

DELHI LAW REVIEW

VOLUME 12

1990

© Faculty of Law, University of Delhi

Mode of Citation : 12 *Del. L. Rev.* . . . (1990)

The Delhi Law Review is the annual publication of the Faculty of Law, University of Delhi, Delhi. Its present circulation is 4000 copies.

The manuscripts for publication, subscriptions, books for review and other enquiries about advertisements, etc. should be addressed to the Dean, Faculty of Law, University of Delhi, Delhi-110007, INDIA.

Rate of Subscription : Rs. 40.00 (Domestic)
US \$ 10 (Overseas)
UK £ 5 (Overseas)

BACK ISSUES OF DELHI LAW REVIEW

Vol. I	1972	Rs. 5.00	US \$ 2.	UK £ 1.5 Shilling
Vol. II	1973	Rs. 10.00	US \$ 3.	UK £ 1
Vol. III	1974	Rs. 10.00	US \$ 3.	UK £ 1
Vol. IV & V	1975-1976	Rs. 15.00	US \$ 5.	UK £ 2
Vol. VI & VII	1977-1978	Rs. 15.00	US \$ 5.	UK £ 2
Vol. VIII & IX	1979-1980	Rs. 25.00	US \$ 10.	UK £ 5
Vol. X & XI	1981-1982	Rs. 25.00	US \$ 10.	UK £ 5

Available from Dean, Faculty of Law, University of Delhi, Delhi-110007 on payment of cash, bank draft or cheque. Add Rs. 10.00 while sending cheque towards bank collection charges.

Delhi Law Review did not appear from 1983 to 1989.

RATE OF ADVERTISEMENT

Back cover full page	: Rs. 2000.00
Inner cover full page	: Rs. 1500.00
Inner Full page	: Rs. 1000.00
Half page	: Half of the above amounts

EDITORIAL COMMITTEE

Editor-in-Chief

Professor P. S. Sangal

Head of the Department &
Dean, Faculty of Law

Editor

Dr. S. N. Singh

Members

Professor K. B. Rohatgi
Professor B. P. Srivastava
Dr. Hosi Prasad

Professor K. Ponnuswami
Dr. Gyan Chand
Shri Balbir Singh

Assistance

Shri V. K. Singh
Ms. Rupa Tiwari

BOOK REVIEWS

P.S. Atchuthen Pillai, <i>Jurisprudence and Legal Theory</i>	Autar Krishen Koul	192
V.D. Mahajan, <i>Jurisprudence and Legal Theory</i>	Autar Krishen Koul	192
K.P. Chakravarti, <i>Jurisprudence and Legal Theory</i>	Autar Krishen Koul	192
Kimud Desai, <i>Law of Torts-An Outline with Cases</i>	S. K. Verma	196
P.S. Atchuthen Pillai, <i>Law of Torts</i>	S. K. Verma	196
P.M. Bakshi, <i>An Introduction to Legislative Drafting</i>	Autar Krishen Koul	198
D.C. Wadhwa, <i>Guaranteeing Title to Land-A Preliminary Study</i>	B. B. Pande	200
Autar Singh, <i>Principles of Mercantile Law</i>	N. K. Rohatgi	202
Satli K. Roy Chowdhury and H.K. Saharay, <i>Arbitration Law</i>	S. N. Agarwal	205
M.N. Das, <i>Ganguly's Criminal Court Practice and Procedure</i>	T.D. Sethi	207
Autar Singh, <i>Ekadhikar Avrodhak Tatha Vyaparik yavhar Vidhi (in Hindi)</i>	N. K. Rohatgi	211
N.M. Lahiri and A. Bhattacharjee, <i>S.M. Lahiri's The Transfer of Property Act</i>	V. K. Singh	212
J.N. Saxena, Gurdip Singh and A. K. Koul, <i>United Nations for a Better World</i>	V. K. Singh	214
B.M. Gandhi, V. D. Kulshretha's <i>Landmarks in Indian Legal and Constitutional History</i>	Parnanand Singh	217
S.C. Sivastava, <i>Treatise on Social Security and Labour Law</i>	Sunil Gupta	220
M. Rama Jois, <i>Legal and Constitutional History of India</i>	M. P. Singh	223

THE FACULTY

HEAD OF DEPARTMENT AND DEAN, FACULTY OF LAW:
 Professor P.S. Sangal, B.Sc., LL.M., Ph.D. (ALLAHABAD)

PROFESSORS

- Baxi, Upendra, LL.M. (Bombay), LL.M., J.S.D. (Berkeley)
- Errabti, B. B. A., M.L. (Madras), Ph.D. (Delhi)
- Kohli, Baldev, M.A. (Panjab), LL.M. (London)
- Koal, A.K., LL.M., Ph.D. (Delhi)
- Kuba, Mrs. S.K., M.A., LL.M., Ph.D. (Delhi)
- Mahmood Tahir, LL.M., Ph.D. (Aligarh), FALS (London)
- Menon, N.R.M., B.Sc., B.L. (Kerala), M.A. (Panjab), LL.M., Ph.D. (Aligarh)
- Nigam, K.K., B.Sc., LL.M. (Lucknow), LL.M. (California)
- Pande, B. B., LL.M. (Lucknow)
- Ponnuswami, K., B.Sc., M.L. (Madras), LL.M. (Yale), D.C.L. (McGill)
- Rohatgi, K. B., M.A., M.Com., B.C.L., LL.M. (Delhi), J.S.D. (Cornell), FCCS (London)
- Sangal, P.S., B.Sc., LL.M., Ph.D. (Allahabad)
- Siddiqui, Z.M.S., B.Sc., LL.B. (Lucknow), LL.M. (Singapore), J.S.D. (Cornell)
- Singh, M.P., B.A., LL.B. (Agra), LL.M. (Columbia), LL.M., LL.D. (Lucknow)
- Singh, Parnanand, LL.M. (Lucknow), Ph.D. (Delhi)
- Sivastava, B.P., B.Sc., LL.M. (Lucknow), M.C.L. (Columbia)
- Sivaramayya, B., B.Sc., M.L. (Andhra), LL.M. (Yale), D.C.L. (McGill)
- Verma, Mrs. S.K., LL.M. (Banaras), LL.M. (Berkeley), J.S.D. (Harvard)

READERS

- Aggarwal, Mrs. Nornita, M.A. (Allahabad), LL.M. (Lucknow), Ph. D. (Delhi)
- Aggarwal, S.K., B.Sc., LL.M. (Delhi)
- Alakh, P. P. Singh, LL.M. (Delhi)
- Bakshi, Mrs. Veena, LL.M. (Yale)
- Batra, A.K., LL.M. (Delhi)
- Batra, T.S., B.A. (Hons.) (Panjab), M.A., LL.M. (Delhi)
- Bhalla, S.L., B.A., LL.M. (Panjab), Ph. D. (Delhi)
- Chand, Gyan, B.A. (Panjab), LL.M., Ph.D. (Delhi)
- Chander, Harish, M.A. (Delhi), LL.M., FALS (London), Ph. D. (Delhi)
- Deshmukh, U.M., B.A. (Agra), LL.M. (Poona)
- Dhar, P.M., LL.M. (Delhi)
- Din, Mala, M.A. (Panjab), LL.M., Ph.D. (Delhi)
- Dixit, V. K., LL.M. (Aligarh), Ph.D. (Delhi)
- Gupta, A.K., LL.M. (Panjab)
- Gupta, V.K., LL.M. (Gwalior)
- Jambhalkar, Mrs. Lakshmi, B.Sc., M.L. (Madras)
- Khare, S.C., LL.M. (Lucknow), Sahitya Ratan, Dip. Lab. Law, Cer. Int. Law (the Hague), LL.D. (Lucknow)
- Kumar, Arun, M.Com. (Agra), LL.M., Ph.D. (Delhi)
- Maini, S.L., B.C.L., LL.M. (Delhi)
- Mishra, Govind, LL.M. (Patna), LL.M. (Columbia)
- Prasad, Hori, LL.M., Ph.D. (Delhi)
- Prasad, Surendra, B.A., LL.M. (Lucknow), Ph. D. (Delhi)
- Rathore, S.S., LL.M. (Lucknow)
- Rekha, Mrs. Chitra, LL.M. (Aligarh), Ph. D. (Delhi)

Sabri, P.S., LL.M. (Delhi)
 Sharma, M.C., LL.M. (Delhi), J.S.D. (Northwestern)
 Shukla, M.S., LL.M. (Delhi)
 Siddique, Ahmad, LL.M. (Aligarh)
 Singh, Balbir, M.A., LL.M. (Panjab)
 Singh, Gurdip, LL.M., Ph.D. (Delhi)
 Singh, S.P., Dip. Taxation, P.G.D. Criminology (Lucknow), LL.M. (Connell)
 Singh, S.N., B.A., LL.B. (Gorakhpur), LL.M. (Banaras), Ph.D. (Delhi)
 Vats, S.S., LL.M. (Delhi)

LECTURERS

Bawa, N.S., LL.M. (Delhi)
 Bhambra, S.S., LL.M. (Delhi)
 Gupta, Mrs. Sunam, LL.M., Ph.D. (Delhi)
 Gupta, V.K., B.Sc. (I & K), LL.M., Ph.D. (Delhi)
 Ishar, I.S., LL.M. (Delhi), LL.M. (Columbia)
 Kaul, B.T., LL.M. (Delhi), Dip. Lab. Law (I.L.I.), LL.M. (London)
 Khaduria, O.P., LL.M. (Delhi)
 Khanna, Rajiv, LL.M. (Delhi)
 Khatripal, N.K., LL.M., Ph.D. (Delhi)
 Kumar, Ashwani, B.Sc., LL.M. (Delhi)
 Kumari, Miss Ved, LL.M. (Delhi)
 Lal, O.B., LL.M. (Delhi)
 Minocha, S.K., LL.M. (Delhi)
 Mirashi, S.L., M.A. (Allahabad), LL.M. (Delhi)
 Paul, Soli, LL.M. (Delhi), LL.M. (Michigan)
 Popal, O.P., LL.B. (Delhi), LL.M. (Ukat)
 Rohatgi, N.K., B.Com. (Hons.), M.A., LL.M. (Delhi)
 Sahi, T.D., LL.M. (Delhi)
 Sharma, K.R., LL.M. (Delhi)
 Singh, J.N., B.A., LL.B. (Gorakhpur), LL.M. (Banaras), Ph. D. (Delhi)

ADOPTION OF INDIAN CHILDREN BY FOREIGNERS

Directions of Supreme Court in *Laxmi Kant Pandey v. Union of India**

S.N. Singh, Editor

LAKSHMI KANT PANDEY, an advocate of the Supreme Court of India, had written a letter to the Supreme Court complaining of certain mal-practices indulged in by the social organisations and voluntary agencies engaged in the work of offering Indian children in adoption to foreign parents. The letter was based on a press report published in a foreign magazine "*The Mail*" which indicated that Indian children adopted by foreigners, who reached foreign countries, were used as beggars or for prostitution. The letter sought the relief of restraining the India-based private agencies "from carrying out further activity of routing children for adoption abroad" and directing the Government of India, the Indian Council of Child Welfare and the Indian Council of Social Welfare to carry out their obligations in the matter of adoption of the Indian children by foreign parents. The letter was treated as a writ petition by the court which passed a number of directions¹ in the case with a view to prevent mal-practices followed in adoptions of children of one country by another. The directions *inter alia* included the establishment of a Central Adoption Resource Agency and the state level agencies for promotion of adoption, preparation of a list of foreign adoption sponsoring agencies to be recognised/licensed by the central government and circulation of the court's order to all the High Courts and social and child welfare agencies located in different parts of the country, preparation of list of Indian sponsoring agencies, organisations and institutions recognised for inter-country adoption of orphan children of India, preparation and maintenance of records of adoptive parents and Indian orphans so adopted and send them to appropriate embassies and High Commissions for follow up action and answering the well being of the adopted children. These directions were to be implemented within a fixed time schedule. The High Courts were also requested to frame rules on the basis of the judgment.

The Supreme Court gave further directions² in the case regarding the recognition of representatives of foreign adoption agencies with liberty to operate in India. By another order,³ the court directed all district collectors in India to ensure enlisting of abandoned/desitute children by the missing homes/hospitals within their respective jurisdictions with foster care homes or the social welfare departments of the concerned government, the publication of the list of recognised Indian placement agencies and their associate agencies in two local leading newspapers at least annually and the monthly reports by the juvenile courts in India to be submitted to their respective High Courts about the filing, disposal and pendency of the application for release order of the abandoned children.

According to the petitioner, the above directions issued by the court were

* Writ Petition (Ca.) No. 1171 of 1982.
 1. *Laxmi Kant Pandey v. Union of India*, AIR 1984 SC 469=(1984) 2 SCR 795.
 2. *Laxmi Kant Pandey v. Union of India*, AIR 1986 SC 272: (1985) Supp. 3 SCR 71.
 3. *Laxmi Kant Pandey v. Union of India*, (1987) 1 SCC 66.

not complied with and, therefore, he approached the court for contempt proceedings. By its order,⁴ the court called upon the central and state governments to comply with the directions issued by it in the case from time to time and make a return to the court's registry about their compliance within ten weeks of the order. Pursuant to this order, the central government and most of the state governments filed affidavits of compliance on different dates.⁵ The court, presided over by Ranganath Misra J (as he then was), the present Chief Justice of India, passed the following order⁶ to the remaining states and union territories which had not filed affidavits of compliance till then:—

"The remaining States and Union Territories served in terms of the Court's order are Arunachal Pradesh, State of West Bengal and the Union Territories of Andaman & Nicobar Islands and Lakshadweep as also Dadra and Nagar Haveli. All these States & Union Territories have now entered appearance and have filed their affidavits. In view of the fact that there has been compliance with the notice of the Court the contempt proceedings are dropped.

A petition filed on behalf of the All India Lawyer's Union, Tamil Nadu, Madras, has brought to the notice of the Court the fact that at the time the main judgment was delivered the operative law was contained in the Children's Act and the Juvenile Court was authorised to deal with the children concerned. With the enforcement of the Juvenile Justice Act, 1986, U/s 63 the provisions of the earlier law have been repeated as Chapter III of the Juvenile Justice Act, 1986, has contained provisions for neglected juveniles. Under this chapter the power to deal with relevant aspects vests in the Board constituted under that Act and, therefore, reference made in the main judgment to the Children's Act in regard to production of neglected juveniles and the procedure adopted to be followed in regard to such children including power to commit them to suitable custody now vest in the Board. The main judgment shall, therefore, be deemed to have been modified by operation of law and reference made to Juvenile Courts for such purposes shall be taken to be to the Board under Juvenile Justice Act, 1986. We would like to clarify the position that as a result of the change in the law the Juvenile Courts under the Children Act would no longer deal with these matters and the Board constituted under the Juvenile Justice Act, 1986 shall be appropriate authority for such purpose. This alteration shall be operative from 1st of September, 1990 so that adequate notice will be available of this change and for the purpose of informing the courts and the people dealing with this matter. We direct that this part of the order shall be given adequate publicity in law journals and the Registrar general shall have it otherwise publicised. The matter shall now be called on 21.9.1990."

