will be surveyed. The relation between the Society Registration Act and BPTA will also be examined. The process of bringing the PTs to legal regime, the normative regime of commands and directions, and the means of control over PTs will be explained. Comparisons with other models and systems will be made and inferences will be drawn on the issues raised.

Historical background

The traditional law of endowments had relied on the trustworthy conduct of individual shebait and mahants, on community's participation in the oversight of the endowments, and on judicial or royal interference to rest on the purposive scheme. The pre-1950 legal position in Bombay province witnessed co-existence of diversity of community specific laws.⁷ Continuing this legal policy, the Justice Tendulkar Committee recommended to the Government of Bombay for enacting comprehensive law with Charity Commission's central role in implementing the policy on the lines of the British Charity Commission. Emerging from this background, the Bombay Public Trusts Act, 1950,

had the objective to regulate and to make better provision for the administration of public religious and charitable trusts in the State of Bombay. After the reorganization of the states in 1960 the State of Gujarat enacted to adopt the Bombay Public Trusts Act, 1950 into Gujarat and finally enacted the Gujarat Public Trusts Act, 2011. The State of Rajasthan enacted the Rajasthan Public Trusts Act, 1959 replacing the regional laws of Bikaner and Jaipur and the Central Law without disturbing the application of the Wakf Act and Rajasthan Nathdwara Act 1959. The Madhya Pradesh Public Trusts Act, 1951 also provided for better administration of religious and charitable trusts of public character. The Bihar Hindu Religious trusts Act provided for administration of Hindu religious trusts in Bihar. In those States which have not repealed the Central Law, the Charitable and Religious Trust Act 1920 and Charitable Endowments Act, 1890 (as amended by the act of 1982) are applicable. While the Bombay and the Gujarat Act have employed the mechanism of Charity Commissioner's pivotal role, other statutes have gone for supervision by Advisory Boards and Management Committees along with the specific role of Commissioners, Registrars and Superintendents. The extensive power of the CC under the Bombay and Gujarat Acts stands in contrast to the limited role and powers of the officers in other statutes.⁸ In those statutes one can find the specific role and powers of the Committees and Boards. This paper focuses on the Bombay and Gujarat Model first, and takes up other jurisdictions for comparison later.

Meaning of Public Trust

As a threshold to the discussion, it is appropriate to know upon which bodies the Public Trust regulatory regime is applicable. Since the very applicability of the law and the CAC model depend upon the meaning

⁵Casson, Mark and Giusta, Marina Della, 'The economics of trust' in Reinhard Bachmann and Akbar Zaheer, *Handbook of Trust Research*, (Cheltenham: Edgar Elgar Publishing Limited, 2006) p. 332.

⁶Piotr Sztompka, *Trust: A Sociological Theory* (Cambridge: Cambridge University Press, 1999) p.24; also see Barte Nooteboom, *Trust: Forms, Foundations, Functions, Failures and Figures* (Edward Elgar: Cheltenham UK, 2002) p.45. "Trust is a simplifying strategy that enables individuals to adapt to complex social environment, and thereby benefit from increased opportunities" Earle, T and Cvetkovich, G T, *Social Trust: Towards a Cosmopolitan Society* (New York: Pagar, 1995) p.35.

⁷Mussalman Wakf Act 1935, Parsi Trust Registration Act, 1936, Charitable and Religious Trust Act 1920, Jamkhandi Rules, 1912, Bombay Public Trust Registration Act 1936 and section 92 CPC.

⁸For a proposition that the Bombay law is least restrictive, see Donald Eugene Smith, *India as a Secular State* (Princeton: Princeton University Press, 1963)256.

of public trust, this discussion is essential. The width of its coverage and case law discussion has made this discourse elaborate. But it is essential for understanding the reach of CAC model.

“Public Trust” is defined in Section 2(13) of the BPTA and GPTA. The Bombay law says” Public Trust means an express or constructive trust for either a public, religious or charitable purposes or both and includes a temple, a math, a wakf, a church, synagogue, agiary or other places of public religious worship, a dharmada or any other religious or charitable endowments and a society formed either for a religious or charitable purpose or for both and registered under the Society’s Registration Act, 1860”. The Gujarat statute contains similar definition but does not refer to “church, synagogue or other places of public religious worship”.

The definition has wide ambit to reach out all institutions/places of public worship amidst all religious communities where features of public trust are prevalent. The secular and all inclusive approach is notable. Although the term ‘trust’ is not defined under the Act, drawing analogy from the Indian Trust Act and other prevalent law, the requirements of components like obligation attached to ownership of property, confidence reposed and accepted by the owner, declaration for the benefit of another or for oneself and another are essential even for public trusts.⁹ It is a curious combination of trust ownership and beneficial ownership, and is distinct from other transactions.¹⁰ Dedication of property for religious or charitable purpose being the cardinal factor, this will be inferred from ev-

idences and conduct of parties about the way of treatment of property in case express trust deed is not available.¹¹ Judiciary has been liberal insofar as the form of the trust is concerned, but has always insisted on clear intention to create the trust and specificity about the lawful purpose of the trust, beneficiary and trust property.¹² A constructive trust arises from the operation of law and equity, and includes trustee *de son tort* and holder of property in fiduciary obligation and capacity.¹³ In interpreting the term ‘public’ preceding ‘charitable’ and ‘religious’, the courts have employed the test whether it furthers the general interests of the community as opposed to a particular interest of the individual.¹⁴ Even when it benefits sufficiently large section of society and not necessarily benefiting the whole mankind, it satisfies the legal requirement.¹⁵

Public religious worship is a major theme or component of public trust. ‘Temple’, which is one of its forms, is defined to mean a place by whatever designation known and used as a place of public religious worship, and dedicated to or for the benefit of or used as of right by the Hindu community or any section thereof as a place of public religious worship.¹⁶ Temples are the places where certain physical acts of adoration coupled with certain systematized prayers, mantras and musical invocations are carried towards certain psychological result.¹⁷ In determining the public character of the temple the factors to be considered are: historical origin of the temple, the manner of management of the affairs of the temple, the rights exercised by the devotees in regard to worship in the temple, gifts or grants received from the public or the

⁹K N Shah’s *The Bombay Public Trusts Act*, 18th ed (A K Gupte) (Pune: Hind Law House, 2012) 60.

¹⁰Salmond, *Jurisprudence* (13th ed PJ Fitzgerald) [New Delhi: Universal Publishing Co] *Halsbury’s Laws of England* 3rd edition volume 33 pg 87.

¹¹Sri Gopal Jew Thakur Vs. Provisini AIR 1947 Ori 85; Sri Thakurji Vs. Sukhdeo Singh (1920) U2 AIR 495, Dasarathram Vs. D. Subba Rao (1959) SCR 1122.

¹²Chhotobai Vs. Jnanchandra, AIR 1935 PC 97, 37 Bom LR 567, Menakuru Dasharatharami Reddi Vs. Duddakuru Subba Rao, AIR 1957 SC 797, Subava Yellappa Vs. Yamanapa Sahu AIR 1933 Bom 209, Kayastha Pathasala Vs. Mst. Bhagwati AIR 1937 PC 4, 39 Bom LR 322, Amardas Vs. Harmanbhai AIR 1942 Bom 29, Palaniappa Vs. Devasikamony, 19 Bom LR 567. In re Subnis Goregaonkar and Senjit AIR 1933 Bom 374; Madhaviprasad Vs. Mongilal, AIR 1928 Bom 97.

¹³Munshi Abdul Rahim Khan Vs. Fakir Mohammad Shah, AIR 1946 Nag 401, Shripadprasad Beharilal Vs. Lakshmidas Durgabai AIR 1924 Bom 193.

¹⁴Ramsarandas Vs. Jairam AIR 1943 Pat 135, State of Bihar Vs. Bishesar Das AIR 1971 SC 2027.

¹⁵Shabir Hussain Vs. Ashiq Hussain, AIR 1929 Oudh 225, trust for the benefit of Parsi community’s education or medical relief is good purpose as per Bombay High Court judgment dated 11.01.1954.

¹⁶sec 2(17).

¹⁷Hindu Religious Endowment Commission Report 1960-62 p 42.

government, the consciousness of the manager and of the devotees and such other considerations.¹⁸ This approach excludes private temples wherein family idols are worshipped mainly by family members and relatives despite that public trust also are given leaves and licenses to have darshan.¹⁹ Where the details of the origin of the temple are lost in antiquity and when private temple acquires reputation and attracts large number of devotees, gradually a private temple may become a public temple.²⁰

While temples help in the path of devotion (*bhakti marg*), the maths guide avenues of knowledge (*jnana marg*), and other charities of general public utility enable traversing the path of good action (*karma marg*). 'Math' as defined in the BPTA means an institution for the promotion of Hindu religion presided over by a person whose duty it is to engage himself in imparting religious instructions or rendering spiritual services to a body of disciples or who exercises or claims to exercise headship over such a body and includes places of religious worship or instructions which are appointed to the institution (Section 2(9) BPTA. Maths have enormous socio-religious importance in professing, researching, disseminating and innovating religious knowledge. In modern times, because of involvement of general and higher/professional education, they attain immense public importance.²¹ Unlike some states which exempted maths from regulations, the BPTA has a comprehensive coverage. Since math is also inclusive of places of religious worship, its good governance is essential. But where math is neither involving in imparting religious instruction nor rendering any spiritual service to any group of disci-

ples or members of the public, and the entry of devotee is subject to permission and restraint, it is not coming under the purview of math.²² Succession of Mahants, alienation of mahantship and the extent of rights and duties of Mahant are issues litigated in some cases. The trend is to protect the public interests and tradition and avoid abuses.