4. *Laxmi Kant Pandey v. Union of India*, 1989 (2) SCALE 691.
5. See *Laxmi Kant Pandey v. Union of India*, 1990 (1) SCALE 144 and 1990 Supp. (1) SCALE 133-36

6. *Laxmi Kant Pandey v. Union of India*, 1990 (2) SCALE 64. This order, passed on July 12, 1990 in C.A. Nos. 3357/1989, 789, 1712, 1713 & 2045/1990 in W.P. (Ct.) No. 1171 of 1982, is being published in *Delhi Law Review* as directed by the Court.

DEAN'S PAGE

I AM very happy to place this issue of Law Faculty Journal, Delhi Law Review, in the hands of the readers. It fills me with joy to recall that in 1972, I was the Founder Editor of Delhi Law Review, under the kind guidance of my senior colleague and the then Dean, Professor K.B. Rohatgi. Now during the last few years, the Delhi Law Review has not been appearing. On my assumption of office as Dean of the Faculty of Law on 20th of June 1989, one of the few things about which I took some urgent steps, has been the Delhi Law Review. The result of those steps is before you. However, I wish to assure the readers that Delhi Law Review has now been put on sound footing and, therefore, it is expected that it will never stop appearing in the future.

According to our perception, the role of law teachers is not only teaching of law but also to advance the frontiers of knowledge in the field of law so that law performs its true function of social engineering for solution of the socio-economic problems of the nation. I am sure that the Law Faculty of this University will keep this goal constantly in view, and Delhi Law Review will serve as the vehicle for carrying the thoughts of our teachers and students.

I deem it proper to place here on record the excellent services in teaching and research of one of our stalwarts, Professor P.K. Tripathi, who finally retired from the Law Department on May 24, 1989. Professor Tripathi is even now keeping himself busy in legal writing of a high order and we wish him very well in his scholarly pursuits.

We are very happy to place on record our admiration of another stalwart, Professor Upendra Baxi, who is the first Law Teacher to occupy the high office of Vice-Chancellor of Delhi University. In spite of his expected busy schedule as Vice-Chancellor, he has promised us his full association with the teaching and research of this Department, as before. We are grateful to him for this promise of continued association.

In the end, I must thank my friend and colleague, Dr. S.N. Singh, the learned Convenor of the Editorial Committee who worked relentlessly to make this venture a success.

PROFESSOR P.S. SANGAL
Head of the Law Department and
Dean, Faculty of Law

EDITORIAL
SUPER 301

IT IS surprising that India has been singled out for retaliation under Super 301 by the United States. So far at the international level, General Agreement on Tariffs and Trade (GATT) is the Organisation under which all matters connected with trade are decided. One country, namely U.S.A., trying to retaliate in the field of international trade under a provision of its own law, is something which is beyond the domain of international legality.

The U.S. wants that India should change its laws about insurance, banking, foreign investment, international trade, etc. and should throw open its borders for, among others, the entry of U.S. insurance and banking companies. This is certainly trying to infringe the sovereignty of this country. It is another thing that by mutual agreement, India may relent on any of these matters. But to try arm-twisting in this manner is nothing short of economic coercion at the international level.

One of the several changes that the U.S. wants India to make in its laws is a change in the Intellectual Property Laws of India, i.e. law of patents, trademarks, copyright and designs. The U.S. feels that because of weak protection of Intellectual Property Rights in this country, distortion is created in international trade; whereas the fact is that adequate protection is available to Intellectual Property Rights in this country.*

In view of these factors, there is absolutely no justification for the United States to single out India for the purpose of retaliation under its domestic law.**

PROFESSOR P.S. SANGAL***

* See the author's article entitled "Intellectual Property Laws of India and Foreign Accusations: An Evaluation", published at pp.16-45 of this very issue and also P.S. Sangal, "Protection of Trademarks in India—How Effective?" published in 80 *The Trademark Reporter* 159-70 (March-April, 1990) brought out by the United States Trademark Association, New York.

** See also P.S. Sangal, "Indian Exports to the United States and Section 301 of the U.S. Trade Act of 1974" *XLVII India Quarterly* 270 (July-December, 1988), a Journal of Indian Council of World Affairs, New Delhi.

*** L.L. M., Ph.D., Head of the Department & Dean, Faculty of Law, University of Delhi, Delhi.

ON THE PROBLEMATIC DISTINCTION BETWEEN
"LEGISLATION" AND "ADJUDICATION": A
FORGOTTEN ASPECT OF DOMINANCE*

UPENDRA BAXI**

I

THE LAW—as an ideology and as an ensemble of institutions—has featured preeminently in the mainstream theorizing concerning the nature, and changing forms, of the state, both in the liberal and marxian traditions of analysis. Indeed, a characteristic feature distinguishing the state from any other social ordering has been expressed in terms of the legal monopoly of force by the state; the notion of "law" is thus central to thinking about the state. It has been a prime cultural and civilizational function of the law to reiterate and reincarnate the boundaries between the permissible and proscribed uses of force. The critical role of legal norms in the complex organization of the internal powers of state is also recognized in theorizing, and in actual practice, of the capitalist and in actually existing socialist societies.

Indeed, a major question concerning the nature of state and law (which has fertilized most recent theorizing on capital and state) was acutely formulated by E.B. Pashukanis when he asked:

Why does the dominance of a class not continue that to be that which it is—that is to say, subordination in fact of one part of the population by another part? Why does it take on the form of official state domination? Or, which is the same thing, why is the mechanism of state constraint created as a private mechanism of the dominant class—taking the form of the impersonal mechanism of public authority isolated from society?

His own answer to this question that the legal form of *Rechtsstaat* is required by the nature of the bourgeois social relations, entailing a close analysis of the homology between the commodity form and the legal form,¹ has in turn generated many varied elaborations of linkages between the state as an "ideal collective" capitalist and the nature and forms of law in capitalist societies.²

But in most of this state theorizing (which at times becomes state and law theorizing) the "law" appears as an undifferentiated category, encompassing legislation, administration, adjudication and enforcement. The distinctive character-

* This is a revised version of a paper presented by the author at the International Political Science Congress, Paris, July 15-20, 1985.

** Professor of Law, Vice-Chancellor, University of Delhi.

1. E.B. Pashukanis, *Law and Marxism: A General Theory* 139 (1968).

2. Isaac D. Ballbin, "Commodity Form and Legal Form: An Essay on the 'Relative Autonomy of the Law'", *11 Law & Society Rev.* 571 (1977).

3. For a recent analysis of writings on commodity circulation, law and state, see B. Jassop, *The Capitalist State* 84-101 (1982); J. Holloway & S. Picotino et al. (eds.), *State and Capital: A Marxist Debate* (1978); U. Baxi, *Marx, Law and Justice—Indian Perspectives* (1990, in press).

teristics of these domains of law, so familiar to the lawpersons, tend to be totally ignored. The form and function of the state is perhaps understood but at the cost of encapsulating the forms of law. Thus, for example, Poulantzas attributes to the legal and ideological structures the "effect of isolation." Agents of production are distributed "in social classes as juridico-ideological subjects" who actually experience "specific fragmentation and atomization".⁴ Individuation through the system of juridical norms thus helps to conceal from the agents "in a particular way that the fact that their relations are class relations"⁵ and the state also appears to perform the function of representing the "unity of isolated relations."⁶ The reference to normative legal order causing this effect of isolation, of course, cannot only signify legislation; the effect of isolation must be seen as a joint product of legislation, administration, adjudication and enforcement. The interesting and intriguing way in which these different domains of the law collaborate or compete to continuously produce and reproduce this pertinent effect does not constitute apart of the problematic for Poulantzas.

Similarly, we constantly come across the notion of the centralized unity of state power in state theorizing. However, its existence and development may be sought to be explained, the assumption of such unity seems to be an ineluctable feature of marxian theoretical approaches to state power. And the locus of the centralized unity of state power often enough turns out to be the executive. The seeds of this tendency were, of course, sown in the much misleadingly misquoted aphorism in the *Communist Manifesto*: "The executive of the modern state is but a committee for managing the common affairs of the whole bourgeoisie."⁷

From this standpoint, the doctrine of separation of powers, which features prominently in the liberal discourse on the nature and forms of state as a critical variable, marking the differentiation of state power, appears "above all, a political problem of relation of forces, not a juridical problem concerning the legality and its spheres." As Louis Althusser has reminded us, Montesquieu himself meant by the notion of separation of powers "no more than the calculated division of *pouvoir* between determinate *passances*."⁸ And when one asks of the doctrine of separation of powers the question: "*To whose advantage does this division work?*," one begins to decipher the class domination legitimated by this doctrine,⁹ which otherwise powerfully projects the ideology of a multi-centred, pluralist state, mediating conflicting social interests.

The very notion of separation of powers is said to presuppose a unity of state power, of which it represents delegation or division among various domains.

4. N. Poulantzas, *Political Power and Social Classes* 130 (Verso ed., 1975).

5. *Id.* at 130, 132.

6. *Id.* at 132-33.

7. K. Marx and F. Engels, "The Common Manifesto of the Communist Party" in *1 Selected Works of Karl Marx and Friedrich Engels* 110-11 (1969). Note the emphasis not merely on the "executive" but also on the "common affairs of the whole bourgeoisie".

8. L. Althusser, *Montesquieu, Rousseau, Marx: Politics and History* 91 (Verso Ed., 1982).

9. *Id.* at 91-92.

Poulantzas, for example, maintains that the separation of powers is more appropriately viewed as division of functions; such separation or division constitutes merely "the index of the internal relations of *subordination* by delegation of power, of the various state 'powers' to this dominant 'power' which constitutes the principle of unity of state power."¹⁰ Typically, the "nodal point where the unitary institutionalized state power is concentrated within the complex state organization"¹¹ is often enough identified with the executive, and in rare instances with the legislature. There is not a single theoretical analysis which identifies this nodal point in adjudication. The quest for understanding the state has invariably focussed on the composition and decomposition of the executive power, which liberal jurists comprehend to be the power to initiate and implement policies affecting the community and which most state theorists characterize simply as the totality of state powers. It is, therefore, not surprising at all that adjudication does not feature at all in the landscape of state theorizing.

Perhaps one may seek partially to explain this in the light of the fact in most societies of Western Europe, adjudication has a subordinate role compared with legislation and administration. Indeed, Montesquieu went so far as to describe judicial power as being "in some measure, next to nothing" and judges as merely "a sigh and a sound", providing some sort of animation to the codes.¹² Of course, adjudication is not to be demoted to such a nondescript status in theory or practice of state; judicial creativity - in the sense of adjusting the text of the law to the context of capitalist development - has been a striking feature of both the civil law and common law traditions.¹³ But the civil law systems are not conspicuously endowed with judicial review powers, that is powers in constitutional courts to invalidate legislations. No doubt, West Germany's Federal Constitutional Court (*Bundesverfassungsgericht*) and Italy's *Corte Costituzionale* furnish in recent experience significant exceptions. But, overall, there is not much scope for judicial activism—that is, such exercise of judicial power as may generate a recodification of power relations among the dominant institutions of governance¹⁴—in the organization of adjudication as an internal aspect of power structure of the state.

The attribution of a secondary status to adjudication is, however, not only confined to the civil law tradition. In the common law orbit too, the jurisprudential ideologies have inclined predominantly to the view that adjudication merely consists in the application of the law enunciated by the legislature and that judges declare the law but do not make it. In England where codification did not reach, and which evolved almost all its basic principles and doctrines due to judicial creativity, the common law was nothing but the law made by the judges unaided by the legislatures to meet the needs of expanding capitalism)¹⁵ the Great Blackstonian Lie

10. Poulantzas, *supra* note 4 at 303.

11. Quoted in L. Althusser, *supra* note 8 at 90.

12. See G. Erosi, *Comparative Civil (Private) Law: Law Types, Law Groups, The Roads of Legal Development* (1979).

13. For this conception of judicial activism, see U. Baxi, *Courage, Craft and Contention: The Indian Supreme Court in mid-Englighten* 2-20 (1985).

14. David M. Trubek, "Max Weber on Law and the Rise of Capitalism", *Wisconsin L. Rev.* 720 (1972).

still persists that judges do not make law; what is more, judges and everybody else are asked to believe this unquestioningly. In a sense, this assertion assists the ideology of parliamentary sovereignty, which in real terms means the supremacy of the executive. In the United States where a written Constitution provides for judicial review of executive and legislative action and where the American Supreme Court has at times been significantly activist (in the sense given above), persistent questioning concerning the legitimacy and democraticity of judicial review has become the standard feature of political and jurisprudential discourse.¹⁵ In other words, judges are constantly asked to observe judicial restraint and maintain institutional comity with other organs of the state and are reminded of their true role of expositors of the Constitution and the law.

In other words, there seems to be a persistent tendency, whether in the liberal or marxian variants of political thought, to regard "adjudication" as distinct from "legislation" and subordinate to it. In the current theorizing on the state, the real bases for comprehending this tendency are not readily available. In what follows the difficulties in cogent articulation of this tendency in jurisprudential discourse is explored. Typically in that discourse, the question of the role and limit of judicial power is articulated, more or less, through the questions: Do judges "make" law? And if they actually do, *ought* they do so?¹⁶

II

There are many good reasons why some people might say that judges ought not to make law. The phrase "make law" has to be clearly understood at the outset. Hans Kelsen has seminally reminded us that all judges, trial as well as appellate, create specific individual norms by their decisions. Specific individual norms directed to persons (e. g. X is hereby denied bail; marriage between X and Y is hereby annulled; P is the implied term of a contract, etc.) do not and cannot pre-exist a judicial decision. Such norms come into being only when a judge decides in accordance with the higher norm, which is concretized by that decision. In other words, the process of concretization of general and abstract norms always results in creation of new, individuated and specific norms. In this sense, the distinction between norm creation and norm application is not an absolute but a relative distinction.¹⁶

If this is conceded, much of the futile controversy concerning whether judges ought to make law or not is silenced. And by the same token it is focussed on the more meaningful question: How should judges make law? In other words, judges have choices to make in the matter of concretization. How ought they to exercise their choice to questions concerning how one ought to appraise judicial decisions and their justifications. The normative justifications we prescribe for judges to reach their decisions also then become the standards by which we ought to evaluate their performance. A prescriptive theory of judicial discretion is thus

15. See e.g. literature cited in I. Stone, *Social Dimensions of Law and Justice* 656-96 (1966); Ely, *Democracy and Distrust* (1980).

16. H. Kelsen, *General Theory of Law and State* (1961).

also a prescriptive theory of evaluation of judicial role.

One general answer is that in making choices judges ought to follow the will of the legislature as embodied in the statute. They ought to do so because in a democracy the will of the elected representatives of the people who are accountable to the people should be respected by judges who do not (ordinarily) possess this representative character and are not politically accountable as are the legislators. Many of the rules of statutory interpretation are based on this premise. The familiar idea that judges declare or discover law through interpretation is also anchored on the secondary and auxiliary status assigned to judicial choice making. Since judges primarily declare pre-existing law, it is also accepted that their decisions are retroactive in character.