An impressive feature of the definition of public trust in BPTA is its multicultural approach to include all communities under the same umbrella. Church, though not defined anywhere under the Act, is understood as a sacred structure or building designed for public divine worship by the Christians.²³ As per the Bombay High Court, Roman Catholic Parish church is a public religious trust.²⁴ The Court viewed that it involved a place for Christian religious congregation to pray on Sundays and festive occasions. The inclination of Christian endowments towards promotion of brotherhood amongst children of God and service of the poor and needy persons was referred. The missionary's contribution to education and health, humanitarian acts, housing and socio-cultural activities was pointed out. In contrast, the Madhya Pradesh High Court declined to include the Roman Catholic Church within the net of the MP Public trusts Act 1951 for the reason that (a) donors of the church did not create trust obligation; (b) the dedication of money to public purpose was absent; (c) the Registrar's decision of non inclusion of church within public trust was based on facts properly enquired; and (d) state had no power of interference upon Registrar's decision through writ litigation.²⁵ But the Court made it categorical by referring to *Ratilal*²⁶ that no religious denomination can

¹⁸TD Gopalan Vs. Commissioner, HRE, Madras AIR 1972 SC 1776, Bhagwan Din Vs. Girdhar Swaroop AIR 1940PC 7, 42 Bom LR 190, Sri Rajesh Anant Dev Vs. Commissioner. HRE AIR 1981 SC 798, Jammi Raja Rao Vs. Sri Anjaneya Swamy Temple (1992) 3 CC 14, Bola Shankar Maha Shankar Vs. Charity Commissioner, Gujarat 1995 Supp (1) SCC 485, AIR 1995 SC 167.

¹⁹Radhakant Dev Vs. Commr HRE Orissa AIR 1981 SC 798, State of Bihar Vs. Smt Charusila Devi AIR 1959 SC 1002; Bihar Board of Religious Trust Vs. Palat Lal AIR 1972 SC 57; when a property owner offers a sabhamandap for religious discourse to which the general public attend, it does not necessarily become a place of public religious worship Martanda Pandharinath Harkare Vs. Charity Commissioner 63 Bom LR 274, ILR 1962 Bom 562.

²⁰Goswami Mahalaxmi Vasuji Vs. Shah Ranchhoddas Kalidas AIR 1970 SC 2025, Mundachen Vs. Achutan, AIR 1934 PC 230.

²¹The Deemed Universities of JSS Math and Matha Amritanandamayi Math, and educational institutions of Adichunchanagiri Math and various other Maths of Karnataka are examples.

²²Charity Commissioner of Bombay Vs. The Administration of Shringeri Math AIR 1969 SC 566.

²³Oxford Dictionary.

²⁴Rev Fr. Farcisus Mascarenhas Vs. State of Bombay, 62 Bom LR 790.

²⁵State of M.P. Vs. MS Convent School, AIR 1958 MP 362.

²⁶Ratilal P Gandhi Vs. State of Bombay, AIR 1954 SC 388.

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nullify the operation of the law of the land relating to property. The Supreme Court in *Vinod Kumar Malviya Vs. Maganlal Mangaldas Gameti*²⁷ recognized registered church society as a type of PT under the BPTA and held that the process of merger amidst the church societies was not legally complete.

Although Wakf was one type of Public Trusts included in the definition, after the enactment of section 112(3) of the Wakf Act 1995, it is governed by the central law. Mention of synagogue and agiary speak about the all inclusive policy of the law. In including 'dharma-mada' and any other religious and charitable endowments and registered societies constituted for a religious or/and charitable purpose, the same policy continues.

'Dharmada' is a concept and practice that explicitly connects the business world to the domains of charity. According to section 54 of the BPTA, when as per the custom or usage of any business or trade or the agreement between the parties to any transaction, any amount is charged to any party to the said transaction or collected under whatever name, as being intended to be used for a charitable or religious purpose the amount so collected (dharmada) shall vest in the person charging or collecting as a trustee. Such person shall submit an annual account statement to the Deputy or Assistant Charity Commissioner SC 54(2). These authorities have the power of conducting enquiry into correctness of the account. In *Bijli Cotton Mills case*²⁸ the Supreme Court held that gift to dharmada is not void due to vagueness or uncertainty, but is a validly earmarked amount for charitable purposes, and hence does not form part of assessable income. While *dharmada* need not be registered, it is essential that there shall be clear intention to dedicate the fund

for charitable purposes, and hence, mere crediting in account book is not sufficient²⁹. The fact that *dharmada* is not made fully available to support *goshalas* (Charitable Cow Sheds) speaks about inherent weakness of *dharmada* system.³⁰

Regarding the implications of 'religious and charitable endowment' used in the definition of public trust there is a judicial view that in the light of *ejusdem generis* rule, the said term shall mean only that of public purpose.³¹ Hence dedication for worshipping of family idol is not coming within the purview of BPTA. The requirements of *Uthsarga*, *Pratishta*, *Sankalpa* and *Samarpana* have been emphasized in the matter of endowments.³²

A unique approach of the BPTA is an integration of trusts and registered society under the canopy of Public Trusts. As the definition says when the societies registered under the Societies Registration Act 1860 (SRA) are constituted for religious, charitable or both purposes, they are to be considered as public trust. In a case relating to a section 25 company, this principle has been extended to non-profit company, and it was held as public trust.³³ This is a noteworthy decision which avoided textual interpretation and expanded the scope of the law.

Mere registration under the SRA as charitable society will not make it a public trust. In order to be governed under BPTA, it shall undergo the process of enquiry by Deputy or Assistant Charity Commissioner and get registration.³⁴ However writ remedy does not lie against office bearers of the registered society.³⁵ The need to read the BPTA and SRA together and to comply with the requirements of both has been emphasized by the apex court.³⁶ Because of the synergy between the Public Trust and registered societies, the advantage

²⁷AIR 2013 SCW 5782.

²⁸Income Tax Commissioner New Delhi Vs. Bijli Cotton Mills AIR 1979 SC 346.

²⁹Madhavaprashad Nathuram Pandit Vs. Manghilal Maheshri AIR 1928 Bom 97; K. N. Shah 644.

³⁰M H. Querreshi Vs. State of Bihar, AIR 1958, SC 731.

³¹Rudrappa Vs. Kadeppa, AIR 1967 Mys 239.

³²Deoki Nandan Vs. Murlidhar, AIR 1957 SC 133.

³³Akhil Deshastha Rugvedi Brahmin Madhyawarti Mandal Vs. Joint Charity Commissioner, AIR Bom 313.

³⁴Suresh Ramnivas Mantri Vs. Mohd. Iftiqaruddin, Indian kanoon.org/doc/1383312, 1999 (2) Man (31).

³⁵Mahadeorao Vs. State of Maharashtra, 1995 (2) Man J. 881.

³⁶Vinodkumar Malviya Vs. Maganlal Mangaldas Gamiti, 2013 AIR 5782.

of both is available and mutual exclusion of disadvantages is also possible.³⁷ Super addition of community participation to command and control model under the supervision of CC avoids conflicts and strengthens the competitiveness for social services.

One common characteristic of public religious or/and charitable bodies is their orientation and inclination to promote the socially useful objectives. Regarding religious purposes, the permissibility is decided on the basis of the practices of the religion, whose social side or humanitarian approach counts a lot in this regard. About charitable purpose there is detailed provision under section 9 of the BPTA. Since meaning of 'charitable purpose' is vital for the identity and functioning of public trust and also to the reach of command and control model, it is necessary to delve into some aspects of charitable purpose. Basically, the legal policy is progressive as it transcends the traditional mode of charity like relief of poverty or distress, education, medical relief and advancement of the object or general public utility. The latter includes provisions for facilities for recreation or other leisure time occupation (including assistance for such provision) if the facilities are provided in the interest of social welfare and public benefit. The interest of social welfare requires that (a) the facilities are provided with the objective of improving the condition of life of the persons for whom the facilities are primarily intended and (b) either (i) those persons have need for such facility as aforesaid by reasons of their youth, infirmity or disablement, poverty or social and economic circumstances, or (ii) the facilities are to be available to the members of the public at large. This new clause relating to recreational charity was inserted by amendment brought in 1971. This is comparable to the change in English Law brought in 1956. The above provisions and requirements are applicable to the provision of facilities of village halls, community centers and

women's institutes and to the provision and maintenance of grounds and buildings to be used for the purposes of recreation and leisure time occupation, and extends to the provision of facility for these purposes by organizing of any such activity.³⁸

The emergence of recreational facility as a component of charity stands in contrast to the pre-1972 position where charity entirely to sports was excluded from the purview of 'objects of general public utility'. The traditional position in English Law was not in favor of charity for sports unless it was a part of the scheme to bring advancement in education. Any help in horse race, fox hunting, and cricket could not get the status of charity.³⁹

The judicial hesitation to keep sports and games other than for education outside the ambit of charity was because of the English Charity Law's background and express statutory provisions reflecting such policy. But social practice of assisting wrestling and other games was part of the Indian tradition. Sidelineing such tradition, which was prevalent for more than a century in case of an akhara created by the donor by dedicating it to Mahadeo, Mahabirji and Hazrat Ali by invoking Hindu idol and Muslim tasbir to attract both Hindu and Muslim communities the Supreme Court declined to recognize existence of public trust.⁴⁰ The Court relied on the English cases which denied public trust character to dedication of fund for games. Further, dedication of property partly in the name of Hindu God and partly in the name of Muslim Saint was held to be deviating from both the Hindu Law of endowment and Muslim law of Waqf. From the perspective of expansive and multiculturalist notion of building social harmony and use of endowments in support of it, fulfillment of social expectation would have attained better social result. R.C. Nagpal criticizes the judgment for ignoring the educational dimension of games and sports and for

³⁷Flexibility in formation of trust and democratic participation, accountability and control under registered society provide for good combination of advantages.

³⁸C I T Vs. Ahmedabad Rana Caste Association, (1973) 88 ITR Bom 354; Ahmedabad Rana Caste Vs. CIT, AIR 1972 SC 273; Trustees of Tribune Press Vs. CIT AIR 1939 PC 208; Charity Commissioner of Bombay Vs. Jamubhai Purushotam Kaku, decided on 12/7/1956 by Bombay High Court; Manilal Pitamberdas Bhatt Vs. Kantilal Hargovinddas Soni (1967) Guj L T 260.

³⁹Re Notage (1895) ch; Bangalore Race Club Vs. CIT (1970) 77 ITR 435 Mys; Cricket Association of Bengal Vs. CIT, AIR 1959 Cal 296, K.N Shah op cit., p 185.

⁴⁰Ramchandra Shukla Vs. Mahadeo Mahabirji, AIR 1970 SC 458.