But this idea that judges are to enunciate the will of the legislators very often breaks down in practice. Judges do enunciate new rules, principles, standards, doctrines and even ideals and in doing so either fill gaps in law or transcend whatever might be the will of the legislator. Very often, such decisions in hard cases generate new bodies of law. But even so, as Ronald Dworkin has felicitously put it, when "... the expectation runs, they will act not only as deputy to legislators but as deputy legislators." That is to say, they will still act as subordinates to legislature and proceed to make law "in response to evidence and arguments of same character as would move the superior institution if it were acting on its own."¹⁷

Or, we may vary the metaphor and say that judges have certain delegated legislative powers, just as the executive has. Judges, we might say, ought always to be aware that they derive their powers of making law, either implicitly or explicitly, from the legislature or the constituent body. For example, article 141 of the Constitution proclaims: "The law declared by the Supreme Court of India shall be binding on all courts within the territory of India." If we construe the word "declared" in Kelsenian terms, it would implicitly extend to norm creation as well. But legal system can embody the idea of delegated legislative power quite explicitly as is done by article 1 of the Swiss Civil Code "which requires the judge to decide, where the law is silent, as if he himself were legislator..."¹⁸

Or, further still, one may envisage the judicial role essentially as a bureaucratic role. In this view, governmental institutions appear as "politically active" and "transmitting" agencies. The paradigm instance of the former type is the legislature, and of the latter, are administration and judiciary. These latter receive "instructions" from the politically active agencies which they further transmit to people. Of course, there are marked differences between administration and adjudication: the "judiciary, while different from other bureaucracy, is nevertheless a bureaucracy."¹⁹ Prescriptively put, the sole expectation here is that when carrying out legislative instructions requires filling of gaps, judges ought to go about

17. R. Dworkin, *Taking Rights Seriously* (1977).

18. I. Stone, *Legal Systems and Lawyers' Reasonings* 113 (1964).

19. R. Dworkin, *Judicial Decision-making* (1979, mimeo., University of Delhi Law Faculty Lectures).

their tasks as intelligent bureaucrats seeking to emulate what their superior would have done were she (the superior) to be confronted with the same new, unexpected or unparalleled situation.

Implicit in these formulations is the basic theme both of separation of powers and division of functions. The separation of powers idea entails the proposition that making of laws is the pre-emptive and primary domain of the legislature; their implementation (and to some extent their initiation) the primary function of the administration or the executive and their interpretation and application in dispute *inter partes* the pre-eminent and primary domain of the adjudicators. But, of course, as Julius Stone has aptly reminded us, the doctrine of separation of powers "is no longer generally seen as a legal straitjacket for each branch of government, or an absolute pre-condition of liberty. It is mainly translated into a precept concerning the distribution of functions to be respected by the self-restraint of each kind of organ rather than enforced upon it."²⁰ The translation of the separation of powers doctrine into a division of functions carries with it an idea that judges ought not, even if they can (and can get away with it), perform a truly legislative role and that they ought to find answers to hardest of hard cases from within the authoritative legal materials rather than legislate afresh or anew. The doctrine of judicial self-restraint prescribes that judges ought not to behave as if they were full-fledged legislators; they really ought to behave as bureaucrats or at best as "deputy legislators."

This kind of approach enables us to formulate the following propositions concerning how judges ought to perceive and perform their tasks:

- (i) judges ought to be aware of the fact that in applying general norms to specific situations they are always creating specific, concrete, individuated norms of law which were previously not existent;
- (ii) judges ought to faithfully apply the will or carry out the instructions of legislatures;
- (iii) in doing so, they ought to respect the legislator's will since that will is ultimately expressive of the will of the people at large expressed through periodic elections conducted under the law;
- (iv) judges ought to realize that in clear cases, "an antecedent legal rule uniquely determines a particular result;"²¹
- (v) judges ought also to recognize that in hard or determinate cases, problems of discretion arise whenever the applicable precepts provide not one but several choices;
- (vi) judges ought, even in hard cases, to have certain matters to other organs of government most suited to decide them efficiently, even if they may at times feel that they could decide them more efficiently

and even wisely; in other words, they must follow the canon of self-restraint.

III

So far, so good. But how does one articulate difference between legislation and adjudication? Or, in other words, what does the doctrine of division of functions tell us concerning how judges ought not to exercise their discretion? The canon of self-restraint itself presupposes that certain functions more appropriately belong to legislatures and not to courts. But the meaning of this proposition is scarcely self-evident.

Two notable efforts have been made to answer this question. Lon L. Fuller (through his thesis of adjudication as a form of social order) and Ronald Dworkin (through his distinction between policy questions and questions of principle) have tried to answer the question: How judges ought not to exercise their discretion? While we personally cannot persuade ourselves to believe that there is or ought to be a universal theory of judicial role,²² it is still worth looking briefly at these two pioneering attempts.

Lamented Fuller sees adjudication as a distinctive form of social order. It is so because it marks "the influence of reasoned argument in human affairs." In the pure form, adjudication is a process initiated by parties, backed by reasoned advocacy on both sides, and culminating in a judicial opinion based on reasoned elaboration. Reasoned elaboration involves judicial reasoning not so much in the sense of empirical or deductive reasoning. Rather, its role is, in essence, to "trace out and articulate the implications of shared purpose." The importance of reasoned elaboration lies also in the fact that it is based on participation of parties affected, and the decision is shaped not just by pre-existent law and usages but by arguments. In this sense, adjudication is based primarily upon the dignity of discourse.

This means that adjudication, on this pure model, is best suited to matters which yield "either-or" answers. But when questions involved raise a "multiplicity of variable and interlocking factors, decision on each one of which presupposes a decision on all the others" the matter is not fit for adjudication but apt for legislation. Fuller termed such matters (following Polanyi) "polycentric." Polycentric matters, he suggested, fall more adequately within the realm of legislation. Such matters involve negotiation and trade-offs between a variety of social interests and are best left to politically representative institutions rather than to judges. A typical instance is of polycentricity provided by the situation calling for decision to commence a nuclear power plant.

Of course, Fuller is not saying that courts are necessarily incompetent to adjudicate each and every kind of polycentric dispute. He concedes that adjudication can effectively extend to such disputes, but he insists that it ought not to. One reason for this is that adjudication when it so extends will have to be parasitic, that is, it will derive its strength, to the extent it succeeds, from other forms of social order. This

20. J. Stone, *supra* note 15 at 687 (emphasis added).

21. H.L.A. Hart, "Problems of the Philosophy of Law" in 6 *Encyclopedia of Philosophy* at 264 (1967).

22. For reasons elaborated in U. Baxi, *supra* note 13.

ought not to happen.²³

This attempt is interesting but not successful. This is so because the distinction between bipolar and multipolar (either-or and polycentric) is not really viable. The pure type of adjudication is only a model, an ideal type. Issues do come before the courts which are polycentric in nature. Of course, judges who evade the question by invoking the doctrine of political questions might genuinely be persuaded that these are legislative or executive matters best left there. The political questions doctrine is one manifestation of the canon of judicial self-restraint. But important questions can be raised (and have been raised concerning desegregation and busing and apportionment cases for example, in the United States) whether judges can, with justification, invoke this doctrine at the cost of sacrificing rights, ideals and values of constitutional and legal systems. Indeed, whatever course judges may adopt in relation to polycentric questions, "the 'form of social order' kind of analysis cannot dispense us from the much wider and more difficult questions of evaluative choice, whether we call them questions of 'policy', 'justice', 'social philosophy' or 'ideology'." (And indeed, "even if we close our eyes and refuse to see these questions at all)."²⁴

Ronald Dworkin has over the past fifteen years argued brilliantly but, in our opinion, unsuccessfully that the nature of justification of decision ought to vary fundamentally in adjudication as different from legislation. The core of his argument is that while both legislative and judicial decisions are broadly political in nature, the legislature ought to justify its decisions in terms of policy, while the court ought to do so in terms of principles. The court ought to "justify a political decision by showing that the decision respects or secures some individual or group rights." On the other hand, arguments from policy "justify a political decision by showing that the decision advances or protects some collective goal of the community as a whole."²⁵ Dworkin maintains that legislation is better suited to handle arguments of policy and courts are better suited to handle arguments of principle. Indeed, he maintains that courts ought to proceed only with arguments of principle.

Dworkin maintains that judges do not have discretion to choose even in hard cases because there are always to be found in the authoritative legal materials standards and principles which the judge ought to follow. He maintains that judges are always constrained to follow the law; for "all practical purposes", he says, "there will always be a right answer in the seamless web of law."²⁶

Decisions based on principle protect individual or group rights; decisions based on policy advance community goals. If a judge is conscientious, she would

23. See Lon L. Fuller, *The Forms and Limits of Adjudication* (1959, mimeo), lecture delivered to the Association of American Law Schools at Jurisprudence Round Table Seminar, Lon L. Fuller, "Collective Bargaining and the Arbitrator", *Wisconsin L. Rev.* 3 (1963).

24. J. Stone, *supra* note 15 at 655.

25. R. Dworkin, *supra* note 17 at 82-85.

26. R. Dworkin, "No Right Answer?" in P. M.S. Hacker and J. Raz (eds.), *Law, Morality and Society: Essays in Honour of H.L.A. Hart* 58 at 84 (1977).

always be able to ground her decision even in a hard case on some principle protecting group or individual rights. She ought only to justify her decision this way and not by reliance on goals. Goals are non-individuated whereas rights are individuated. Goals "encourage trade-offs, benefits and burdens within a community to produce some overall benefit for the community as a whole." Rights, while they can be weighed against other rights, have by definition certain "threshold weight" against ordinary routine goals and can only be defeated or overcome by the goal of special urgency. Decisions on principle furthermore demand an articulate consistency; in other words, judges as political officials must make such decisions on enforcement of rights "as they can justify within a political theory that also justifies the other decisions they propose to make." Intuitionistic decisions are thus precluded in enforcement of rights. This demand of articulate consistency does not apply in the same measure to decisions on policy because policies are thought to be "aggregative in their influence and it need not be a part of responsible strategy for reaching the collective goal that individuals be treated alike." In other words, principles entail "distributional consistency from one case to next;" principles forbid the idea of "unequal distribution of benefits."

The "rights thesis" of Dworkin is fascinatingly complex but what has been said so far makes clear that it forbids judges from making decisions and justifying them on policy. They ought always to ground their decisions on principles and their reasoned elaboration must satisfy the demands of articulate consistency. If rights are to be taken seriously, judges ought not to mess around with goals and weigh rights with goals, excepting where goals of special urgency are involved.

Judges have still choices to make. A principle justifying rights may still have to yield place to goal of special urgency and principles and rights may conflict with other principles and rights. In both situations, judges have to choose. Dworkin says at this point that judges ought to have "a coherent political theory" recognizing a "wide variety of different types of rights, arranged in some ways that assign rough relative weight to each."²⁷ But can we have a coherent political theory which will perform this task without at the same time moving back and forth from principle to policy and *vice versa*.

R. Sartorius in an attempt to tide over these difficulties and in grappling with the problem of competing principles has ultimately been able only to offer us the following solution: "In any case... the obligation of the judge is to reach that decision which coheres best with the total body of authoritative standards which he is bound to apply."²⁸ He elaborates this point thus:

The correct decision in a given case is that which achieves "the best resolution" of existing standards in terms of systemic coherence as formally determined, not in terms of optimal desirability as determined either by some supreme substantive principle or by the judge's

27. R. Dworkin, "Is Law a System of Rules?" in R. Summers (ed.), *Essays in Legal Philosophy* 35 (1968).

28. R. Sartorius, "Social Philosophy and Judicial Legislation", 8 *Am. Philosophical Q.* 151 (1971).

own personal scheme of values...It is the distinctive feature of the institutionalized role of the judiciary, in contrast to the legislature, that it may not directly base decisions on substantive considerations of the value of competing social policies.²⁹

However, well intentioned, this kind of prescription for judicial role is indeed vacuous. What does the demand for coherence really mean? Does it mean following precedents? If so, we must all accept that the demand for coherence really amounts to formal as well as substantive matters. How do we measure and determine systemic coherence? How should judges articulate such coherence?

IV

We find at the end of the road that a prescriptive judicial role theory which denies to judges a less law creating role is indeed difficult, if not impossible, to maintain without much internal strain and confusion. As Lord Lloyd put it, the "democratic ideal that adjudication should be as 'unoriginal as possible', that judges should not be 'deputy legislators' seems as much violated by Dworkin's theory as by the theories of those whom he attacks."³⁰

Unless a coherent theory satisfactorily preempting creative role for judges is available, it seems that we ought frankly to accept that judges, as political decision makers, do legislate. Judges do decide to create new norms of law and act prescriptively rather than descriptively, when they so decide. Professor H.L.A. Hart is right when he asserts:

The truth may be that, when courts settle previously unenvisaged questions concerning the most fundamental constitutional rules, they get their authority to decide them accepted after the questions have arisen and the decision has been given. Here all that succeeds is success.³¹

Indeed, although the observation specifically confined to "most fundamental constitutional rules," it admits of much wider application. Professor Hart further maintains, and quite rightly, that the question here involved concerns the power and authority of courts and judges rather than one of morality. "Nothing succeeds like success" is a maxim which does not stipulate that success need be a morally justified and justifiable one. There is thus no necessary connection between law and morals even at this point. At best, such a relation would be a contingent one. It is "folly to believe", says Hart, "that where the meaning of the law is in doubt, morality always has a clear answer to offer."³²

V

More recently, Dworkin has argued, that we bid farewell to the "ancient question whether judges find or invent law."³³ Rather, "jurisprudence and

29. *Id.* at 156-59.

30. D. Lloyd, *Introduction to Jurisprudence* 848-49 (4th ed., 1979).

31. H.L.A. Hart, *The Concept of Law* (1961).

32. *Id.* at 200.

33. R. Dworkin, *The Law's Empire* 225 (1986).

adjudication" stand united by the principle of law as integrity which insists that adjudication "is different from legislation, not in some single, univocal way, but as the complicated consequence of the dominance of that principle."³⁴ Law as integrity is a complex and rich conception, deserving a fully-fledged analysis; we here ambush it momentarily in our search for a coherent discourse on adjudication. *The Law's Empire* seems to offer us a fresh start in this direction by illuminating the "complicated consequence of the dominance" of integrity in adjudication which marks it off from legislation.