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unduly insisting on finding parallels for joint use of both Hindu and Muslim images. He observes that co existence of such images may be admitted in agreement with the Hindu notion / practice of invoking the blessings of the divinity.⁴¹ Compared to the above legal position, the post-1972 scenario has comfortable social consequences.

Judiciary has insisted on keeping the doors of charity wide open and excluded partisan approach of benefit to specified class or members of a community from the category of public trust. Hence, caste based seclusions and discriminations do not fit within the public charitable purpose.⁴²

A brief discussion on mode of charity will disclose the thrust of development in expanding or narrowing down or keeping stagnant the scope of charity. Relief of poverty is a head which got expansion through judicial interpretation in some cases. In *Thyagarajan Charities*, rural reconstruction involving uplift of the rural masses and welfare of them through supply of raw material to cottage industry at reduced rate amounted to charity.⁴³ When the trust provided for benefit to the indigent persons by supply of food, clothes and accommodation and relief in case of natural calamity but also provided that not less than 50% of the income shall be used preferably for the benefit of indigent or poor relatives of the donor, the Supreme Court has upheld it as for charity.⁴⁴ Financial assistance for the performance of marriages of the poor is a charitable purpose.⁴⁵

Education as a charity head has received cautious attention of the courts to avoid trust for political purpose or that which facilitates commercialization. Since courts do not have competence to judge public wel-

fare or social benefit from an advancement of political cause, the educative value of political propaganda is not determinable.⁴⁶ Even after independence similar juridical approach continued as evident from the majority judgment of the constitutional bench in 1962. The court in this case reversed the Bombay High Court judgment in appeal. The Bombay High Court, while upholding the decision of the Assistant Charity Commissioner who registered the Kesari and Maratha Trust as Public trust under the BPTA had observed, 'making people politically conscious by spreading the knowledge of Political Science amongst them is education by itself. It has a distinct educational value, as it educates public opinion, makes people see things for themselves and imparts understanding to them as to their rights.'⁴⁷ The Court distinguished creation of public opinion through education from arousing political purpose of capturing power. It also deals with the matter under the 'general public utility' clause which is different from the English Law and conceded it to be part of charity. But the majority of the Five Judges Bench (4:1) of the Supreme Court disagreed about the educational dimensions of press activity and relied upon English cases on exclusion of political movement from the ambit of charity.⁴⁸ The sole dissent by K. Subba Rao J. meticulously examined the views of Tilak and the intention underlying the trust and observed, "In the context of modern state, education in political rights may include diverse aspects of it such as political, economical social etc. The importance of said education has no relation to the form of government existing at a particular time. Unless the people know their rights, they cannot work either for their freedom or elect proper persons to represent them after attaining freedom".⁴⁹ In view of divergent views in English Law in the matter of charity v/s politics and

⁴¹Ramesh Chandra Nagpal, *Modern Hindu Law* (Lucknow, Eastern Book Company P 1030).

⁴²Monilal Pitambar Das Bhatt Vs. Kantilal Hargovandas Soni (1961) Guj LT 260, Charity Commissioner Vs. Natwarlal Gokuldas Shah Gujarat High Court 15/7/1971, Ahmedabad Rana Caste Society Vs. CIT (Guj) AIR 1972 SC 273, Charity Commr of Bombay Vs. Jamunabhai Purushottam Kabu, Bombay HC 12/7/1956.

⁴³Thyagarajan Charity Vs. Addl CIT, AIR 1997 SC 2541.

⁴⁴Trustees of the Charity Fund Vs. CIT Bombay, AIR 1959 SC 1060.

⁴⁵CIT Vs. Ananda Swarup Bijendra Swarup Charitable Trust, (1991) 187 ITR 656 All.

⁴⁶Subhash Chandra Bose Vs. Govardhandas Patel, AIR 1940 Bom 96, Lokmanya Tilak Jubilee National Trust case AIR 1942, Bom 61.

⁴⁷Laxman Balvant Vs. Charity Commissioner, AIR 1959 Bom 83 paragraph 20.

⁴⁸Laxman Balvant Bhopatkar Vs. Charity Commissioner, AIR 1962 SC 1589.

⁴⁹*Ibid*, para 40.

different legal policy of allowing objects of general public utility as charity, he was inclined to uphold the Bombay HC judgment. From the angle of strengthening the political system through human rights, the expansive approach in Justice Subba Rao's decision is cogent, coherent and convincing.

Another line of development is to keep commercialization of education away from charity. As viewed in Children's Book Trust case, mere education by itself is not charity.⁵⁰ The element of philanthropy in support of education and the public benefit arising out of education make education an act of charity. Collection of donation or capitation fee from parents does not come under charity, but causes discrimination in the matter of access to education which is also a human right.⁵¹

Charity for medical relief or for the maintenance of the sick is traditionally well known ground of charity. Direct benefit in the form of funding the hospital expenses and indirect relief like gift for the establishment or support institutions such as hospitals, infirmaries, dispensaries, sanatorium providing services either free or at reduced cost come under this category.⁵² In a case it was decided that trust created by will for establishing dispensary by spending Rs. Sixteen thousand and for using the interest earned from the trust fund of Rs 50,000 did not fail on account of the death of the executors.⁵³ When the charity is for advancement of spirituality, establishment of Ayurvedic College Hospital is not allowed under the trust.⁵⁴ While establishment of primary health centre or donation of ambulance is charity for medical relief establishing a medical college does not come under the purview of med-

ical relief.⁵⁵ Where a hospital is running mainly on commercial lines, a petty sum spent for medical relief of the poor does not render it charitable trust for the purpose of building tax relief.⁵⁶ Construction of quarter for doctors outside the hospital does not amount to medical relief.⁵⁷ When a medical college / hospital is established extensively for charitable purpose but negotiation for sale of it to private body was going on its charitable status is at doubt.⁵⁸

The generic /residual clause in the definition 'any other object of general public utility' has invited the same cautions approach as that under the Income Tax Act. As viewed by the Subba Rao J in Laxman Balvant 'general' means pertaining to a whole class, 'public' means the body of the people at large including any class of the public, utility means usefulness. Therefore, the advancement of any object of usefulness or benefit to the public or a section of the public as distinguished from an individual or a group of individuals is a charitable purpose".⁵⁹

The approach of identifying charitable purpose in benefit to the general public which is a fluctuating and unascertainable body of people as distinguished from specific persons continued in subsequent cases, and holds good for even today.⁶⁰ In earlier cases in 1950s and 1960s benefit accruing exclusively to specific caste or community was not regarded as charitable.⁶¹ Perhaps, by responding to social reality or caste based charitable acts, a slightly liberal approach was adopted in 1972 when the matter of trust for Rana caste was in issue. The court viewed that the benefit need not be for the whole mankind or all persons of

⁵⁰Municipal Corporation Delhi Vs. Children's Book Trust, AIR 1992 SC 1456.

⁵¹*Ibid.*

⁵²See Tudor on Charities op cit p 41; Pelham Vs. Anderson (1764) 2 Eden 296, R Vs. Welsh Hospital (Netley) *Fund* (1921) 1 Ch 655.

⁵³Advocate General Bengal Vs. Belchamber, ILR 36 Cal 261.

⁵⁴A. Poornachandra Rao Vs. Govt. of AP, AIR 1982 AP 141.

⁵⁵Nachan Ashwin Vs. State of Maharashtra, AIR 1998 Bom.

⁵⁶State of Kerala Vs. Gregarious Medical Mission, 1992 (KLT 230), St James Hospital Vs. Chalakudi Municipality 1998 (2) KLT SN 16) Thomas Panjikaran Vs. Chalakundi Municipality, AIR 1990 Ker 41.

⁵⁷Devamatha Hospital Vs. Tahsildar, Muvattupuzha, AIR 2002 KM 190.

⁵⁸*in the matter of KKP Charitable Trust* AIR 2006 Mad 230.

⁵⁹AIR 1962 SC 1589 at 1604 dissenting view but the above observation is in concurrence with the majority.

⁶⁰CIT Vs. Andhra Chamber of Commerce, AIR 1965 SC 1281.

⁶¹Charity Commissioner of Bombay Vs. Jamubhai Purshottam Kaku, Civil App 657 of 1954 judgment of Bombay HC dated 12.09.1956, Manilal Pitambardas Bhatt Vs. Kantilal Hargovandas Soni (1967) Guj LT 260, Charity Commissioner Vs. Nathvarlal Gokuldas Shah, Civil appeal 418 of 1964 Guj HC 15.2.1971.

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a country but that if any section of public as distinguished from specific individual gets benefit, it is also charitable.⁶²

'General Public Utility' (GPU) is a phrase of wide coverage to include mending of roads, supply of water, repair of bridges, providing for life boats, gifts to public library or museum, prevention of cruelty to animals or children etc. Establishment of goshalas for protection of cows against destruction is also charity.⁶³ Trust for newspaper brings GPU as it supplies to the society education and public opinion⁶⁴ in *All India Spinning Association Vs. CIT*⁶⁵ supply of spinning work was held as charitable. But comparatively restrictive approach was adopted in Maratha Kesari Trust case by the majority in *Laxman*.⁶⁶

Two provisos as they stood originally, limiting the scope of GPU were: (a) exclusive use for sports and games and (b) trust exclusively to religious teaching or worship. The former was deleted by an amendment, and in contrast recreational charity has emerged. About the latter, it can be commented that the proviso is deviating from English and Islamic concepts of charity where gift for religious purpose (even exclusively) is charitable. The proviso is opposed to the spirit of the Hindu Law as well. As B. K. Mukherjea viewed, "in the Hindu system there is no line of demarcation between religion and charity. On the other hand, charity is regarded as a part of religion. The Hindu religion recognized the existence of a life after death, and it believes in the law of Karma according

to which the good or bad deeds of man produce corresponding results in the life to come."⁶⁷ Similar view was expressed by the Prannath Saraswati and by the Supreme Court in *Ramchandra Shukla Vs. Shree Mahadeo*⁶⁸ The definition clause on public charity under section 9 of BPTA is supported by express provisions that protect public charity against the possibility of being declared void. These keep the wide net of public charity quite strong and stable. First, only for reasons that the persons or objects for whose benefit the trust is created are unascertained or unascertainable a public trust shall not be declared as void.⁶⁹ This is in contrast to the legal position provided by virtue of the Privy Council judgment that a gift to dharma is void for vagueness and uncertainty.⁷⁰ The traditional practice of bequest for *Dharmada, punya karma* etc gets support from this approach⁷¹. Secondly, when Public Trust is created for multiple purposes some of which are charitable or religious and some are not, it shall not be deemed as void in respect of charitable or religious purpose only on the ground it being void qua non charitable or non religious purposes.⁷² But when trustees are given absolute power to shift from valid to invalid objects, the trust becomes void.⁷³ Thirdly, absence of obligations attached to disposition of property for a religious or charitable purpose does not result in rendering the public trust void.⁷⁴ Although it is generally an essential incident of the trust that obligation shall co exist with entrustment of property a safety net is provided under the law to such public trust in view of bringing benefit to the religious or charitable object.