In this conception, judges are no longer deputies to legislators. Rather, the courts emerge as "the capitals of law's empire" and "judges are its princes,"³⁵ integrity which elevates adjudication thus consists of two political principles:

[A] legislative principle, which asks lawmakers to try to make the total set of laws morally coherent, and an adjudicative principle, which instructs that the law be seen as coherent in that way, so far as possible.³⁶

The principle of integrity is "attractive" for several reasons well stated by Dworkin.³⁷ He also concedes that neither the legislative nor the adjudicative principle of integrity is sovereign, for example, pursuit of justice may require sacrifices of integrity.³⁸ But, in real life, a "working political theory must be more relaxed"³⁹ as far the legislative principle of integrity is concerned; here, pursuit of "general strategies that promote the overall good as defined roughly and statistically..."⁴⁰ will have to do. Strategic decisions of this sort are matters of *policy*, not of *principle*; they

[M]ust be tested by asking whether they advance the overall goal, not whether they give each citizen what he is entitled to as individual.⁴¹

In contrast, the adjudicative principle of integrity emphasises matters of principle, the *principle* being that rights will be taken seriously, recognizing [D]istinct individual rights as trumps over these decisions of policy, right that the government is required to respect case by case, decision by decision.⁴²

In a sense, we find rehearsed the same distinction as a mark of distinguishing legislation from adjudication which attract the same difficulties articulated in the preceding section of this paper.⁴³ What makes *The Law's Empire* distinctive is Dworkin's analysis of how the adjudicative principle of integrity ought to work in

34. *Id.* at 410.

35. *Id.* at 407.

36. *Id.* at 177.

37. *Id.* at 188-90.

38. *Id.* at 217-18.

39. *Id.* at 222.

40. *Ibid.*

41. *Id.* at 223.

42. *Ibid.*

43. The notion that rights do have a "trumping" feature has been rigorously assailed by Allan Buchanan, "What's Special About Rights?" 2 *Social Philosophy & Policy* 61 (1984).

matters of principle. In this prescriptive framework, judges constitute an interpretive community; they "interpret contemporary legal practice as an unfolding political narrative."⁴⁴ Each judge must think of herself as "an author in the chain of common law." Each judge must think of the past judge's decision as "a part of the long story." She must now interpret and "then continue" according to her "best judgement of how to make the developing story as good as it can be."⁴⁵ A chain novel is a novel-in-progress, demanding both continuity and innovation in narration; and when several authors contribute a chapter each. Complex interpretive acts and standards of consistency (fit), totality and taste come into play. Like chain-novelists (for aesthetic reasons), judges too (for reasons of political and moral theory) have to embark on increasingly complex interpretation from "competitive rather than contradictory principles, that is, from principles that can live together in an overall moral or political theory though they sometimes pull in different directions."⁴⁶ The collective work of judges, respecting integrity, aspires to the construction of "a community of principle"⁴⁷ such that:

The imperatives of integrity always challenge today's law with the possibilities of tomorrow's, that every decision in a hard case is a vote for one of law's dreams.⁴⁸

Dworkin's endeavour to furnish, at the level of deep structure, affinities between legal and literary theory is excitingly controversial.⁴⁹ But for the present purposes, we have to ask whether this mode of interpretation sufficiently distinguishes 'adjudication' from 'legislation'. Legislation can also be construed as narration in time of a society's search for a "community of principle." Constitutions and statutes recognize principles just as adjudication, in fact, the former furnish both a preinterpretive and postinterpretive context for adjudication.⁵⁰ And there is no inherent reason why legislators should not be considered with Dworkin (with all the infirmities of such an analogy)⁵¹ as collective authors of a chain novel. Further, as Dworkin himself concedes, that even when "all the discrete rules and other standards enacted by our legislatures" cannot be brought "under any single coherent scheme of principle" commitment to integrity demands that:

We must report this fact as a *defect*, not as the *desirable* result of a fair division of political power between different bodies of opinion....⁵²

Integrity still exerts its normative, ideal force on legislation, even though Dworkin has (as seen earlier) counselled a "more relaxed" political theory for judging political practices. Indeed, *The Law's Empire* ends with a clarion call that

44. R. Dworkin, *supra* note 33 at 225.

45. *Id.* at 238-39.

46. *Id.* at 241 (emphasis added).

47. *Id.* at 243.

48. *Id.* at 410.

49. S. Fish, "Working on the Chain Gang: Interpretation in the Law and in Literary Criticism", R. Dworkin, "My Reply to Stanley Fish Please Don't Talk about Objectivity Any More" and W. Bern, "Is There a Politics of Interpretation?" in W.J.T. Mitchell (ed.), *The Politics of Interpretation* at 271, 287 and 335 respectively (1982).

50. R. Dworkin, *supra* note 33 at 65-68.

51. See *supra* note 49.

52. R. Dworkin, *supra* note 33 at 217 (emphasis added).

the law's constructive attitude aim "to lay principle over practice to show the best route to a better future, keeping the right faith with the past."⁵³ The 'law' here signifies both legislative and adjudicative law. All in all, the magnificent achievement of *The Law's Empire* falls short of the articulation of a coherent distinction between 'legislation' and 'adjudication.'

VI

The internal incoherence of bourgeois legal thought concerning the role of the judge and of adjudication in general is partly a result of the heritage of state theorizing which treats law undifferentially in relation to the state and puts all legal domains and powers under the shadow of the executive. In part, the confusion represents essentially the denial of even a relative autonomy of courts as a domain of the law, which is itself often thought of as having a relative autonomy of its own. The law has been identified as autonomous in terms of methodology, occupational culture, institutionally; it has features which render it at times even substantially autonomous.⁵⁴ The implicit denial of such autonomy to adjudication⁵⁵ must perform the ideological task of preventing adjudication from emerging as an arena for expression of class struggle, of articulation and accentuation of social contradictions through the legal order. That adjudication be a very powerful arena for such articulation has been dramatically, manifested in the recent experience of the Indian Supreme Court which through the social action litigation (miscalled public interest litigation) has begun its transformation from the Supreme Court of India to a Supreme Court for Indians.⁵⁶ In matters such as racial desegregation and legislative reapportionment and affirmative action, the American Supreme Court has also become an arena manifesting the relations of class struggle.⁵⁷ These examples point to an urgent need for a reexamination of the ideological functions of the doctrine of separation of powers and the inchoate distinction between "legislation" and "adjudication".

53. *Id.* at 413.

54. R.M. Unger, *Law in Modern Society* 53 (1976); D. Tribe, "Complexity and Contradiction in Legal Order: Balbus and the Challenge of Critical Social Thought About the Law", 11 *Law & Society Rev.* 529 (1971).

55. Even when considered as public officials, judges do not seem to strike as important public officials for the purposes of state theorizing. For the recent fascinating study of the relative autonomy of capitalist state, see E. Nordlinger, *The Relative Autonomy of the State* (1979).

56. U. Baxi, "Taking Suffering Seriously: Social Action Litigation Before the Supreme Court of India", 8 & 9 *Del. L. Rev.* 91 (1979 & 1980) and its revised version, with the same title, in U. Baxi (ed.), *Law and Poverty: Critical Essays* 387 (1988).

57. D. Horowitz, *Courts and Social Policy* (1979).

INTELLECTUAL PROPERTY LAWS OF INDIA AND FOREIGN ACCUSATIONS : AN EVALUATION*

P. S. SANGAL**

AT THE global trade negotiations currently under way, a lot of accusations have been made against the developing countries including India which suggest that adequate and effective protection and enforcement of intellectual property rights has not been available in the developing countries and this results in trade distortions and impairment of concessions previously negotiated. They point towards the supposedly inadequate international obligations as the principal causes of distortion in trade. They also advert to the growing phenomenon of counterfeiting and piracy which are highly injurious to the trading system as a whole. The proposals call for an effective international dispute settlement machinery because at present the conventions relating to intellectual property rights do not have effective dispute settlement provisions.

The proposals submitted by the U.S.A., European Economic Community and Japan in relation to trade-related aspects of intellectual property rights can broadly be divided into three categories: (1) Ineffective and inadequate system for the protection of intellectual property rights; (2) Discrimination against the foreigners and (3) Inadequate intellectual property protection with regard to changing circumstances and new technologies. In the first category, we can cover patent protection for food-stuffs, chemicals and pharmaceuticals; intellectual property rights duration; compulsory licensing and enforcement procedures. In the second category will fall several allegations of discrimination against the foreigners and the foreign goods. In the third category, we can cover new technology and changing circumstances with which the existing intellectual property regime is not in a position to cope.

In this paper, the proposals would be commented upon from the viewpoint of Indian intellectual property laws. Does Indian system provide adequate and effective protection to the intellectual property rights; is it discriminatory against foreigners and is it in a position to cope up with the changing circumstances and high technology? In India, the different types of intellectual property rights are governed and protected by the Copyright Act, 1957, the Designs Act, 1911, the Patents Act, 1970 and the Trade and Merchandise Marks Act, 1958. These Acts provide the legal remedies which can be invoked by an aggrieved person in the event of an infringement of his intellectual property rights. They provide for civil remedies. In addition, the Trade and Merchandise Marks Act and the Copyright Act provide for criminal remedies. These two sets of remedies are distinct and independent and can

* Paper presented at the Annual Meeting of Association for the Advancement of Teaching and Research in Intellectual Property (ATRIP), held at George Washington University, Washington, (July 24-27, 1988.)

** L. M., Ph.D. (Allid.), Professor of Law, Head of the Department and Dean, Faculty of Law, University of Delhi, Delhi.

be invoked simultaneously. In the event of an intellectual property right being infringed, various Acts dealing with intellectual property provide that an aggrieved party may file a civil suit in a court of law. The reliefs in the nature of injunction, damages and accounts, delivery of infringing goods or materials, etc. can be asked for. Amongst these, the grant of an injunction is the most effective and important relief available in the Indian legal framework for the protection and effective enforcement of the intellectual property rights available to the holder of the intellectual property rights (IPRs).

I CHARGE OF INADEQUATE AND INEFFECTIVE SYSTEM FOR THE PROTECTION OF INTELLECTUAL PROPERTY

(a) Intellectual Property Rights Duration

(i) Patents

The proposals submitted by U.S.A., E.E.C. and Japan assert that at present in many of the countries the period for the protection of patent rights is not sufficiently long and the inventor or the holder of right cannot work the patent in such a short time. So it must be 20 years from the date the patent protection is sought or 17 years from the date the patent is granted.

In India, the normal term of all patents granted under the Patents Act, 1970 is 14 years except that a patent for the process of manufacturing substances used or capable of being used as food, medicine or drug is five years from the date of sealing of the patent or seven years from the date of grant of the patent, whichever period is shorter.¹ Thus the Act provides a fairly long period of protection in all fields of inventions except food and drugs which are essential to the health and life of the nation and thus viewed differently in view of their strategic need. This patent duration is comparable to that available in most of the developed countries of the world and in view of fast changing technologies, there is hardly any justification for a longer duration.

(ii) Copyright

The term of the copyright protection in literary, dramatic, musical and artistic works (other than a photograph) published within the lifetime of the author is fifty years from the beginning of the calendar year next following the year in which the author dies.² In the cases of anonymous and pseudonymous works, the protection is available for fifty years from the beginning of the calendar year next following the year in which the work is first published.³ Thus, the duration prescribed under the Indian law is exactly the same as suggested by the U.S.A.

(iii) Trade mark

Regarding the duration, of trade mark, under the Trade and Merchandise

1. The Patents Act 1970, sec. 53.

2. The Copyright Act, 1957, sec. 22.

3. *Id.*, sec. 23.

Marks Act, 1958, the trade mark is registered for a period of seven years but may be renewed from time to time.⁴ The U.S. suggests a minimum period of five years only.

(b) Compulsory Licences and Licences of Right

(i) Patents

The proposals assert that the governments should generally not grant compulsory licences in case of patents and shall not grant a compulsory licence where there is legitimate reason for non-working of the invention and no compulsory licence should be exclusive. The proposals also accuse that in certain countries compulsory licences are granted systematically without having regard to whether the invention is worked or not.

In India, the Patents Act, 1970 provides for granting of compulsory licences⁵ for the working of patented inventions and also for revocation⁶ of patents on the ground of their non-working in the country. According to the Patents Act, a compulsory licence to work a patented invention may be granted⁷ by the Controller of Patents to an interested person, or a patent may be endorsed with "licences of right" on the ground (1) that reasonable requirements of the public with respect to the patented invention have not been met, or (2) that the patented invention is not available to the public at a reasonable price.⁸ It is clear from these provisions that compulsory licensing of patented invention is permitted to prevent public harm and to promote public interest. Justice and fair play demand that in the scheme of priorities, public interest should be placed above private interests of a few. Further, it should not be forgotten that these provisions have been enacted perhaps more for their psychological deterrent effect than for actual enforcement, except in extreme cases. Many countries which claim to be upholders of intellectual property rights have similar provisions in their laws.

(ii) Copyright

The Copyright Act, 1957, provides for compulsory licensing in both the published⁹ and unpublished¹⁰ work on the ground that the work is not available to the public and on reasonable terms. India being a member both of the Berne Convention as well as the Universal Copyright Convention, these provisions are in conformity with India's obligations under those Conventions.

(iii) Trade mark

The Trade and Merchandise Marks Act, 1958 does not contain any provision regarding compulsory licensing of the trade mark.

4. The Trade and Merchandise Marks Act, 1958, sec. 25.

5. The Patents Act, 1970, sec. 84.

6. *Id.*, sec. 89.

7. *Id.*, sec. 86.

8. The Copyright Act, 1957, sec. 31.

9. *Id.*, sec. 31-A.

(c) Charge of Granting Compulsory Licences as a Matter of Course

It has been alleged that some countries grant compulsory licences in the ordinary course without any special justification. In India, there are various provisions in the Patents Act, 1970, which require governmental authorities to make certain findings before granting the compulsory licence including findings on whether or not sufficient time had elapsed since the sealing of the patent to enable the working of the invention or whether a government regulation, rule or order had intervened which prevented working or whether the patentee had taken adequate or reasonable steps to start working.^{9a}

Thus, the Patents Act recognizes legitimate and realistic reasons as a justification for not granting a compulsory licence. This indicates that a compulsory licence cannot be granted easily or as a matter of course.¹⁰

(d) Process Patent versus Product Patent in Food, Drugs, etc.

The suggestions/submissions oppose the idea of giving process patent and insist that in case of food, drugs, etc., product patent should be given and not process patent as done by several developing countries. In India, under section 5 of the Patents Act, 1970, only process patent is available in case of food, drugs, etc. Very cogent reasons were found for this choice in India by *Ayyangar Committee Report* which forms the basis of the Patents Act, 1970. This Report says that the grant of a patent to a chemical *per se* had a deadening effect on research since it precluded attempts to arrive at the same products by other alternative processes whereas if patentability was restricted to novel processes, it stimulated research in regard to other alternative methods for producing the same product.¹¹ After detailed considerations, the Committee came to the conclusion that the interest of the country would be best served by confining patentability to the processes by which the products were obtained and to deny patents to the products *per se* in the area of chemicals, etc. The reasoning given above appears to be flawless and has found favour in a large number of countries including many developed countries.