⁶²Ahmedabad Rana Caste Vs. CIT, AIR 1972 SC 273.

⁶³D R Pradhan vs. Bombay State Federation of Goshalas and Pinjrapole, 58 Bom LR 894, ILR 1957 Bom 140.

⁶⁴Trustees of Tribune Press Vs. CIT, AIR 1939 PC 20841 Bom LR 1150.

⁶⁵AIR 1944 PC 88.

⁶⁶AIR 1962 SC 1589; The dissent by Subba Rao J is appealing: "To say that the object of a trust for a village school, hospital or choultry is one of general public utility and to deny that character' to a trust created for pursuing the objects of Tilak, that is, the regeneration of the country, is to make a mockery of the section. What trust could be more in the interest of the public than that created to educate them in their political rights so that they could know their rights, understand and appreciate the problems of their country, and contribute their mite to its progress and prosperity?" para 42.

⁶⁷B. K. Mukherjea, *The Hindu Law of Religious and Charitable Trusts* 5th ed (A C Sen)[Kolkata: Eastern Law House, 2003] at 11, 12.

⁶⁸AIR 1970 SC also see Atul M. Seltarvad, *Law of Trusts and Charities* (New Delhi: Universal, 2009) P251, 458.

⁶⁹section 10 BPTA.

⁷⁰Ramchandra Vandra Vasudeb Vs. Parbatidevi, 1 Bom LR 607, ILR 23 Bom 725.

⁷¹*Ibid.*

⁷²section 11.

⁷³East India Industries Vs. CIT, AIR 1967 SC 1553.

⁷⁴section 12.

Hence, when a trustee has only pious obligations but not express legal obligation or when has wide discretion to dispose surplus income as in case of Mutawalli there is no infirmity. This arrangement provides for necessary flexibility based on moral principles rather than strict legalism. Fourthly, failure of specific objects of the public trust on account of impossibility or impracticality in performance of the objects does not render the public trust void. Similarly, non-existence or ceasing of existence of a society or institution does not render public trust void. This is irrespective of the position whether there was intention to appropriate the property for a general charitable or religious purpose. This enables the Charity Commissioner to invoke the *cy pres* doctrine.⁷⁵

It can be noted that the scope of 'public trust' is very comprehensive to include all the public dedications of private properties in the spheres of all religious and charitable acts. The legal policy is avoiding partisan or piece meal approaches, and has a multicultural spirit. It has overcome the rigid approach of the English law of charity by accommodating vague objectives and dharmada. The integrated approach by roping in the registered societies meant for charitable and religious acts has escaped from unnecessary dichotomy.

Charity Commissionerate - Backbone of Law Enforcement Mechanism

In order to promote an effective use of charitable resources and better administration of public trusts and check the abuses the BPTA and GPTA have devised the system of charity commissioners, and vested on them extensive powers of monitoring and supervising. The role of CC is that of friend, guide and discipliner with administrative and judicial powers.⁷⁶

Charity Commissioner is an officer appointed by the State Government for exercising the powers and performing functions and duties laid down under the BPTA.⁷⁷ A Joint Charity Commissioner to act under the control of the CC may also be appointed either to superintend a specific region or to assist the CC (3A). They may be absorbed from judiciary or from amidst retired judges of the rank of District Judges or shall possess ten years experience as advocate or attorney of High Court.⁷⁸ Deputy and Assistant Charity Commissioner possessing qualifications judge at lower cadre are to be appointed to perform functions under the law of the regional or sub regional levels.⁷⁹ Other subordinate officers like Director of Accounts etc shall also assist.⁸⁰ They are servants of the State Government and are 'public servants' under IPC⁸¹. They shall draw salary from the Public Trust Administration Fund created on the basis of contributions made by Public Trusts, donors and the State Government.⁸² The CC is recognized as corporate sole.⁸³ CC has autonomous power of high importance in various capacities as officer authorizing suits, formulating schemes, giving advices, holding inquiries and taking crucial decisions. His duties, functions and power are listed in Sec 69 and include power of general superintendence of the administration and carrying out the purposes of the Act; power to decide about registration on appeal, power to direct special audit and get copy of the balance sheet and accounts statement; power to sanction alienation of immovable property of the trust; power of entry, inspection and enquiry; power to act as public trustee in some circumstances; power to file suit in cases of breach of trust etc⁸⁴; power to give consent for suits; power to frame, amalgamate or modify schemes; power to give notice to trustees for express application

⁷⁵The doctrine postulates that when the charity fund or property could not be used for the purpose stated in the founding document because of impossibility or illegality, it could be used for purposes nearer to the original purpose so that the trust fund does not get utilised.

⁷⁶*Tudor on Charity* op cit., 333-334, B. K. Mukherjea, op cit., 405-5.

⁷⁷Section 3.

⁷⁸Section 4.

⁷⁹Section 5.

⁸⁰Section 6.

⁸¹Section 78.

⁸²Sec. 6B, 57 and 58.

⁸³Section 42.

⁸⁴Similar to sec 92 of CPC but not involving sec 92.

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of trust money; power to give directions and advices, and such other powers as may be prescribed.⁸⁵

The Deputy or Assistant Charity Commissioners have the duties, functions and powers in the matter of keeping books of records, documents, to hold inquiry for registration, to make entries in registers, to enter trust property and hold inquiry, to call for returns, accounts and statements to permits inspection of documents and such other functions of similar type. This role is that of supportive and assisting the CC in fulfilling the responsibilities under the Act.

It can be inferred that the CC system has a good composition to meet the requirement of justice and administration. While it has enormous powers, the procedural safeguards and structuring of discretion have protected against abuses and arbitrariness. Further, the requirement of consultation with the interested persons has toned down bureaucratization.

Role and Competence of ‘Persons Having Interest in Public Trust’

In spite of far reaching powers of CC to command and control, it cannot be said that the top down model gives no space to the beneficiaries at the bottom. ‘Persons having interest the public trust’ have been the recognized entity for participation in various spheres of decision making and remediating process under the Public Trust Act.

As per section 2(10) they are defined to include (a) in the case of a temple, person who is entitled to attend at or is in the habit of attending the performance of worship or service in the temple or who is entitled to partake or is the habit of parting with the distribution of

gifts thereof; (b) in the case of a math, a disciple of the math or a person of religious persuasion to which the math belongs; (c) in the case of Wakf, a person who is entitled to receiving any pecuniary or other benefits from the fund; (d) in the case of a society registered under the Societies Registration Act 1860, any member of such society; and (e) in the case of any other public trust any trustee or beneficiary.

The legal development relating to the above definition is towards broad basing of the clientele, involving the society progressively and avoiding the possible abuses and unjustified exclusions. This can be substantiated as follows. Firstly, by amendment that converted Sec 2(10) into inclusive definition and by including trustee of public trust in the category, what would have been a restrictive judicial approach was repaired.⁸⁶ Secondly, judiciary has been flexible by adopting case-to-case approach.⁸⁷ The phrase includes beneficiaries who get substantial or real interest in the trust property but not hostile to the same.⁸⁸ Members of the general public who constitute devotees of the religious institution,⁸⁹ persons residing in a village whose business was to assist pilgrim and idol worship,⁹⁰ donors and worshippers⁹¹ persons who contribute their time and energy for preservation trust property,⁹² tenants of agricultural property which was converted into trust in order to escape from termination of tenancy.⁹³ Come within the category of persons having interest in trust’.

On the other hand, persons who are merely desirous to visit the particular temple,⁹⁴ person mainly grabbing the offerings made by devotees in the place of worship,⁹⁵ mere resident of a temple village claiming access to fire kitchen run by the temple for providing

⁸⁵Sec 69.

⁸⁶Khemchand Vs. Premanand, 64 Bom LR235; Bombay Public Trust (Amendment) Act 1953; for a liberal interpretation after the amendment see RajgopalRaghunath Das Vs. Ramachandra HazarimalJham, 69 Bom LR 472.

⁸⁷Lakpatrai Vs. Durgaprosad, AIR 1928 All 758; Ramachandra Vs. Parameswaran, 42 Mad 360.

⁸⁸President Purohit Sangh Vs. Prabhakara Ramachandra Gokhale, 2014 (Supp.) Bom CR292.

⁸⁹Mukaram Vs. Chhagam, AIR 1959 Bom 491.

⁹⁰Manohar Vs. Lakhmiram, (1888) 12 Bom 247; Vaidyanath Vs. Swaminath, AIR 1924 PC 221.

⁹¹Ramaswami Vs. Karumuthu, AIR 1957 Mad 567.

⁹²Mangilal Vs. Durga Devi, AIR1968 Raj 314; A Prospective Shebait (Shri Shurdhas) Jew Vs. K M Malik, AIR 1947, Cal 213.

⁹³Naranbhai Dayabhai Patel Vs. Suleman Isubji Dadabhai, AIR 1996 SC 1184.

⁹⁴Vaidyanath Vs. Swaminath, AIR 1924 PC 221.

⁹⁵President Purohit Sangh Vs. Prabhakar Ramachandra Gokhale, 2014 (Supp) Bom LR 292.

food to visitors,⁹⁶ tenant of trust property, who could be a person belonging to any religion, by virtue of mere tenancy are not persons having interest in public trust.