(e) Exceptions from Patent Protection: Patentability

The submissions/suggestions, particularly from Japan, point out that the problem of "unpatentable subjects" or exceptions from patent protection are specially serious, as there are many countries which do not grant any patent at all or do not grant patents for a large number of inventions. In India, the patents are granted to all the inventions of novelty. As stated above, in India, the case of food, chemicals, drugs, etc., process patents instead of product patents are being granted. In atomic energy, however, neither product nor process patent is granted. The

9a. The Patents Act, 1970, sec. 91.

10. See P.S. Sangal, "Paris Convention and the Indian Patent System: Legal Perspectives" in P.S. Sangal and Kishore Singh (eds.), *Indian Patent System and Paris Convention: Legal Perspectives* 45 (1987).

11. See *Report on the Revision of the Patent Law 23* (Chairman: Justice N. Rajagopala Ayyangar, Government of India, September, 1959).

Patents Act, 1970 provides that "no patent shall be granted in respect of an invention relating to atomic energy falling within sub-section (1) of section 20 of the Atomic Energy Act, 1962."¹² The Act also provides that even after the acceptance of a complete specification if the central government is of the view that the invention is related to the atomic energy, it can direct the controller to revoke the patent.¹³

In the year 1985-86, a total of nine cases were referred to the Department of Atomic Energy. In 6 cases, the patents were not granted in view of the provisions of section 4.¹⁴ In the case of defence, the Act provides that if the controller is of the view that the application filed for a patent is relevant for defence purposes, he may give directions to prohibit the publication of any information relating to such invention.¹⁵ The main object of such prohibitions is to protect the defence of India. This is an absolutely legitimate justification for restricting patentability.

(f) Strict Action in Case of Counterfeiting

In the submissions/suggestions, it has been stated that strict action is not generally taken to prevent counterfeiting of goods. The position in India is that criminal punishment is provided for counterfeiting. The Supreme Court took a strict view of counterfeiting in *Sumai Prasad Jain v. Sheojanan Prasad and State of Bihar*.¹⁶

(g) Foreign Trademark and Appellations of Origin Protected in India

(i) Foreign trade mark

There have been cases in India where a foreign trade mark was protected only on the basis of prior user in India through imports. In *Consolidated Foods Corporation v. Brandon & Co.*¹⁷ upholding the American company's objection to the registration of the trade mark 'Monarch' by the Indian company, the Bombay High Court ordered cancellation of the registration of the trade mark 'Monarch' in favour of Brandon & Co. by the Registrar of Trade Marks solely on the ground that the American trade mark 'Monarch' was in use in this country through imports even though it was not registered in India by the American company.

(ii) Appellations of origin

Though there is no specific provision for protecting appellations of origin, yet in actual practice this is done. This was done in *Ellora Industries, Delhi v. Banarasi Dass Goela*,¹⁸ in which Delhi High Court heavily relied on well-known cases on the point such as *J. Bollinger v. Costa Brava Wine Co. Ltd.*¹⁹

12. The Patents Act, 1970, sec. 4.

13. *Id.*, sec. 65.

14. See *Patents Fourteenth Annual Report of the Controller General of Patents, Designs & Trade Marks 17 (1983-86)*.

15. The Patents Act, sec. 35 (1).

16. AIR 1972 SC 2488. See *infra* under Effective Enforcement.

17. AIR 1965 Bom. 35.

18. AIR 1980 Del. 254.

19. 1961 RPC 116. This case is popularly known as *Spanish Champagne* case and has been discussed in detail, *infra* under Effective Enforcement.

II CHARGE OF DISCRIMINATION AGAINST FOREIGNERS

The European Economic Community and Japan have levelled charges of discrimination against foreigners. The E.E.C. spoke of "Discrimination against Imported Products" and "Preferential Treatment of Activity on National Territory". Japan speaks of "Deficiencies in protection of prominent foreign trade marks", "Inadequate system of opposition to registration", "Excessive/discriminative protection of intellectual property rights" and "Restrictions on Foreigners' Patent Rights aiming at protection of home made technologies".

(a) The Position in India

India is not yet a member of the Paris Convention but the country is not practising any discrimination. The Patents Act, 1970 provides that any country may by agreement acquire the status of a convention country which means that on the basis of reciprocity, it can acquire for its citizens similar privileges as are granted to India's own citizens.²⁰ On this basis, at present India has notified United Kingdom, Australia, Canada, New Zealand, Sri Lanka and State of Eire as the convention countries. Ruling out discrimination completely on the basis of reciprocity is only fair and also in accordance with the Paris Convention though, as stated above, India is not yet a member of that Convention. This position of law is based on fairness and equity. However, in actual practice, it appears from a large number of cases²¹ that even the compliance with the requirement of reciprocity is not looked into and equal justice, and in some cases even preferential treatment, is given to the foreign companies/individuals.

(b) Accuser itself Accused

It is really strange that a country like Japan which is itself violating the established norms (even prescribed by the Paris Convention of which it is a member) is accusing others for the violation of those very norms. Japan is of the view that the restrictions on import of foreign goods and discriminatory treatment to foreign nationals and inadequate patent systems are hampering the trading interest of that country. The statistical evidence available confirms that foreigners are not given the same protection for their inventions in Japan as the Japanese obtain in Japan and in other foreign countries.²² Japan is a country which is a member of the Paris Convention that provides for national treatment,²³ i.e. same treatment to foreigners as it provides to its own nationals. Thus, Japan is itself violating the Paris

20. See the Patents Act, 1970, chapter XXII, sec. 133-139 "International Arrangements".

21. *Philip Morris Belgium, S.A. v. Golden Tobacco Co. Ltd.*, AIR 1986 Del. 145; *M/s Bonga Watch Co., Chandigarh v. M/s. N.V. Philips, Holland*, AIR 1983 P & H 418; *Glaxo Operations U.K. Ltd., Middlesex (England) v. Serraval Pharmedicals, Kanpur*, AIR 1984 Del. 265; *Consolidated Foods Corporation v. Brandon & Co.*, AIR 1965 Bom. 35; *Penguin Books Ltd., England v. M/s. India Book Distributors*, AIR 1985 Del. 29; *John Richard Brady v. Chemical Process Equipments P. Ltd.*, AIR 1987 Del. 372.

22. See Arthur Winberg, "The Japanese Patent System: A Non-Tariff Barrier to Foreign Businesses?", *Journal of World Trade* 11 (1987).

23. See the Paris Convention, article 2.

Convention of which it is a member. United States companies complain that they do not experience the same success in getting patents in Japan which they receive for their inventions in America. Tales of foreigners' frustrations in protecting their inventions in Japan are part of the oral tradition of doing business in Japan.²⁴

The following excerpt from Arthur Wineberg's article throws adequate light on the way the Japanese patent system is actually operating:

The pressure in Japan is on the licensing of patent "applications". The Japanese regularly share inventions and cross-licence their patents. Cross-licensing would clearly discourage opposition at the Patent Office. For foreign companies, though, cross-licensing Japanese competitors in the Japanese market often means ceding it to them. Unless a foreign company has a decided advantage of some kind, it will not be able to compete successfully in Japan against Japanese companies. So, a unique feature or product derived from the patent right of exclusivity may be the only means for a foreign company to compete successfully. However, if the price of obtaining a patent is giving away the right to exclusivity, the reward may no longer be worth the price.

While the environment in which foreigners apply for patent protection in Japan is not favourable, the institutional barriers and conduct of the Japanese industry can be overcome. Patent protection is available in Japan, but it is not cheap, and it cannot be obtained easily.²⁵

The above excerpt shows that Japan is itself at fault in regard to the very same matters about which it is blaming others.

III COPING UP WITH NEW TECHNOLOGIES

In the submissions/suggestions, a doubt is expressed about the capability of countries in giving adequate protection to emerging new technology like computer software, biotechnology, semi-conductor chips and tackling the problem of video piracy. The position in India in regard to these matters is as follows.

(a) Computer Software

The importance of computers in the field of science, technology, commerce and other places of activities is increasing very fast. It would, therefore, be very necessary to assure legal protection which would encourage investment and trade in computer software and provide its wider acceptability. In India, the protection of computer software is provided by the Copyright Act, 1957. The Act was amended in September, 1984, to expressly extend protection to computer programmes (software). This has been accomplished by re-defining the term

24. See Arthur Wineberg, *supra* note 22, 25, *id.* at 22.

"literary work" to include computer programme. The amended definition of "literary work"²⁶ is as follows:

"Literary work" includes tables, compilations and computer programmes; that is to say, programmes recorded on any disc, tape, perforated media or other information storage device, which, if fed into or located in a computer or computer based equipment is capable of reproducing any information.

By providing copyright protection for computer software under the Copyright Act, 1957, a lead is given to recognize that copyright as against patent is the appropriate protection device for computer software.

(b) Biotechnology

Biotechnology may be defined as the technology that uses living organisms (or part of organisms) to make or modify products to improve plants or to develop micro-organism for specific uses.²⁷ In the field of biotechnology, patent protection is available for the application of micro-organism and strains leading to the production of substances like enzymes, yeast, antibiotics, alcohols and for other similar industrial application. But the strains of micro-organism as such are not patentable. Though biotechnology has come into prominence recently, it is one of the oldest technologies. From the beginning of the civilization, man has deliberately selected organisms that improve agriculture, animal husbandary, baking and brewing. However, the human possibilities of intervening in the process of nature in exploiting it for a long time remained very limited.

Patent laws require an invention to be new to comprise of an inventive step and industrially applicable. In addition, inventions must be repeatable since the disclosure must enable others to repeat the described technical solution. As regards the condition of novelty, an invention is not new if it has been disclosed to the public either in writing or orally, by use or otherwise, before the filing date or priority date. A question, therefore, may arise as to whether the naturally occurring substances, micro-organisms or other biological materials may be treated as new when found in nature. As in the other technological fields, the patentability requirement of inventive step also constitutes one of the most complex questions in the biotechnology. The consideration of industrial application has been a major obstacle to patenting in the area of biotechnology.

Sufficient disclosure of the invention in the patent application is a standard patentability requirement. In the biotechnological fields, the condition of sufficient disclosure poses specific problems since living entities are difficult to describe in writing. To make up for the insufficiency of description of an invention relating to biotechnological field to which the public does not have any access, the patent

26. The Copyright Act, 1957, sec 2(c).

27. See N.R. Subbaraman, "Patent Protection for Inventions Relating to High Tech. Areas: Indian Scenario", p. 5 (Paper presented at the Seminar on Intellectual Property and High Technology organised by WTO, UNDP and Government of India in March, 1987).

procedure requires not only the filing of written description but also the deposit of the sample micro-organism with authorised depository authority. As the deposit is considered a part of the description, it could be concluded that the sample of the micro-organism must be deposited with the depository institution at the latest on the date on which the patent application is filed or, if a priority is claimed, on the priority date. The deposit supplements the description of the micro-organism, so that a person in the art is able to identify the type of micro-organism involved.²⁸

The definition of patentable inventions under the Patents Act, 1970 as applied to a process, method, art or manner of manufacture is regarded as an artificial process or operation of an industrial nature wherein certain starting materials have been subjected to the process or operation to convert the material in such a manner as to produce a new and useful article or a substance. In addition, the method of agriculture or horticulture and any process for the medicinal, surgical, curative, prophylactic or other treatment of human beings or any process for similar treatment of animals or plants to render them free of disease or to increase their economic value or that of their products are not patentable inventions under the Act.²⁹ Accordingly, the living entities of natural or artificial origin like animals, plants or micro-organisms and biological materials like viruses, cultures, processes for their creation/production are not patentable under the Patents Act, 1970. However, inventions relating to the processes for the production of substances like enzymes, yeast, antibiotics, alcohols, etc. by bioconversion utilising micro-organisms, etc., are patentable under the Act as the resultant products are tangible and non-living entities.³⁰

(c) Tackling the Problem of Video Piracy

The Copyright Act, 1957 was comprehensively amended by the Copyright (Amendment) Act, 1984, which aimed mainly at discouraging and preventing the widespread piracy prevailing in video-films and records. The salient points of the amendment given below show the seriousness with which the Parliament viewed the menace of video-piracy:

- (1) Video-films are henceforth deemed to be work produced by a process analogous to cinematography (sec. 2(f), Explanation);
- (2) The definition of duplicating equipment was introduced (sec. 2 and 2(a));
- (3) Duplicating equipment has been included in the term 'plate' (sec. 2(i));
- (4) Import of infringing copy of cinematographic film or record for private and domestic use of the importer, formerly allowed, is now considered infringement. But import of two infringing copies of other works, formerly allowed, is retained (sec. 51(b)(iv) and proviso);

²⁸ *Id.* at 6.

²⁹ The Patent Act, 1970, sec. 3(b) and (i).

³⁰ See N.R. Subbaraman, *supra* note 27 at 7.

(5) Certain particulars to be displayed on any published record or published video film (sec. 52A);

(6) The punishment for committing the offence of infringement of copyright has been substantially enhanced. The term of imprisonment under the amended provision varies from six months to three years and the amount of fine has been enhanced from fifty thousand rupees to two lakh rupees. When the offence is repeated by the same person, the punishment for the subsequent commissions are further enhanced (secs. 63 and 63A);

(7) Police officers are given powers to seize without warrant copies of a work and instruments used for making infringing copies of the work, wherever found, if the officer is satisfied that an infringement of copyright has been committed or is likely to be committed (sec. 64);

(8) Publication of a record or a video-film which does not display the particulars required under section 52A is made an offence punishable with imprisonment and fine (sec. 68A);

(9) Punishment for making or possessing instruments for the purpose of infringement of copyright is enhanced (sec. 65); and

(10) Infringement of copyright has been made an economic offence under the Economic Offences (Inapplicability of Limitation) Act, 1974³¹ so that an infringer of copyright cannot get the benefit of the law of limitation by passage of time.

(d) Semi-conductor Chips

The U.S. has argued that in the field of high technology like semi-conductor chips, protection is not available even in the developed countries and most developing and newly industrialized countries are only considering laws relating to the semi-conductor chips and mask works. The position in India is possibly different from many other developing countries because the provisions of the Patents Act, 1970 provide protection to the invention relating to semi-conductors. Under the Act, the semi-conductors are patentable only in regard to the methods or process of their manufacturing.³² No patent can be granted for the semi-conductors themselves.

IV CHARGE OF EXISTENCE OF NON-PARTIES TO THE COPYRIGHT CONVENTIONS AND THE PHONOGRAMS PROTECTION CONVENTION

About the Copyright Conventions, Japan states in its submissions that as there are still a number of non-member countries, expediting their participation "is the first issue to be dealt with". About Phonograms Protection Convention, which obliges the parties to protect phonogram producers of foreign nationality against

³¹ See P. Narayanan, *Copyright Law* 11 (1986).