By virtue of the law, 'person having interest' have legal space for participation in the following matters: process of inquiry for registration⁹⁷; initiating inquiry by complainant to CC⁹⁸; initiating removal of dismissal of trustee by application CC⁹⁹; bringing to the notice of CC the need for protection of charities¹⁰⁰; filing suit with the consent of CC for remediating breach etc. of the public trust¹⁰¹; and initiating the framing, amalgamate or modifying the scheme by approaching CC¹⁰².

The legal space on the part of Persons having Interests in the above function is significant for community participation in good governance of the public trusts. Since societal involvement is crucial, integration of this role with that of CC reduce the level of authoritarianism and brings harmony. That provides scope for socially innovative participations and initiatives.

Bringing the Public Trusts Within the Regulatory Net: The Process of Registration

Generally, the CAC model employs the mechanism of registration, licensing or notification for assuming its jurisdiction which brings them with the regulatory regime. BPTA has chosen registration as a means of establishing jurisdiction. Registration enables establishing a repository or authentic data base regarding all the public trusts. It systematizes the document keeping process and authenticates changes in accordance with the procedure. The original information, changes

and annual filing of statement of accounts, budgets and such other reports enable the CC to keep watch on the health and functioning of public trusts. In Chapter IV of the BPTA there are elaborate provisions about registration of public trusts.

The legal arrangement for registration of public trust aims at mandatory registration of all the eligible public trusts with due observance of the fair procedure. There are five ways through which registration of public trust occurs.

First, by virtue of deeming provision under section 28 of the BPTA all the public trusts registered under the existing laws in Schedule A¹⁰³ shall be regarded as being registered under the BPTA. Under Sec 22B the properties of such public trusts shall be entered in the register. Second, the registration process starts with the application submitted by the trustee of public trust, who is duty bound under section 18 to register within 3 months from the creation of the trust or from the date of commencement of the Act in case it is created earlier. The failure to perform this duty is punishable with fine under section 66.¹⁰⁴ Third, upon an application made by any person having interest in a public trust, the registration process commences.¹⁰⁵ Fourthly, the Deputy or Assistant Charity Commissioner, on his own motion, may initiate registration process by going ahead with inquiry for registration.¹⁰⁶ Fifth, Public trust may be created by Will wherein the executor of the Will shall make an application for registration within one month from the grant of probate or within six months from the date of testator's death.¹⁰⁷

In view of the normal tendencies of trustees to escape from the clutches of regulatory regime, the above com-

⁹⁶Harnam Singh Vs. Gurudyal Singh, AIR 1967 SC 1415.

⁹⁷Section 19.

⁹⁸Section 41B.

⁹⁹sec 41D.

¹⁰⁰Sec. 41E.

¹⁰¹Sec. 50.

¹⁰²Sec. 50A.

¹⁰³which are now repealed.

¹⁰⁴The application shall be in writing and shall disclose details about the trusts, trustees, succession mode, list and value of moveable and immovable properties, gross average annual income expenditure and addresses for communications.

¹⁰⁵Sec. 19.

¹⁰⁶Sec. 19.

¹⁰⁷Section 29.

prehensive net or funnel that brings all the public trust entities to the level playing field is a significant policy. The inquiry to be conducted by the Deputy or Assistant Charity Commissioner the second, third and fourth circumstances enumerated above is a quasi judicial function and shall conform to the broad, if not rigid, principles of natural justice.¹⁰⁸ Since a *suo motu* inquiry under Sec 19 combines the roles of investigator, prosecutor and judge in DCC or ACC, they shall employ the service of Inspector and shall act objectively.¹⁰⁹ As per section 73, officers holding inquiry possess the powers of civil court, and giving of public notice of holding inquiry is mandatory under the law.¹¹⁰ This opportunity of community participation makes the process socially involving. The question whether the author of the trust had the right to gift the property is not within the purview of Sec. 19, although the DCC or ACC may incidentally inquire into the matter, and hence civil court's jurisdiction is not barred.¹¹¹ Regarding the question whether any property is property of the trust, Bombay High Court's view is in favour of allowing the jurisdiction of civil court since the Act does not provide remedy to parties who are not parties to the inquiry.

However, the Gujarat High Court has contrary approach on this point.¹¹² But when facts of the case show disputed claims of two factions of a registered society (for example as in case of Depressed Classes Mission Society at Bombay and Pune), and the inquiry officer hears both the factions, civil court's jurisdiction does not arise as each case is to be decided on the basis of facts.¹¹³ Similarly, when the Government's grant of property in the name of a trustee 'V' was sought

to be included as trust property by another trustee, and the heirs of 'V' were also heard, the ACC can be held as possessing exclusive jurisdiction.¹¹⁴ The trend of development is towards avoidance unnecessary and prolonged litigation and to allow remedy through the commissionerate.

The jurisdiction of the DCC or ACC under section 19 consists in ascertaining (i) whether a trust exists and whether such trust is public trust; (ii) whether any property is the property of such trust, (iii) whether whole or any substantial portion of the subject matter of the trust is situate within the jurisdiction; (iv) the names and addresses of the trustees and managers of the trust; (v) the mode of succession; (vi) origin, nature and object of such trust, (vii) the amount of gross average annual income and expenditure of the trust; and such other particular as prescribed.

Answers to all the above issues anticipate meticulous scrutiny, and in a good number of circumstances the matters involve complicated set of facts. In order to find out whether there is a trust, the evidence about the initiation, disposition, and dedication (*Sankalp* and *Samarpan*) are taken into account.¹¹⁵ In determining public character of the trust the inquiry officer shall look into the issues whether members of the public have access as a matter of right; whether contributions are made by the public; whether the management and devotees treat the entity as public trust; and whether the services and festivals are conducted in public.¹¹⁶ Mere permission to worshippers to visit the temple, keeping of offering box, and using of *Sabha Mandap* for public lectures by themselves do not

¹⁰⁸Kuberbhai Shivdas Vs. Mahant Purshottamdas Kalyandas (1961) 2 GLR; A K Kraipak Vs. Union of India, AIR 1970 JC 150; Charyasi Taluka Mandli Ltd. Vs. Surat DC (1972) 13 GLR 797.

¹⁰⁹Vithoba Babaji Ghodke Vs. Bal Krishna Ganesh Bholerao, 69 Bom LR 31; AIR 1968 Bom 14.

¹¹⁰CPC, Order 1, Rule 8, Rule 7A of BPT Rules; Shivnath Vs. Himatlal Manishankar Pandey Guj HC 15/03/1974; Vithoba Vs. Balkrishna, AIR 1968 Bom 14.

¹¹¹Shri Adinath Jain Mandir Vs. Shri Shantappa Dada Madnik, AIR 1967 Bom 86; for a contrary view of Gujarat High Court see *The City Deputy Collector Vs. Shukla Ramanujacharya*, (1976) 17 GLR 529; *Keki Pestonji Vs. Radabhai*, 94 Bom LR 198 (FB).

¹¹²Kuberdas Vs. Purshottamdas (1961) 2GLR 564.

¹¹³Special civil Application No. 158 of 1975 decided on 22-08-1979.

¹¹⁴Samastha Ladanjari Samaj Vs. Waman Sarup, 1979 Moh. L.J. 806.

¹¹⁵Babu Bhagwan Din Vs. Gir Har Swaroop, AIR 1940 PC7; K N Shah op cit 230-233.

¹¹⁶Goswami Shri Mahalaxmi Voluji Vs. Ramchoddas Kalidas, AIR 1970 SC 7025; Charity Commissioner Vs. Hari Bhanu Maharaj, Gujrat HC dt. 22-09-1970; K N Shal 237-239; Monekoru D. Reddi Vs. Duddukura Subba Rao, AIR 1957 SC 797; Dhameshwarbuwa Guru Pushottambuwa Vs. The Charity Commission, AIR 1976 SC 1971.

constitute public trust.¹¹⁷ But overwhelming number of affidavit-based evidences and perusal of the philosophy and practice of a particular religious tradition like Haveli of *Vaishnava Sampradaya* establish the fact of public trust.¹¹⁸

In addition to evidence about dedication to the public, actual use by the public is essential.¹¹⁹ The fulfillment of requirement that substantial portion of the public trust shall be situated within the jurisdiction of DCC or ACC is to be decided on the basis of facts¹²⁰ and law of the concerned state shall apply. The Inquiry Officer under section 19 shall also carefully register the customary rules relating to succession when the trust deed does not specially provide for mode of succession.¹²¹ Woman's capacity to succeed as a trustee or *pujari* is not a settled matter, thus continuing a gender issue unresolved.¹²² On the basis of comprehensive inquiry, the DCC or ACC shall make entries about the public trust in the register kept for the purpose.¹²³

Where any change occurs in relation to any of the entries recorded in the register, within 90 days from the occurrence of such change the trustee shall report such change to the concerned DCC or ACC as the case may be.¹²⁴ After holding inquiry for verification of the change, the DCC or ACC shall make necessary change [section 22 (3)] after being satisfied about the change. The inquiry connotes judicial inquiry.¹²⁵ As the case law development shows, change under section 22 is a contested issue in light of facts and rival contentions.¹²⁶

From the above it is clear that the legal framework for registration of public trust is elaborate, fair and effective in roping all the public trusts to the operation of

legal regime. The DCC or ACC has great responsibility of judicious determination of facts relating to public trust. Sufficient space for involvement of people or affected persons, decisive role of the Commissionerate and due respect to tradition have been the hallmark of legal policy. There is no sign of bureaucracy choking the creative dialogue as the task is to be handled by responsible officers with judicial background.

The Regime of Commands: Legal Norms and the Charity Commissioner's Directions

In the CAC model, setting clear ideals or norms and insisting on compliance with them are crucial. That is a pre requisite for law abiding culture. BPTA has several categorical principles stating the do's and don'ts.

First, as per section 36A (1), "trustee of every public trust shall administer the affairs of the trust and apply the funds and properties thereof for the purpose and objects of the trust in accordance with the terms of the trust, usage of the institution and lawful directions which the Charity Commissioner or court may issue in respect thereof, and exercise the same care as a man of ordinary prudence does when dealing with such affairs, funds or property, if they were his own". For the due performance of duties imposed upon him, the trustee is entitled under section 36A (2) to exercise the entire powers incidental to the prudent and beneficial management of the trust within the legal framework.

Second, the trustee shall not borrow money for the purpose of or on behalf of the trust except with the previous sanction of CC under section 36A (3). He shall not borrow money for his own use from the public trust.

¹¹⁷Amardas Mangaldas Vs. Harmohan Bhai, 44 Bom LR 643; AIR 1942 Bom 291 KN Shah op cit., 244-5.

¹¹⁸Moharaj Purushottam Lalji Junargad Vs. Collector of Junar, AIR 1986 SC 7.

¹¹⁹Dhoribhai Vs. Pragadaji 40 Bom L R 1041; AIR 1948 Bom 471; Charity Commissioner Vs. Ramdasbuwa Guj HC 5-7-1965; K N Shah, 253-255.

¹²⁰Charity Commissioner Vs. Shringeri Math, AIR 1969 SC 566; Anant Prasad Vs. State of AP, AIR 1963 SC 853; State of Bihar Vs. Charushila Dasi, AIR 1959 SC 1002.

¹²¹Ramprakash Vs. Ananda, AIR 1916 PC 256; Pandurang Vs. Narayan B Pawar, 2002 (3) Bom C R 575.

¹²²Raj Kali Kuner Vs. Ram Ratan Pandey, AIR 1955 SC 493; Puran Dai Vs. Jai Narain ILR 4 AU 482.

¹²³Sec. 21.

¹²⁴Sec. 22.

¹²⁵Jagat Narayan Singh Vs. Swarup Singh Education Society 1980 Mah. L.J. 372; Marutirao Vs. Dinkar Kashinath, AIR 2005 Bom 52.

¹²⁶Murlidhar Janrao Kale Vs. State of Maharashtra 2011 (1) Mah. L. J. 849; Kanhaiya Naidu Vs. Jeevraj Bhairavlal, 2010 (2) Mah.L.J. 31 Vithal Row Vs. Motiram 2010 (1) Mah L J 977.

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Third, the public trust shall prepare and maintain a register of all moveable and immovable properties of the trust, including the detailed enumeration of jewels and precious things 36 B (1) and (2). The register shall be signed by all the trustees, and the auditor shall annually report in his report about upkeep of the document.¹²⁷

Fourth, where the trust property consists of money, and cannot be applied immediately for the purposes of the public trust, it shall be deposited in the Scheduled Banks, Postal Savings Bank or Co operative Bank recognized by the State Government.¹²⁸ However, the CC may permit investment in other manner. Proper maintenance of accounts of the trust is another responsibility.¹²⁹

Fifthly, alienation of immovable property by way of sale, exchange or gift and lease of agricultural property exceeding ten years or lease of non agricultural property exceeding three years are invalid if done without the previous sanction of the CC.¹³⁰ The CC may give previous sanction if he is satisfied that the alienation is in the interest or for the benefit and protection of the trust. The CC may impose appropriate condition in the sanction or may revoke sanction after due hearing, if it is obtained by fraud or misrepresentation. Permission in trust deed to alienate does not alter the application of section 36. The position of trustee is comparable to that of Karta who has a fiduciary obligation.¹³¹ Hence justification for alienation in terms of legal necessity and benefit of es-

tate has been insisted by the courts by following the *Hanooman Prasad* case.¹³² Accordingly, payment of antecedent debt, protection of property from deterioration, expenses of action to recover property from trespassers, inconvenient location and unprofitable character of property and need for better housing of the idol are the circumstances considered as permissible for alienation.¹³³ The Charity Commissioner may ascertain market price by issuing directions in the process of giving sanction.¹³⁴ A sale of trust property without the concurrence and participation of all the trustees becomes invalid because of lack of application of collective wisdom.¹³⁵ As in private trusts, in case of public trusts also alienation of trust property to trustee is invalid.¹³⁶ The CC shall, while sanctioning alienation, respect the intention of the donor about the restrictions.¹³⁷

Sixthly, it shall be the duty of every trustee or every person related to the trust to abide by the directions issued by the CC for proper administration of the trust.¹³⁸ The CC may issue such direction to ensure that the trust is properly administered, and the income thereof is properly accounted and duly appropriated to the objects and purposes of the trust and the trust property is not put into waste, damage or wrongful alienation.¹³⁹ In *Lahudas Sambhaji Karad Vs. State of Maharashtra*,¹⁴⁰ the Bombay High Court restricted the CC's power of interference only to property related administrative matters, and did not allow CC's intervention through directions in the matter of elections. The disputed facts involved pre-election membership

¹²⁷36B(4) & (b).

¹²⁸Sec. 35(1).

¹²⁹Sec 32.

¹³⁰Sec. 36.

¹³¹*Shridhar Vs. Jagannathji Temple*, AIR 1976 SC 1860.

¹³²*Hanooman Prasad Vs. Mst. Bobooyee*, (1856) 6 Moores IA 393 PC.

¹³³*Niladri Vs. Mahant Chaturbhuj*, AIR 1976 PC 112; *Laxmi Vs. Patta*, AIR 1957 Guj 86; *Palaniappa Vs. Lakshmindra* AIR 1927 PC 131; *Baijnath Vs. Saman*, AIR 1940 Pat 33, *Biram Vs. Narendra*, AIR 1966 SC 1011; *Ramasaroop Vs. Ramanacharya*, AIR 1945 Pat 326.

¹³⁴*Arunodaya Vs. M D Kambli*, 1979 Mah. L.J. 104.

¹³⁵*Shanti Vijay Vs. Princess Fatima Farzia*, AIR 1980 SC 17.

¹³⁶Section 52 of the Indian Trusts Act 1882, *Janaki Ram Iyer Vs. P.M. Nilakanta Iyer*, AIR 1962 SC 633; *M V Ramasubbier Vs. Manicka Narasimhachari*, AIR 1979 SC 67.

¹³⁷*Murlidhar Deosthan Vs. Joint CC 2011 (5) All M. R. 108.*

¹³⁸Sec. 41A(2).

¹³⁹Section 41 A (1).

¹⁴⁰AIR 1993 Bom 315.

drive and efforts of manipulation of electoral process. But the Court declined to provide remedy. The Court's reasoning is not very convincing as the first part of the section is generic and not confined to property's administration. Further, the advisory role of CC should be comprehensive in order to avert mismanagement. K N Shah lists within the ambit of power of giving directions the circumstances such as non-user of property to the trust object, avoiding cessation of functioning of the trust, and failure in periodical holding of election of trustees.¹⁴¹ This is an instance of CAC functioning with self-imposed limitation, and not a satisfactory position from the angle of compliance.

Seventhly, the CC may issue directions to the state-aided public trusts which maintain hospitals, dispensary or centers of medical relief, and whose annual income exceeds five lakhs of rupees to avoid discrimination in access to their service on account of race, religion, caste, sex, place of birth or language; to reserve ten percent each of the total operational beds and ten percent each of the total capacity of patients in medical centre to both the indigent persons and persons belonging to the weaker section of the people who shall be given treatment either free of charge or at concessional rate and to comply with the incidental requirements.¹⁴² The phrase 'State aided public trust', is defined to mean trusts established exclusively for providing medical relief which has received any grant of land, building of lease at nominal or concessional rate or has received exemption from the land ceiling law or has received relaxation from the development control rules or has received financial assistance, guarantee or loan from the central, state or local government. As a result, the scope of duty under this provision is substantive. This legal position is laudable from the angle of human rights, social justice and poor people's access to health.

Some brief inferences can be drawn on the above commandments: Purpose compliance on the public trust's functioning has received focused attention and importance; duty of trustees to bring public benefit is insisted; trust property which is the economic base for societal expectation shall be guarded against abuses and pilferage; and concerns for human right and social justice in the service of state-aided medical public trusts have been addressed. The care for upholding moral worthiness of public trusts underlies these norms.

The Means, Mechanisms and Reach of Controls

Once the normative regime sets the ideals, achieving them through suitable means is the task to be seriously attended to. The Bombay model has the following methods of control, listed in the Chapter titled 'Control'.

First, the Public Trusts under the BPTA, whose annual income exceeds the prescribed amount, shall submit to the CC the annual budget showing the probable receipts and disbursements in the following accounting year making adequate provision for carrying and the objects of the trust and maintenance of trust property.¹⁴³ Law has not prescribed the requirement of approval of the budget by CC, although the original draft had such proposal. There is the requirement of annual auditing of accounts and submission of balance sheet and audit reports to the CC.¹⁴⁴ Failure, loss, omission and waste, if any in the use of trust fund shall be reported in the audit report.¹⁴⁵ The CC has the power of directing a special audit of the account of public trust.¹⁴⁶ On receipt of audit report, annual or special, the DCC or ACC shall call for explanation from the trustee and report to the CC with the findings about gross negligence, breach of trust and

¹⁴¹K N Shah, op cit 462-3; However, he lauds the *Lahudas ruling*.

¹⁴²Sec. 41 AA.

¹⁴³Sec. 31 A; the Gujarat Public Trusts Act, 2011 does not prescribe such requirement. The corresponding laws of Rajasthan, MP, and Bihar require submission of annual budget whereas the Bihar law goes a step ahead to require approval of the budget by the Commissioner. In *Mahant Motidas Vs. SP Sahu*, AIR 1959 SC 942 while upholding the requirement the apex Court interpreted the provision, section 60, to mean that it did not empower to modify or alter the budget in a manner to affect the exercise religious freedom.

¹⁴⁴Sec. 33 and 34.

¹⁴⁵Section 33(2).

¹⁴⁶Sec. 33 (41).