³² See the Patents Act, 1970, sec. 5(b).

production, importation and distribution of unauthorised copies of phonograms, the Japanese state that "It is an effective means for prevention of pirate editions and participation in this Convention is, therefore, to be promoted". As stated above, India is a member of both the Copyright Conventions, viz. the Berne Convention as well as the Universal Copyright Convention. About the Convention for the Protection of Producers of Phonograms against Unauthorised Duplication of their phonograms, established in 1971, the position is that majority of the 39 members as on January 1, 1986 were developing countries and India is a member.³³

V ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS IN INDIA

In the event of an intellectual property right being infringed, various statutes dealing with intellectual property mentioned above provide that an aggrieved party may file a civil suit in a court of law. The reliefs in the nature of injunction, damages³⁴ delivery of infringing goods and materials for destruction can be claimed. The courts in India have power to protect the holders of intellectual property rights in obtaining and preserving the evidence of infringement of such rights by passing appropriate interim orders like injunctions during the pendency of trial in the court. Moreover, the courts have also been equipped with the power to appoint any person as a commissioner³⁵ to carry out local investigation for the purposes of examining any matter in dispute, to examine accounts, to make an inventory of stocks, raw materials or other property lying at any place, to seal any premises and to take possession of the goods for keeping them in safe custody with the object of preserving the same.³⁶

In India, the most important and effective remedy available to the holder of the intellectual property is to seek an injunction from a court of competent jurisdiction. Whenever there is a breach of an intellectual property right or such breach is threatened, apart from penal remedies available to the owner of an intellectual property, civil proceedings can be instituted and an order of injunction sought against the person committing the breach. The grant of an injunction is a right expressly provided under the provisions of the Copyright Act,³⁷ the Trade and Merchandise Marks Act³⁸, the Patents Act³⁹ and the Designs Act.⁴⁰ The procedure and the principles to be followed for the grant of an injunction are laid down in the Code of Civil Procedure, 1908 and the Specific Relief Act, 1963. An injunction may

33. See WIPO, "Protection of Neighbouring Rights (Rights of Performers, Producers of Phonograms and Broadcasting Organisations): International Conventions in the Field of Neighbouring Rights", 28 *JIL* 450 (1986).

34. The Specific Relief Act, 1963, sec. 40. See also *Slyam Lal Pakaria v. Ganga Prasad Gupta*, AIR 1971 All. 192; *Y.S. Prakasa Rao v. Chief Secy., Govt. of A.P.*, AIR 1984 NOC 7 (A.P.). For detailed discussion of these cases, see *infra* under Effective Enforcement.

35. *Slyam Lal Pakaria v. Ganga Prasad Gupta*, supra note 34.

36. The Copyright Act, 1957, sec. 55(1).

37. The Trade and Merchandise Marks Act 1958, sec. 106(1).

38. The Patents Act, 1970, secs. 108 and 106(1) (b).

39. The Designs Act, 1911, sec. 53(2)(b).

be temporary (interlocutory), perpetual (permanent) or mandatory. A temporary injunction may be sought either at the time when a case is instituted or during the pendency of trial. A remedy by way of temporary injunction is required when there is imminent danger to the rights of the intellectual property owner. An order of injunction is protective and preventive and primarily issued with an object to stay further injury and keep the things as they were at the time when the order is issued.⁴¹ Perpetual injunction, on the other hand, is granted to the plaintiff to prevent permanently the breach of an obligation existing in his favour. The relief of perpetual injunction⁴² is granted only on the conclusion of the trial.⁴³ In order to prevent the breach of an obligation where it is necessary to compel the performance of certain acts, the court may, at its discretion, grant a mandatory injunction to prevent the breach complained of and also to compel performance of the requisite acts.⁴⁴

The Indian courts grant *ex parte* injunctions also. The grant of *ex parte* injunction in the field of intellectual property rights is one of the most effective and speedy remedies available to the holder of the right. At times, it is necessary to catch an infringer of a property right by surprise.⁴⁵ In England, such *ex parte* orders are known as *Anton Piller orders*. In fact, Indian courts often grant relief which is greater in magnitude than the *Anton Piller orders*.⁴⁶ The Copyright Act, 1970⁴⁷ and the Trade and Merchandise Marks Act, 1958⁴⁸ also provide for effective penal criminal sanctions against the infringement of those rights. There is, however, no such

41. The Code of Civil Procedure, 1908, order XXXX, rr. 1-10. See *Philip Morris Belgium S.A. v. Golden Tobacco Co. Ltd.*, supra note 21; *Glaxo Operations U.K. Ltd. Middlesex (England) v. Sarrat Pharmaceuticals, Kanpur*, supra note 21; *Sri Swarn Singh Trading as Appliances v. U.B.H.I. Enterprises (Regd.)*, AIR 1985 Del. 210; *Pennin Books Ltd., England v. Ms. India Book Distributors*, AIR 1985 Del. 29; *Mis Raghav v. Rightways Foot Wear*, AIR 1986 T & K 71; *Consolidated Foods Corporation v. Brandon & Co.*, supra note 21; *Mis Manoj Plastic India Co.*, AIR 1987 Del. 312; *Mis Hindustan Radiators Co. v. Mis Vrajaji Manilal and Co.*, AIR 1987 Del. 353; *Mis Virendra Dresser, Delhi v. Mis Varinder Garments, Delhi*, AIR 1987 Krishna Chaitan v. Ambal & Co., AIR 1970 S.C. 146; *John Richard Brady v. Chemical Process Equipments*, AIR 1987 Del. 372; *Pillalamarri Lakshminatham v. Karthisha Pictures, Vijaya-wada*, AIR 1981 AP 224.

42. The Specific Relief Act, 1963, sec. 38.

43. See *Mis. Banga Watch Co., Chandigarh v. Mis N.V. Philips, Holland*, supra note 21; *Globe Super Paris v. Blue Super Flame Industries*, AIR 1983 Del. 245; *Mis Kalariketan, Karol Bagh, New Delhi International Ltd. v. Sara Exports International*, AIR 1988 Del. 161; *Sarabhai v. S.C. Gudimani*, AIR 1986 Del. 329; *Esso Sanitations, Delhi v. Mascot Industries (India) Delhi*, AIR 1982 Del. 308; *Tobu Enterprises (P) Ltd. v. Mis Joginder Metal Works*, AIR 1985 Del. 244.

44. The Specific Relief Act, 1963, sec. 39. See *Anglo-French Drug Co. (Easterly) Ltd., Bombay v. Mis Balso Pharma (Harjama)*, AIR 1984 P & H 430.

45. *Tata Oil Mills Co. Ltd. v. Mis Wypro Ltd.*, AIR 1986 Del. 345; *K.P.M. Sundaram v. Mis. Ratan Prabashan Mondir*, AIR 1983 Del. 461.

46. See B.N. Kirpal, "Enforcement of Intellectual Property Rights in India", p. 13. Paper presented at WIPO Symposium on "Effective Enforcement of Intellectual Property Rights" (Geneva, June 15-16, 1987).

47. The Copyright Act, 1970, secs. 63-70.

48. *Id.*, secs. 78-90.

provision either in the Designs Act, 1911 or the Patents Act, 1970.

The material difference in criminal provisions between the Trade and Merchandise Marks Act and the Copyright Act is that whereas under the former Act, the offence committed is non-cognizable⁴⁹ while in case of latter by reason of the recent amendment in the Copyright Act,⁵⁰ the offence committed has been made a cognizable offence. This makes the criminal proceedings under the Copyright Act more effective as the delay in obtaining warrant from the magistrate before conducting a raid is eliminated. To make the copyright protection more effective, the Act also confers powers on a police officer not below the rank of a sub-inspector, even in the case of a threatened infringement, to seize without warrant all copies of infringing work and all plates used or likely to be used for the purpose of making infringing copies of the work.⁵¹ The effect of this provision is that a threatened infringement of the copyright can be nipped even before the commission of an offence. To prevent the abuse of power by police officer, the Act gives right to any person having an interest in materials so seized to make an application to a magistrate, within 15 days of such seizure, for restoration of the materials to him.⁵²

The Copyright (Amendment) Act, 1984 introduced certain important amendments, the object of which is mainly to discourage and prevent the wide-spread piracy prevailing in video-films. Among other things, it substantially enhances the punishment for committing the offence of infringement of copyright. The term of imprisonment, under the amended provision, shall not be less than 6 months but may extend upto 3 years, and the fine which shall not be less than Rs. 50,000/- but may extend upto Rs. 2 lakh.⁵³ Where the offence is repeated, the infringer shall be punishable for the second, and for every subsequent offence, with imprisonment for a term which shall not be less than one year but which may extend upto three years and with fine which shall not be less than one lakh of rupees but which may extend upto Rs. 2 lakh.⁵⁴

VI CHARGE OF INADEQUATE SYSTEM OF OPPOSITION TO REGISTRATION

Both the U.S. and Japan have emphasised in their submissions/ suggestions that owners of a trade mark identical or confusingly similar to a mark for which registration is sought should be given the opportunity to challenge promptly such registration.

In this regard, the position in India is that section 21 of the Trade and Merchandise Marks Act, 1958, provides for 'opposition to registration'. Sub-section (1) of section 21 lays down that any person may, within three months, from the date of the advertisement or re-advertisement of an application for registration

49. See *State of UP v. Ram Nath*, AIR 1972 SC 222.

50. The Copyright (Amendment) Act, 1984.

51. The Copyright Act, 1957, sec. 64.

52. *Ibid.*

53. *Ibid.*, sec. 63.

54. *Ibid.*, sec. 63A.

or within such further period not exceeding one month in the aggregate as the Registrar may allow give notice in writing in the prescribed manner to the Registrar of opposition to the registration. Two cases⁵⁵ show that opposition to registration succeeds in this country in all deserving cases. It is worth recalling here that in *Brandon & Co.* case,⁵⁶ the trade mark 'Monarch' for Brandon & Co. (Indian party) registered by the Joint Registrar of Trade Marks was ordered to be cancelled by the Bombay High Court merely on the ground that the American trade mark 'Monarch' was in use in this country through imports, even though it was not registered in India by the American company, the Consolidated Foods Corporation.

VII ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS IN INDIA : JUDICIAL DECISIONS

An accusation commonly found in the submissions from the three aforesaid countries is that in some countries proper legal protection is not available to intellectual property rights consisting of patents, designs, trade marks and copyrights. It is a well-known fact that the real law is not what is embodied in the provisions of the statute but how it is really interpreted, implemented and enforced by the courts of the country. In India there are not only provisions in the statute but they are in fact enforced effectively. The following discussion of various decisions would prove this.

(a) Trade and Merchandise Marks

Under this head, the cases in which foreign entities/companies were involved prove that there has not only been effective enforcement of the provisions of law but there has been no discrimination between an Indian party and a foreign party. In fact, the courts have taken not only an impartial view but a view which has in fact favoured the foreigner. In *Philip Morris Belgium S.A. v. Golden Tobacco Co. Ltd.*⁵⁷ the Belgian company had registered a trade mark in this country with the following particulars:

Number	Trade Mark	Class	Goods
243469	VISA	34	Tobacco manufactured and un-manufactured

This trade mark was valid and subsisting in India. It was being used by the plaintiff company in relation to cigarettes manufactured and sold in a large number of countries of the world but it had not been able to sell in India under this trade mark for some years because of import restrictions. The defendant Indian company advertised⁵⁸ that it had introduced a new brand of cigarettes under the trade mark

55. *Consolidated Foods Corpn. v. Brandon & Co.*, supra note 21 and *Surjit Singh v. Alenbic Glass Industries Ltd.*, AIR 1987 Del. 319. For a discussion of these cases, see *infra* under "Effective Enforcement".

56. *Ibid.*

57. *Supra* note 21.

58. *The Times of India*, Delhi, October 27, 1980.

VISA. The plaintiff filed a suit asking for a permanent injunction. The Delhi High Court granted a temporary injunction pending disposal of the suit restraining the defendant from infringing the plaintiff's trade mark.

Several contentions of the defendant were rejected by the court. One of them was that the registered trade mark "VISA" of the plaintiff company was only in respect to tobacco, manufactured and unmanufactured, and was not in respect of cigarettes and so the display of the same on the cigarettes of the defendant could not constitute infringement. But this contention was rejected by the court on the ground that the actual constituent of cigarette was tobacco though enclosed in a paper. It was also contended that the plaintiff's trade mark was liable to be removed from the register of trade marks on the ground of its non-use under section 46 of the Trade and Merchandise Marks Act, 1958. The court rejected the argument on the ground that section 46(3) provided an exception to the aforesaid general rule when the non-use was occasioned due to 'special circumstances' in the trade and since in this case the non-use was due to import restrictions, it was considered to be special circumstance for the purposes of section 46(3). Keeping in view the canons of interpretation, the court in this case could have easily decided the dispute in favour of the Indian party, but it did not do so and put an interpretation which took more than due care of the interests of the foreign company. This shows the judicial attitude in this country which is responsible for holding the scales even between the Indian parties and the foreign parties.

Similarly, in *M/s. Banga Watch Co., Chandigarh v. M/s. N.V. Phillips, Holland*,⁵⁸ the plaintiffs, Dutch company and its Indian subsidiaries (respondents) were manufacturing and selling a wide range of goods in the engineering and electrical fields with the trade mark 'Phillips'. The defendant (appellant) Indian company adopted the said trade mark for their watches and clocks. The respondent Dutch company had never manufactured watches or clocks but they had been manufacturing clock-work-timers used in photography and the radio clocks. The watches and clocks were sold on the same counter along with radio accessories and other electrical appliances even by the appellant. The plaintiffs filed a suit for perpetual injunction to restrain the defendant from using the name 'Phillips' or any similar mark on watches, clocks and the like so as to pass off their goods as those of the plaintiffs. The defendant, a partnership firm, was carrying on business in the sale of watches, clocks, time-pieces and their accessories under the trade mark 'Phillips' since 1954. The defendant-appellant contended that the acquisition of an exclusive right to trade mark in connection with a particular type of article of commerce could not entitle the owner of that right to prohibit the use by others of such mark or name in connection with goods of totally different character because an action for passing off was a common law remedy for passing off by a person of his own goods as those of another and unless it was established by the plaintiffs that their goods and the goods sold by the defendant were alike or of a similar nature, it could not be said that the use of the trade mark in dispute was likely to lead to any confusion. The Punjab and Haryana High Court, however, rejected the argument

58. *Supra* note 21.

upholding the order of the trial court granting perpetual injunction restraining the defendant-appellant from using the trade mark 'Phillips'.

Yet another case worth mentioning here is *Glaxo Operations U.K. Ltd., Middlesex (England) v. Sarnat Pharmaceuticals, Kanpur*.⁵⁹ In this case, the Glaxo Operations U.K. Ltd. and Glaxo Laboratories (India) Ltd. instituted a suit for restraining the defendant Indian firm, their servants and agents from manufacturing, selling, offering for sale, advertising and directly or indirectly dealing with glucose powder or any other medicinal or food preparations in cartons which were a substantial reproduction or colourable imitation of cartons of the product Glaxose-D and/or Glucon-D and from adopting an identical or deceptively similar colour combination, lay-out, get-up, etc. The plaintiffs prayed that an order for rendition of accounts of profits illegally earned by the defendant by infringing the trade marks, copyrights and by way of passing off its goods and business as the goods and business of the plaintiffs be made. They further prayed for issue of a direction for delivery up, for the purpose of destruction, of all the impugned materials including the infringing copies of the cartons, labels, wrapping and packing materials, etc.

It was complained by the plaintiffs that in violation and infringement of their trade mark and copy right, the defendant was selling its product Glucose-D in cartons having the various features including the lay-out get-up, colour combination and arrangement of cartons of Glaxose-D and/or Glucon-D, with a view to producing an impact on the public that the products of the plaintiffs were being sold, thus causing deception so as to encash upon the reputation of the plaintiffs and to pass its inferior products as those of the plaintiffs. On a comparison of the two, the court found that the two cartons were similar and that the resemblance was to the extent that any product in the carton of the defendant could be taken to be that of the plaintiffs. On the question of balance of convenience, which was a very important consideration while granting an injunction, the court held that the plaintiffs would suffer irreparable injury inasmuch as, firstly, the sale of the articles of the plaintiffs would be decreased by as much as the sale of the articles of the defendant took place and, secondly, if the articles of the defendant were inferior in quality to the articles of the plaintiffs, there was bound to be damage to the reputation of the plaintiffs resulting in considerable decrease of the sales of the articles of the plaintiffs. The court, therefore, allowed the application and issued an injunction prayed for till the disposal of the suit.

The Supreme Court considered the infringement of trade mark as a serious matter in *State of U.P. v. Ram Narain*⁶⁰ holding that a person charged with the offences under sections 78^e and 79^e of the Trade and Merchandise Marks Act, 1958, could not be exempted from criminal liability by showing that the registered user of the trade mark had discontinued its use. The court held that for the purposes of Chapter

59. *Supra* note 21.

60. *Supra* note 49.

61. Section 78 prescribes the penalty for applying false trade marks, trade descriptions, etc.

62. Section 79 prescribes the penalty for selling goods to which a false trade mark or false trade description is applied.

X (Offences, Penalties and Procedure) of that Act, a trade mark included a registered as well as un-registered trade mark and that, therefore, an offence under section 78 or 79 related to a trade mark whether registered or unregistered. The Supreme Court held that the contention that the registered trade mark of Habib Bank Ltd. had been abandoned since the said bank had discontinued its use from 1954 would not absolve the respondent from criminal liability because even if it was abandoned, it could only furnish a ground for a person to make an application under section 46 of the Act to have that trade mark removed from the register of trade marks. The court held that these circumstances did not entitle him to use the trade mark whether it was current or had been removed from the register or had been abandoned or even if it had never been initially registered but had acquired the currency of a trade mark.

The strict attitude of Indian courts towards infringement of trade marks is also reflected in *Anglo-French Drug Co. (Eastern) Ltd. Bombay v. M/s. Belco Pharma (Haryana)*.⁶³ In this case, the plaintiff (Anglo-French Drug Co.) got BEPLEX registered as a trade mark on 18-5-1945 and since then it had been manufacturing several medicines including vitamin B complex tablets under this trade mark. Somewhere in the year 1974, the defendants (M/s. Belco Pharma) started manufacturing medicines including vitamin B complex in the name of BELPLEX. When this came to the notice of the plaintiff, they served notice on the defendant not to use BELPLEX on their products as it was phonetically, as also visually, similar to their registered trade mark and was likely to cause confusion in the minds of the purchaser of the plaintiff's products. The Punjab and Haryana High Court held that BEPLEX and BELPLEX were visually and phonetically similar and since the plaintiff had BEPLEX as its registered trade mark, the defendant could not manufacture medicines under the trade name of BEPLEX. Accordingly, the defendant company was restrained by perpetual injunction from manufacturing medicines in the trade name BELPLEX. *In view of this, a decree for mandatory injunction was also issued for the destruction of dyes, printing blocks, literature, papers, vouchers, things and goods bearing trade name BELPLEX. A preliminary decree for rendition of accounts was also passed against the defendant company.* The court likewise granted a permanent injunction as also an order for delivery up of the infringing material in *Globe Super Paris v. Blue Super Flame Industries*.⁶⁴ It was held in this case that the plaintiffs were entitled to a permanent injunction restraining the defendants from using the word SUPERFLAME in the name of their business. The court also ordered the delivery up of the infringing material, namely, the small labels affixed at the rear of the "Hot Flame" or "Nuan Gas Cookers" made by the defendants unto the plaintiffs. The defendants were also directed to file an affidavit disclosing the number of labels in their possession and power, as also the dyes, jigs, tools and fixtures used by them, their servants or agents in the manufacturing and preparation of the same within two weeks from the date of the order and to deliver up all the aforesaid infringing articles within 4 weeks from the date of the order. *In M/s. Kalaniketan, Karol Bagh, New Delhi v. Kalaniketan South Extension*

Market No. 1, New Delhi:⁶⁵ it was proved that the disputed name 'Kalaniketan' had become descriptive of the plaintiff's business and the use of the identical trading style 'Kalaniketan' was likely or calculated to deceive or cause confusion and injury to the business reputation of the plaintiff. The trade name 'Kalaniketan' was not descriptive of the sarees in which the parties were dealing. The defendant was, therefore, not entitled to trade under the name 'Kalaniketan' and the plaintiff was held entitled to the relief of permanent injunction restraining the defendants, their servants, agents and representatives from selling or offering for sale or dealing in sarees under the trade name 'Kalaniketan' or any other identical or deceptively similar trade name.

In Sarabhai International Ltd. v. Sara Exports International,⁶⁶ a suit for perpetual injunction for restraining infringement of trade mark, passing off and rendition of accounts was filed by two plaintiffs, namely, Sarabhai International Ltd. and Ambalal Sarabhai Enterprises Ltd. The Delhi High Court decreed the suit of the plaintiffs in the following manner:

(a) A decree for permanent injunction restraining the defendant by themselves, their servants, agents, stockists and all persons on their behalf from using the word 'SARA' as part of their trading style/trade name 'Sara Exports International' which was deceptively similar to the trading style Sarabhai International Ltd. of plaintiff No. 1 and the trading style Sarabhai Chemicals of plaintiff No. 2 and which included registered trade mark SARA of plaintiff 2 or part of their trade mark SARABHAI.

(b) A decree for permanent injunction restraining the defendant themselves, their agents, servants, dealers, importers and all other persons acting for and on their behalf from infringing by using the trade mark 'SARA' as part of defendant's trading style/trading name SARA EXPORTS INTERNATIONAL in respect of goods for which plaintiff 2 was the registered proprietor of the trade mark SARA under No. 113071 in Class 5 and No. 113072 in Class 1;

(c) A decree for permanent injunction restraining the defendant themselves, their servants, agents, stockists and all other persons on their behalf from passing off or enabling others and causing or assisting others to pass off their business and/or goods as and for business and/or goods of the plaintiffs by using the trading style 'Sara Exports International' or any other trading style/trade name in which the word SARA formed a part. *The defendant was also directed to deliver up offending wrappers, cartons, labels, stationary, literature, dyes, blocks and all other materials bearing the trading style Sara Exports International for destruction.*

In Shri Swaran Singh, Trading as Appliances Emporium v. Usha Industries (India), New Delhi,⁶⁷ the court issued an injunction to restrain the defendants from using the trade mark 'USHA' in respect of electric irons. Also the court upheld

63. *Supra* note 44. Another case of similar nature was *Ciba Ltd., Bagle, Switzerland v. M. Ramalingam*

and *S. Subramaniam*, AIR 1958 Bom. 56.

64. *Supra* note 43.

65. *Supra* note 43.

66. *Supra* note 43.

67. *Supra* note 41.

the order of the learned single judge of the High Court, by which he had directed the defendants to use the name 'GOLDEN' and 'USHA' equally prominently, that is, they would be entitled to use the name 'GOLDEN' provided that 'GOLDEN' and 'USHA' appeared equally prominently. This order was passed as a temporary measure pending final disposal of the matter. Likewise in *Tata Oil Mills Co. Ltd. v. M/s. Wipro Ltd.*⁶⁸ the court held that the plaintiffs had not only made out a *prima facie* case but had also succeeded in establishing that in case the defendants were allowed to continue with the manufacture and sale of their products under the trade mark 'Bubbles', the plaintiff would suffer irreparable injury which could not be compensated by money. The court held that the balance of convenience also lay in favour of the plaintiff. As a result, the *ex parte* injunction granted by the court earlier was confirmed. Of course, this order also was passed as a temporary measure pending the final disposal of the case.

Yet another case worth mentioning is *M/s. Rightway v. M/s. Rightways Foot Wear*.⁶⁹ In this case, the court held that the plaintiff was entitled to the *ad interim* relief and, therefore, directed that the defendants be restrained from using the trade mark and trade name and the signboard of the plaintiff 'Rightway Foot Wear' with distinctive mark of foot on its left side. They were also restrained from using the signboard or trade mark or trade name "New Rightway" because the same was deceptively similar and was likely to cause confusion in the minds of the customers to the detriment of the plaintiff. The defendants were further directed not to pass off or sell their goods under the trade name or trade mark or label 'Rightway' or "New Rightway" with a distinctive mark of foot on its left side. Of course, this order too was passed as an interim measure pending the final disposal of the matter. A case of considerable significance involving a foreign corporation was *Consolidated Foods Corporation v. Brandon & Co.*⁷⁰ In *M/s. Vrajfal Manihal and Co. v. M/s. N.S. Bidi Co.*⁷¹ the court observed that they were *prima facie* of the view that the plaintiffs had been able to establish that their goods (Bidis) had become by user distinctive of the plaintiff's goods. The court was also of the view that the conduct of the defendant was calculated to pass off their goods as those of the plaintiffs or at least to produce confusion in the minds of probable customers or purchasers or other persons with whom plaintiffs had business relations as was likely to lead to the other goods being bought and sold for theirs. The court accordingly restrained the defendant from manufacturing, selling, offering for sale or otherwise dealing in bids under the trade mark/labels which might be identical with and/or deceptively similar to the label '22' of the plaintiffs till the final disposal of the suit.

In *M/s. Hindustan Radiators Co. v. M/s. Hindustan Radiators Ltd.*⁷² the plaintiff had filed a suit for permanent injunction against passing off and using its trading style and trade marks by the defendants on the ground that it was carrying

on business since 1959 and had been manufacturing about 100 types of radiators for use in various vehicles like buses, trucks, cars, jeeps, cranes, compressors, etc. under the mark "HINDUSTAN RADIATORS" and with the initials "H.R." (short form of Hindustan Radiator) on the radiators manufactured by it. The court issued an *ad interim* injunction restraining the defendants, their agents, servants, stockists and all other persons on their behalf from using the trading style 'HINDUSTAN RADIATORS LIMITED' and from using the trade mark 'HINDUSTAN RADIATOR/H.R.' in respect of their radiators in any manner whatsoever or to pass off their business and goods as business and goods of the plaintiffs. Similarly, in *Surjit Singh v. M/s. Alembic Glass Industries Ltd.*⁷³ the petitioner had filed an application with the registrar of trade marks to register in part A of the register of trade marks the mark consisting of the word 'YERA' in class 3 in respect of perfumery, cosmetics and non-medicated toilet preparations. The application was duly advertised in the *Trade Marks Journal*. The respondent, which held registration in respect of the same trade mark "YERA" in respect of various goods falling in classes 9, 10, 11, 14, 17, 19, 20 and 21 objected to the registration of the aforesaid trade mark under sections 9, 11(a), 11(e), 12(1) and 18(1) of the Trade and Merchandise Marks Act, 1958. The assistant registrar of trade marks rejected the application of the petitioner for registration on the ground that the trade mark applied for, if allowed to be registered in class 3 as prayed by the petitioner, was liable to deceive or cause confusion and also that the petitioner not being the proprietor of the said trade mark was not entitled to the protection in the court of law within the meaning of section 11(e) of the Act. The petitioner challenged the order under section 109 of the Act and article 227 of the Constitution of India. The Delhi High Court held that the word YERA was being copied by the petitioner in order to take advantage of the reputation acquired by the trade mark. It, therefore, held that the petitioner was not entitled to registration of the trade mark under section 11(a).

Another case worth mentioning here is *Dr. Ganga Prashad Gupta & Sons v. S.C. Gudimani*,⁷⁴ in which the suit for perpetual injunction sought to restrain the defendant from passing off medicinal preparations under the trade mark 'Goodmans' and for rendition of accounts on the ground that the plaintiff firm was carrying on old and established business of manufacturing and selling medicines of all kinds for the last more than four decades and had been using the trade mark 'Goodmans' as its house mark with regard to them. The same was incorporated at Sr. No. 4 of the declaration dated 6-7-1937 and registered with the Registrar of Assurances, Calcutta. A copyright registration entitled 'Amodine Cough Syrup' with regard to its artistic label was also registered and house mark 'Goodmans' appeared in the same. In the circumstances, the plaintiffs claimed that they had acquired an exclusive right to use the distinctive trade mark 'Goodmans' and the purchasing public had come to recognise and identify their medicines under that trade mark. The Delhi High Court issued a permanent injunction restraining the defendant from manufacturing and marketing disinfectants and purifiers under the trade name

68. *Supra* note 45.

69. *Supra* note 41.

70. *Supra* note 21.

71. *Supra* note 41. See also *Vicco Laboratories v. Hindustan Rimmers*, AIR 1979 Del. 134.

72. *Supra* note 41. See also *M/s. Manoj Plastic India v. M/s. Bhalia Plastic Industries*, *supra* note 41.

73. AIR 1987 Del. 319.

74. *Supra* note 43.

'Goodmans'. As volunteered by the plaintiffs the defendants could use the trade mark corresponding to their surname 'Gudimani'. The defendant was also directed to cease marketing the goods under the name 'Goodmans' within a month of the order. Similarly, in *B.K. Engineering Co., Delhi v. U.B.H.I. Enterprises (Regd.), Ludhiana*,⁷⁵ the plaintiffs-appellants had brought a passing off action against the defendant-respondent claiming permanent injunction, accounts and damages. The plaintiffs and the defendants were in the same line of business. Both were engaged in the manufacture of cycle bells. The plaintiffs started manufacturing bells as early as 1971. They adopted "B.K." as their house mark. They manufactured cycle bells under the trade mark 'Crown' and 'Venus'. The house mark "B.K." was used, prominently and in a conspicuous manner on the cartons as a circular logo device in the form B.K. in the stand of the bell and on the carton, the name of the manufacturer "B.K. Engineering Co." was stamped. The defendants, on the other hand, were marketing cycle bells under the trade mark "B.K.-81". They had entered the manufacturing line in 1981. The mark "B.K.-81" was embossed on the dome-shaped cover as well as on the push handle. "U.B.H.I. Enterprises (Regd.)" was engraved on the dome-shaped cover along with the words "B.K.-81". On the stand of the bell and the carton, their manufacturing name U.B.H.I. appeared. The plaintiffs' case was that the defendants' mark "B.K.-81" was deceptively similar to the house mark "B.K." of the plaintiffs and was bound to cause confusion and deception in the course of trade. The plaintiffs made an application for a temporary injunction seeking to restrain the defendants from using the mark "B.K.-81" on the cycle bells till the decision of the suit. A Division Bench of Delhi High Court, hearing the appeal, observed that competition must remain free but it was essential that trading must not only be honest but must not even un-intentionally be unfair. If it is shown that a product or business of a trader has acquired a distinctive character, the law would restrain a competitor from using that other's name. A line must be drawn somewhere between honest and dishonest trading and between fair and unfair competition. The court thought that here the real mischief was in the adoption of the name "B.K." which was associated with the plaintiffs' business, if not the goods. For these reasons, the court allowed the appeal and issued injunction against the defendants restraining them, their servants, agents, representatives and dealers from manufacturing, selling or offering for sale or otherwise dealing in cycle bells under the mark "B.K.-81" or "B.K." or any other mark which might be identical or deceptively similar to the house mark "B.K." of the plaintiffs till the decision of the suit.