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misappropriation.¹⁴⁷ The CC, after considering the report and hearing the party determine the quantum of loss, reasons for the loss, persons responsible for it and the liability arising there from.¹⁴⁸ Order of surcharge upon the person liable may be imposed, and money be recovered.¹⁴⁹

Second, as per section 41 E, in a circumstances of waste, damage or improper alienation of trust property or apprehension thereof, made known by report or complaint of not less than two persons having interest in the trust, the CC may grant temporary injunction or such other order to prevent waste, damage or alienation of property. Such orders or injunctions are enforceable through the sanction of attachment of personal property of the person.¹⁵⁰

Third, the power of CC to inspect supervise and inquire is another control mechanism. The CC or DCC or ACC or any other authorized officer has the power to enter and inspect or cause to be entered on and inspected the trust property; to call for and inspect proceedings, books of account or document in the possession of the trustees or other persons connected with the trust; to call for statement account or report; and to get explanation from the trust or persons connected with the trust.¹⁵¹ The CC, DCC or ACC may, either *suo motu* or on the basis of complaint by any person having interest, institute an inquiry with regard to charities or a particular charity or class of charities either generally or for particular purposes.¹⁵² The inquiry officer has the power of collection of evidence, administering oath and summoning attendance and documents.¹⁵³ The report shall be sent to CC with remarks thereon. The CC shall take such steps as are necessary under the provisions of the Act in response to the report.¹⁵⁴

The fourth control mechanism is the CC's power of suspension, removal and dismissal of trustee. Under section 41D the legal action can be initiated by CC on application of a trustee or any person interested in the trust, or on report after inquiry under section 41B or *suo motu*. The six circumstances in which section 41D can be applied are when the trustee (a) makes persistent default in the submission of accounts, report or return; (b) willfully disobeys lawful orders issued by the CC under the provisions or rules of the Act; (c) continuously neglects his duty or commits any malfeasance or misfeasance, or breach of trust in respect of the trust, (d) misappropriates or deals improperly with the properties of the trust of which to ins a trustee; (e) accepts any position in relation to the trust which is inconsistent with his position as a trustee; or (f) is convicted for an offence involving moral turpitude¹⁵⁵ provides for mandatory procedure of framing of charges against the trustee, giving him an opportunity of meeting the charges, and stating the order with reasons. The trustee may be kept under suspension during the pendency of charges.¹⁵⁶ The order is appealable in courts of competent jurisdiction within 90 days from the date of order.¹⁵⁷ Temporary filling of the vacancy arising from the order is also contemplated.

As clear from the Statement of Objects and Reasons underlying incorporation of section 41D, the remedy through courts is experienced to be ineffective because aggrieved persons may not file suit and continued possession of trust property by the defaulting trustee might result in further misappropriation, misuse or damage of the trust property.¹⁵⁸ In the course of application of section 41D courts have considered the requirement of hearing as

¹⁴⁷Sec. 29 and 30.

¹⁴⁸Sec. 40.

¹⁴⁹Sec. 41.

¹⁵⁰Sec. 41.

¹⁵¹Sec. 37.

¹⁵²Sec. 41B.

¹⁵³Sec. 41B (3).

¹⁵⁴Sec. 41 3(8).

¹⁵⁵Sec. 41D (1). Section 41D (7).

¹⁵⁶Sec. 41D(3).

¹⁵⁷Sec. 41D(5).

¹⁵⁸K.N. Shah op cit., P. 481.

mandatory.¹⁵⁹ The term ‘misappropriation’ is interpreted not to include temporary retention of money without dishonest intervention.¹⁶⁰ According to the Bombay High Court, conviction for an offence of moral turpitude under section 41 (d) (1) (f) includes sexual harassment by the defaulting trustee in workplace while performing official duty.¹⁶¹

Fifthly, judicial intervention and remedy under section 50 (BPTA) provides another means of control over trustees. This resembles section 92 of CPC to some extent but goes far ahead of it, and is a better substitute.¹⁶² The circumstances under which section 50 can be invoked are as follows: (i) where it is alleged that there is a breach of public trust, negligence, misapplication or misconduct on the part of a trustee or trustees; (ii) where a direction or decree is required to recover the possession of or to follow a property belonging to or alleged to be belonging to a public trust or the proceeds thereof or for an account of such property or proceeds from a trustee, ex-trustee, alliance, trespasser or any adverse possessor but not a tenant or licensee ; (iii) when the direction of the court is deemed necessary for the administration of any public trust or; (iv) for any declaration or injunction in favour of or against a Public trust or trustee/s or beneficiary.

The reach of section 50 is quite wide compared to section 92 of CPC. Grievances addressed in section 92 include only ‘alleged breach of trust’ or ‘where direction of the Court is deemed necessary’. In the context of sec. 92, Judiciary has also abstained from expanding its jurisdiction through liberal interpretation. Hence against alienee, trespasser or adverse possessor section 92 does not provide remedy as such deviations do not come within its purview. Even about

negligence misconduct and misapplication of fund by the trustee, sec. 92 is impotent to give remedy.¹⁶³ Under the Gujarat Act negligence, misapplication or misconduct of trustee/s is not included as a remediable circumstance. Similarly declaration or injunction in favour of or against a public trust, trustee/s or beneficiaries is also not claimable.

The remedies under section 50 can be invoked by the CC after necessary inquiry or by two or more persons having an interest if the suit is relating to sub clauses (i) to (iii) or by one or more such persons in case the suit is relating to sub clause (iv). In both the latter two cases, the persons shall have obtained CC’s consent in writing as per section 51. This filtering process prevents vexatious and unnecessary litigation. The refusal of sanction of consent by the CC is remediable through appeal to Revenue Tribunal under section 71. In making necessary inquiry as well as in the process of giving or denying consent, the CC shall act reasonably. He shall give reasons in case of denial of consent.¹⁶⁴

The range of remedies available through suits under section 50 is comprehensive. Recovery of possession, removal and appointment of trustee or manager, vesting of property in trustees, direction for accounts, direction for reimbursement of loss, quantification of allocation of property for various objects of trust, direction about *cy pres* use, direction for alienation of property, settlement of schemes, amalgamation of trusts with framing of common schemes winding up of any trust, handing over of any trust to trustees of another trust, and deregistering of the trust exonerating trustees from technical breach order varying, altering or amending any trust instrument, declaring or

¹⁵⁹Vijay Mehta Vs. Charu K Mehta, 2008 (5) Mah. L.J. 853.

¹⁶⁰Champaklal Nemchand Vs. State of Gujarat (1962) 2 GLR 262.

¹⁶¹Monohar Dhonde Vs. State of Maharashtra, 2007 (1) Bom C R 417.

¹⁶²Section 52 makes section 92 & 93 of CPC not applicable to PTs under BPTA.

¹⁶³In Harendra Nath Bhattacharya Vs. Kaliram Das, AIR 1972 SC 246, denial of opportunity to use Trust property by devotees could not be remediated; *Pragdas; Vs. Ishwaralal Bhai*, AIR 1952 SC 143; *Abram Rahim Vs. Md. Barkat Ali*, LR 55 IA 26; 32 CWN 482; in *C N Evolappa Vs. Balakrishna* 55 Mad L J. 183, and in *Venkatanarasimha Vs. Subba Rao*, ILR 46 Mad 300 courts have held that although trespassers or adverse possessors can be impleaded as defendants, no decree of possession can be passed against them.

¹⁶⁴State of Gujarat Vs. Gujarat Revenue Tribunal Bar Association, AIR 2013 SC 107; in *Mohant Ratnadas Vs. Babubhai Dave*, AIR 1972 Guj 216 and *Hargovinbhai Vs. Prabhu Das*, 2000 (3) GCD 2010 the CC’s function was held only as administrative; *Hari Prasad Shukha Vs. Harilal Shukla* (1969) 9 GRI LR 288 CC was to exercise power objectively by looking to the issues whether there is a fair case.

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denying any right in favour of or against any trust and granting of any other relief as the nature of the case may require in the circumstances of the case and in the interests of the trust are the remedies available under section 50. The CC, instead of instituting a suit, in a fit circumstance, may apply for variation of scheme. Compared to sec 92 of CPC, which has remedies (a) to (h) the remedies available in (a) to (q) are more in numbers and have rich diversity. Section 50 addresses all issues of abuses, misuses and failures, and makes the CAC model vibrant and far reaching in impact. The superiority of CAC model is explicit because of the above reason.

Sixthly, CC himself is given the power under section 50A to frame, amalgamate or modify schemes as an alternative to court. Experiencing that getting judicial remedy is dilatory and is subject to litigation related vagaries and uncertainties, this new provision was introduced, which has made the process speedy, cheap and effective. The power of CC here is quasi judicial, and his 'reason to believe' shall be based on objective satisfaction.¹⁶⁵ Under section 50A the trigger for framing of scheme is CC's reason to believe in the need to settle a scheme or application made by two or more persons having interest in public trust projecting it as in the interest of the proper management or administration of public trust. Trustees shall be given an opportunity of hearing CC's satisfaction that it is necessary or expedient to frame a scheme for the management of the trust is crucial¹⁶⁶.

As per section 50 A (2), the CC after forming an opinion that in the interest of proper management of administration of two or more public trust, they shall be amalgamated, he may through due publicity in the Official Gazette and widely circulated newspapers bring the proposal of amalgamation to the notice of persons interested in the trusts. After giving the trustee and all interested persons an opportunity of hearing he may formulate the common scheme for the trusts amalga-

mated. The CC may modify the scheme at any subsequent time. Subject to court's scrutiny under and section 72, the scheme framed, amalgamated or modified shall be final.¹⁶⁷ Again, the CAC model's pro-active role is a distinguishing feature.

Finally, the CC assists in the process of extrapolating cy pres use of charity fund so that the benefit of public trust will not become defunct or dormant. Section 55 authorizes the CC to require the trustees to invoke the jurisdiction of the court for such decision. He may take action on the basis of application of his own independent opinion. The circumstances might be: (a) when the original object of the trust has failed; or (b) where the surplus income or balance remains unutilized, or (c) when it is not in public interest expedient, practicable desirable, necessary or proper to wholly or partially use the trust income / property for carrying out the original intention, but it shall be applied to any other charitable or religious object; (d) when flexibility has arisen due to unascertainable nature of the object, impossibility of its performance or lack of certainty due to reference to *dharmada*. If the trustee fails to apply for cy pres direction or when the CC himself is a trustee, CC himself shall apply for cy pres direction.

After receiving the application, the Court shall hear the CC, trustees and other parties and hold inquiry to decide the matter and issue directions. As far as expedient, desirable and practicable, and necessary in the interest of public, the Court shall give effect to the original intention of the author of the trust in directing for use of fund for alternative purposes.¹⁶⁸ As held by the Supreme Court, "If the method indicated by the founder cannot be carried out, the Court will substitute another method of cy pres, that is to say, as nearly as possible, to the method specified by the founder".¹⁶⁹ Further, when the initial object itself is impracticable or impossible, the Court may issue direction for cy pres use for nearest objective.¹⁷⁰ When

¹⁶⁵Bipinchandra P Patel Vs. J L Naik, (1974) 15 GLR 41; Tahir Ali Mohamad Vs. Quijar Shaik Nomanbhoy, AIR 1995 Bom 422.

¹⁶⁶sec. 50 A (1).

¹⁶⁷Sec 50 A (4).

¹⁶⁸Sec. 56.

¹⁶⁹Ratilal P Gandhi Vs. State of Bombay, AIR 1954 SC 388.

¹⁷⁰Chhotalal Lalubhai Vs. Charity Commissioner, AIR 1965 SC 1611 ; NSR Mudaliar Vs. SV Mudaliar, AIR 1970 SC 1839.

the grant is to the deity and the income is earmarked for the special services, if there is surplus that cannot be used for special service, cy pres doctrine can be applied.¹⁷¹ Similarly, a trust meant for feeding birds cannot be diverted to secular education.¹⁷² When the grant of land and money made by the erstwhile prince for hostel could be realized through getting possession of land only but without monetary sanction, use of cy pres could permit sale of half the portion of the land and use of the proceeds for construction of hostel.¹⁷³ However, diversion of *devadravya* (property meant for God) for secular purposes of charity is not permissible.¹⁷⁴

The above described control mechanisms, which are available largely at the disposal of Charity Commissioner, help him in enforcing the commands of public trust law. Although it involves hierarchical exercise of power, consultation, hearing and involving the other participants are the tasks contemplated in the CC's approach. While discipline is one of his major concerns, his role goes beyond mere disciplining, and has a distinct societal role.

Comparative Analysis

There is much similarity between the powers and functioning of the British Charity Commissioner and that of CC under BPTA in the matter of registration, document filing, inquiry, accounts, audits and protection of trust property.¹⁷⁵ But a prominent difference is that CCs in Britain have clearer advisory role and powers. According to Tudor, "Their general function is the promotion of effective use of charitable resources by encouraging the development of better methods of administration by giving charity trustees information or advice on any matter affecting the charity and by investigating and checking abuses."¹⁷⁶ Adoption of such

pro-active approach in India would mean rejection of restrictive approach in *Lahudas* case¹⁷⁷ that CC's power of intervention through direction does not extend to guidance for fair election. In view of the problem of dormant trusts, misuses and manipulations, encouragement and warning through advice is an appropriate policy.

The CAC model of the Bombay law influenced 4 States (Gujarat, Rajasthan, Madhya Pradesh and Bihar) to enact similar laws with some modifications and additional bodies or forums for community participation. A brief issue-based comparison can be attempted. Firstly, there is diversity in the matter of definition of public trust, and hence in the very scope of application of law. Bihar statute confines the scope of religious trust to Hindu religious trusts and excludes trusts for Sikhs from its ambit. All other states have treated societies formed for a religious or charitable purpose or for both as public trusts; included public trusts of all religions except Waqf after 1995 (because of the central law); and have brought *dharmada* within the ambit of public trust. It is the responsibility of the collector of *dharmada* to expend the funds for *dharmada* objects. Rajasthan Act has made special provision for treating *dharmada* by a committee consisting of members elected in the prescribed manner by persons connected with trade and business¹⁷⁸ This approach of introduction of democratic element has social significance. All the statutes have opted for integrated treatment of temples and maths, although the latter have some special measures. Avoidance of unnecessary dichotomy is on right lines. The intriguing distinction between public trust and private body is lingering in all the jurisdictions, and factors of social change bring gradual modification of the status of private trust. Secondly, all the States except Bom-

¹⁷¹Shankaranarayan Vs. Board of Commissioners, AIR 1948 PC 25. But when the trust's object is to facilitate community during festival, diverting the fund on account of cy pres for more desirable purpose like support to a hospital is not coming within the permissible legal framework (Charity Commissioner vS. Chunilal Raicharan C A 1037 Guj HC dt. 24-07-1968).

¹⁷²Punamchand Vs. PapatlalSaman F A 28/1963 Guj HC dt. 10.12.1963.

¹⁷³Moharaj Shivjyotisingh Vs. Ganod Bharat Sri Natwarsinghji, Gujarat HC 22.02.1971 F A 874/1965.

¹⁷⁴Ratilal P Gandhi Vs. State of Bombay, AIR 1954 SC 388.

¹⁷⁵See Jean Warburton et al.(Eds), *Tudor on Charities*, Ninth Edn (London: Sweet & Maxwell, 2003) 333-365.

¹⁷⁶*Ibid* 333.

¹⁷⁷Lahudas Sambhaji Karad Vs. State of Maharashtra, AIR 1993 Bom 315.

¹⁷⁸Section 66 of the Rajasthan Public Trusts Act, 1959.

bay and Gujarat have created intermediary bodies like Advisory Boards or Committees that provide additional space for community participation as in states that have opted conventional method. Bihar has created community specific Boards (different boards for Shwetambara and Digambara communities and other section of Hindus) consisting of members elected by respective communities. Thirdly, registration process is the common method used for roping in all the public trusts for legal governance, and laws provide for systematization of the process and remedies in case of grievances. Fourthly, control mechanisms like inquiry, auditing, filing of returns, accounts and annual reports keep the Commissioner informed about the position of trusts. The remedies available through courts, the circumstances in which they are available are comprehensive and go far ahead of those available under section 92 of the Civil Procedure Code. Gujarat has replaced the courts by tribunals in order to ensure speedy disposal of cases. All the statutes have created space for the initiative and participation by persons having interest in the public trust towards effectuation of legal policy. Public Trust Law is more obsessed with orderliness in property or income/expenditure related matters than with good governance through democratization. Finally, the limits on cy pres deviations are getting crystallized. Excessive state intervention on the matter is declared as violating religious freedom.¹⁷⁹

Other models fall into two categories: (a) schemes overseen by courts; and (b) statutory arrangements for hierarchy of bureaucracy supervising the Board of trustees or Committee of Management along with an Advisory Council. In the first category, express or implied public trusts or endowments perform functions subject to invocation of judicial remedies in case of abuse. Section 92 of CPC or Charitable and Religious Trusts Act of 1920 or Charitable Endowments Act 1890 provides remedies in case of abuse. Under the Act of 1890 Treasurer appointed by the Government is the bureaucratic head to look after the charitable endowments. In the second category, which

consists of numerous state enactments the abuses are prevented by hierarchy of officialdom (Commissioners), the board of trustees/committee of management and the Advisory Council. The abuses are remedied by courts. In both the categories, preventive judicial supervision as available in CAC model is not forthcoming. While litigation based remedies are costly, dilatory and disadvantageous, the CAC model which is less dependent on litigation but more relying on supervisory and preventive role of CC has greater advantages.

Conclusions

Public trusts being extremely important for any community for the flourish of its socio-cultural life and human rights defense, making them robust instruments free from undersides is an important policy and task that build the capacity for service delivery. A regulatory regime that uses both carrot and stick, and that acts as friend, mentor and discipliner, has a great responsibility of alerting, warning and encouraging the institution towards purpose compliance. The Indian traditional system of endowment required the support of the state. But the colonial policy of withdrawal from positive intervention due to politically motivated hesitation made the system highly vulnerable.¹⁸⁰ Given the opportunity of legislative experimentation, the Bombay regulatory regime combined the iron hand of discipline and soft heart of social benevolence. Comprehensively covering all the types of public trust institutions of all the religions, it has the compulsion of showering benefits and imposing burdens on all on egalitarian basis. Hence, it comes closer to the basic ideology of secularism.¹⁸¹ The growth of the law around the definition of public trust is towards an inclusive policy so that new categories such as recreational charity, charity for environment came within its arms.

Because of the involvement of beneficiaries, judicial composition and acting within the legal framework and according to procedural safeguards, the CC's

¹⁷⁹Ratilal P Gandhi Vs. State of Bombay AIR 1954 SC 388.

¹⁸⁰Donald Eugene Smith, *India as a Secular State* (Princeton: Princeton University Press, 1963) 244; also see J Duncan M Derret, *Religion, Law and State in India* (Delhi: Oxford University Press, 1999) 492-4.

¹⁸¹*Ibid.*

functioning has allowed sufficient space for community decision and participation. The legal space for the role of interested persons has avoided the suffocating atmosphere of highhanded bureaucratic control. In fact, unlike the Madras model which stood for high intervention by bureaucracy, it accommodates greater autonomy and social innovation, although it has a camouflage of disciplinarian.¹⁸²

The decision in *Ratilal* to the effect that cy pres choices shall not be imposed by the CC but the donor's intention shall be respected in extrapolating the most nearer choice, has averted the imposition of reform from the above. Judicial hesitation to expand the CC's advisory role has obstructed its competence falling short of the British model.

As orderliness and systematization in matters of collection, use and protection of income and property are crucial for good governance of the trust and are to be ensured through the instrument of discipline, CAC has basic justification, both moral and legal. One conspicuous advantage of the CAC model is that there is no

scope for political interferences by the Government in the appointments of trustees as the CC system has judicial composition. The Bombay Act, by contemplating CC's pro-active role for making the charity hospital's facilities mandatorily available for disadvantaged sections has promoted the cause of human rights. Further, CC's power of issuing mandatory directions has the potentiality of reorienting the Non Profit Voluntary Organizations to promote human rights. As many of the NPVOs are directly or indirectly serving as human right defenders, their functioning with good governance adds to the cause of human rights.

The width of circumstances in which judicial remedies are made available under section 50 of the BPTA surpasses those available in other models. Further, CAC model's self reliance on supervision and prevention and less dependence on litigation method has proactive role which is suitable for robust functioning of NPVOs. Future law reformers should keep in mind the successful functioning and desirability of the CAC model.

¹⁸²See D E Smith supra n 175 for the proposition that the Bombay law was least restrictive in nature.