In *Bata India Limited v. M/s. Pyare Lal & Co., Meerut City*,⁷⁶ the plaintiff-appellant company had filed a suit in the court of district judge, Meerut, against the defendant-respondent praying that they themselves, their servants and agents be restrained from using the mark "Batafoam" or otherwise associating the name of "Bata" in any manner or form in advertisements, etc. and further restraining them from "passing off" or enabling others to pass off mattresses, sofas, cushions and

other articles as and for the plaintiff company's goods and from selling or offering for sale any articles associating them with the name of "Bata" in any manner or form. Their further prayer was that the defendants and their servants and agents be directed to deliver the infringing labels and marks of 'Bata' for destruction. The Allahabad High Court felt satisfied that the plaintiff-appellant had a cause of action for instituting a proceeding for passing off. The court also thought that the plaintiff had been able to make out a case for issue of injunction in respect of the user of the name 'Bata' for any of their products by the defendants. The court further observed that the name 'Bata' was neither a fancy name nor in any way connected with the defendants, also it was not the name of a flower or fauna, "it is a fancy name of a foreigner who has established his business in making shoes and the like products in this country. The name is well-known in the market and the user of such a name is likely to cause not only deception in the minds of an ordinary customer but may also cause injury to the plaintiff company." In view of these facts and considerations, the court restrained the respondents from using the name "Bata" or any other name using the word 'Bata' as a part of that name, on any of their packages, advertisements and the like, until the final disposal of this suit.

In *Essco Sanitations, Delhi v. Mascot Industries (India), Delhi*,⁷⁷ the main question for determination was whether the mark "OSSO" adopted by the respondents judgment-debtors was deceptively similar to the registered trade-mark 'ESSCO' of the petitioners decree-holders and amounted to disobedience of the decree for permanent injunction passed by the Delhi High Court in favour of the petitioners against the respondents on July 30, 1980. On February 14, 1980, the petitioners decree-holders had brought a suit seeking permanent injunction restraining—

- (i) The judgment-debtor or their servants, agents, representatives, dealers, workers and all those acting for and on their behalf from infringing their registered trade-mark by adopting and/or using the mark 'ESSO' and/or any other deceptively or confusingly similar mark which was an infringement of their registered trade-mark "ESSCO" in relation to Brass cocks (sanitary and bath room fittings);
- (ii) From manufacturing, selling, offering for sale and/or otherwise dealing in sanitary and bath-room fittings including brass cocks under the mark 'ESSO' or any other deceptively similar mark being colourable imitation of their trade mark 'ESSCO' as was likely to cause confusion and deception and from passing off these goods as those of the decree-holders in any manner whatsoever. They had also prayed for an order for destruction of the goods, cartons, dyes, blocks, labels and other media bearing the impugned mark ESSO, and for rendition of accounts, etc.

The Delhi High Court held that trade mark 'OSSO' adopted by the judgment-debtors was deceptively similar to the registered trade mark ESSO of the

⁷⁵ *Supra* note 41.

⁷⁶ AIR 1985 All. 242.

⁷⁷ *Supra* note 43.

decree-holders and thus the judgment-debtors had disobeyed the decree for permanent injunction granted in favour of the decree-holders by the court on July 30, 1980. The court, however, observed that in the interest of justice, it would have been proper had an opportunity been given to the judgment-debtors to discontinue the user before passing an order for their detention in civil prison which would be a very harsh order. Accordingly, the court warned and directed the judgment-debtors to stop manufacturing, selling, offering for sale or otherwise dealing in sanitation and bath-room fittings including brass cocks under the mark 'OSSO' within one month from the date of that order. The judgment-debtors were also directed to file an affidavit within one month from the date of the order before the registrar stating that they had complied with the directions and had stopped the disobedience of the decree, failing which they were liable to be detained in civil prison.

In *M/s. Virendra Dresses, Delhi v. M/s. Varinder Garments, Delhi*,⁷⁸ plaintiff-appellant challenged the judgment and order of the lower court refusing to issue a temporary injunction restraining the respondent-defendant from adopting a trade name in relation to readymade garments business or any other allied business amounting to passing off and from giving an impression to the trade and public that the defendant was associated with the plaintiffs. The plaintiffs filed a suit for permanent injunction for passing off and rendition of accounts against the defendants alleging that the plaintiffs constituted a partnership firm, and had been manufacturing and dealing in all kinds of readymade garments at Ashok Gali, Gandhi Nagar, Delhi under the name and style of Virendra Dresses since August, 1978. The Delhi High Court accepted the appeal and set aside the judgment of the trial court. The High Court granted a temporary injunction till the decision of the suit by the trial court, restraining the defendant-respondent from adopting or carrying on business in the name of Varinder Garments or any other name calculated to mislead the people to believe that the business of the defendants was the business of the plaintiffs so as to cause confusion between the two businesses.

Another case worth mentioning is *K. Krishna Chettiar v. Ambal & Co.*,⁷⁹ in which the appellant was the sole proprietor of a trading concern known as Radha & Co. while the respondents, Ambal & Co., were a partnership firm. The respondents and the appellant were manufacturers and dealers in snuff, carrying on business at Madras and had business activities inside and outside the State of Madras. On March 10, 1985, the appellant filed an application for registration of trade mark in class 84 in respect of "snuff manufacture in Madras". The respondent filed a notice of opposition. The main ground of opposition was that the proposed mark was deceptively similar to their registered trade-mark. The respondents were the proprietors of two registered trade marks, one consisting of a label containing a device of a Goddess, Sri Ambal, seated on a globe floating on water enclosed in a circular frame with the legend "Sri Ambal Parimala Snuff" at the top of the label, and the name and address "Sri Ambal & Co., Madras" at the bottom. The other trade mark consisted of the expression "Sri Ambal". The mark of which the appellant was

seeking registration consisted of a label containing three panels. The first and the third panels contained in Tamil, Devnagari, Telugu and Kannada the equivalents of the words "Sri Andal Madras Snuff". The centre panel contained the picture of Goddess Sri Andal and the legend "Sri Andal". The respondent had been in the snuff business for several decades and had used the word Ambal as part of their mark for more than half a century. The question was whether the proposed mark was deceptively similar to the respondents marks. A single judge of the Madras High Court dismissed the plaintiff's application for registration of the trade mark and the Division Bench dismissed his appeal. The Supreme Court also dismissed his appeal by holding that there was a striking similarity and affinity of sound between the word 'Andal' and 'Ambal' and that, therefore, there was a real danger of confusion between the two marks.

(f) *Strict action in case of counterfeiting*

Even if a party has not registered any 'trade mark' and if the 'property mark' used by him has been invaded by counterfeiting, the Indian courts have come down heavily on the infringer of the property mark and have subjected the culprit to criminal punishment. Thus, in *Sumat Prasad Jain v. Sheojanan Prasad (Dead, through legal representative) and State of Bihar*,⁸⁰ an appeal, by special leave, was preferred against the judgment and order of the High Court of Patna whereby the High Court had set aside the order of 'acquittal' passed by the additional sessions judge and restored the order of conviction and sentence passed by the trial magistrate under sections 482 and 486 of the Indian Penal Code, 1860. One Sheojanan Prasad (who died during the pendency of his appeal before the High Court) was, at all the material time, the proprietor of a provision store in Arrah. He claimed to have evolved a formula for the manufacture of a scent to which he gave the name of 'Basant Bahar'. The scent when put into market, soon became popular. The scent used to be packed in cartons and other receptacles which carried on them the picture of a *pari* (an angel) holding a bunch of flowers in her hands and an inscription "*Basant Bahar Scent Khushbon Ka Badshah*". The cartons and the receptacles were of green colour and had on them in print name of the manufacturer, namely, 'Basant Bahar Perfumery Company, Shahabad'. Sheojanan Prasad thereafter applied before the registrar of trade marks for registration of the trade mark. The application was, however, not granted as it contained certain technical defects. His case was that even though this trade mark was not registered, the said scent with the aforesaid marks became popular in the market as the scent manufactured and sold by him.

The case of Sheojanan Prasad was that the appellant was also conducting a provision store in Arrah. Finding that his Basant Bahar scent had become popular, the appellant put out for sale a scent prepared by him and gave it the name of Pushp Raj. Pushp Raj scent, however, did not become popular with customers. The appellant, therefore, started putting out for sale his said scent under the name of Basant Bahar in cartons and receptacles similar to those of his (Sheojanan Prasad), in the same colour, shape and size, except for one particular only, namely, the name

78. *Supra* note 41.

79. *Supra* note 41.

80. *Supra* note 16.

of the manufacturer. Before the trial magistrate, the defence taken up by the appellant was that Basant Bahar sent was his original product, that he had put that sent in the market and that it was Sheojanan Prasad, who imitated the genuine scent evolved by him, and that, therefore, there was no question of his having committed any offence either under section 482 or section 486-of the Indian Penal Code. The Supreme Court held that the name Basant Bahar with the picture of an angel with flowers in her hands and the inscription of Basant Bahar *Khusboon ka Badshah* printed on the packets and receptacles was the property mark denoting that the scent in question was the one manufactured and belonging to the complainant. It held that from the findings arrived at by the trial magistrate it must follow that the appellant marked his scent and the packets and receptacles in which it was packed with the same name, the same picture and the same inscriptions with the intention of causing it to be believed that the scent so marked or the scent contained in the said packets and receptacles so marked was the one manufactured by and sold in the market by the complainant. The evidence clearly showed that the scent so marked by the appellant was sold by him in the market with the intention and object aforesaid. It was, therefore, held that the appellant committed offences of both using false property mark and of selling goods marked with counterfeit property mark. The conviction of the appellant under sections 482 and 486 by the lower court was upheld by the Supreme Court.

(ii) *Appellations of origin protected in India*

There is no particular case declaring that protection should be given to appellations of origin, yet the well-known cases on protecting appellations of origin, such as *J. Bollinger v. Costa Brava Wine Co. Ltd.*⁸¹ have been relied upon by Indian courts while deciding cases. Thus, in *Ellora Industries, Delhi v. Banarsi Dass Goela*,⁸² Avadh Behari Rohaigri had observed that in recent times there have been extensions of *passing off*. According to him, it is an expanding business tort because the courts have developed the concept of misappropriation and law has thrown protection around all intangible elements of value. The learned judge observed that the views of Holmes and Brandeis JJ were indeed minority opinions in the *International New Service v. Association Press*,⁸³ in which the U.S. Supreme Court laid the foundations for a general tort of misappropriation of trade values. Rohaigri J thought that these are "property rights" and injunction could be issued against the infringer because predatory business practices and piracy of business rights were denounced by commercial morality as also by law. He held that confusing customers as to source, as in the present case, was invasion of another's property rights as the unfairness arose from the fact that the purchasing public were likely to be misled. For its view, the court relied on the *Spanish Champagne* case,⁸⁴ which is a well-known case on protecting appellations of origin. The decree for injunction passed by the trial court was affirmed and the defendants were ordered to deliver up the offending boxes, wrappers and letter-heads for destruction.

(b) *Cases on Copyright*

The first case worth mentioning here is *Penguin Books Ltd., England v. M/s. India Book Distributors*,⁸⁵ in which the appellant, M/s. Penguin Books Ltd., England (original plaintiff) brought a suit for perpetual injunction against the respondents, M/s. India Book Distributors, New Delhi, Bombay, Madras, Calcutta (original defendants) restraining them from infringing Penguin's territorial copy-rights/ licence in 23 books, the subject matter of the suit. Admittedly, India Book Distributors, Bombay were importing, distributing and offering for sale in India, 13 out of these 23 titles. Some of these books were well-known works such as *Animal Farm* by George Orwell and *Far Pavillion* and *Shadow of the Moon*, both by M.M. Kaye. Some were recent publications such as *Celebrity* by Thomas Thompson and *Lace* by Shirley Conran. Penguins asked for a temporary injunction in the suit. The learned single judge refused injunction because by reason of the consent decree which was passed by the district court in the United States of America, Penguins were disentitled to claim the equitable relief of injunction. The Division Bench held that what had happened was that the U.S. Government had brought a suit against various publishers, British and American, including Penguins Inc., on the complaint that their agreements were in breach of the provisions of the Sherman Act, 1890. This suit had ended in a consent judgment. Clauses V and VI of the consent decree provided:

V. Each defendant is enjoined and restrained, directly or indirectly from preventing or restricting any purchaser of a lawfully published book from importing or exporting such book "to or from the United States or such purchaser from selling, distributing or providing for resale of such book to customers in United States interstate or foreign commerce.

VI. Nothing in this final judgment shall prevent any defendant, in and of itself, from acquiring, granting or otherwise transferring exclusive or non-exclusive copyright rights, or from exercising or authorising the exercise of such rights under the copyright law of any country, including the United States, or from the assertion of such other statutory rights as such defendant may have, provided that no foreign copyright law or other foreign statutory right may be used by any defendant to exclude or restrict the importation or resale in the United States of a lawfully published book.

The learned single judge on construction of these clauses had come to the conclusion that Penguins could not prevent any purchaser of lawfully published books in America from importing them into India. His Lordship had observed:

On a plain reading of the clauses, it is clear that liberty is given to any purchaser in any part of the world to purchase lawfully published books in America and to export them whenever he likes.

81. *Supra* note 19.

82. *Supra* note 18.

83. [1918] 248 US 215.

84. *Supra* note 19.

85. *Supra* note 21.

The Division Bench set aside⁸⁶ the order of the single judge, allowed the appeal of M/s. Penguin Books Ltd., England and issued temporary injunction restraining the defendants (Indian parties) 1 to 4, by themselves, their servants, agents, dealers and stockists, from infringing the plaintiffs' territorial copyrights/rights/licence by importing, distributing and offering for sale in India 13 titles which admittedly they were importing into India. The court permitted the defendants to sell their existing stocks as on the date of the order but ordered that no further imports would be made. The defendants were also directed to keep accounts of the sale of the existing stocks and submit the same in court every 3 months. The defendants were also directed to submit the account of their existing stocks within a week.

Another case worth mentioning is *John Richard Brady v. Chemical Process Equipments P. Ltd.*⁸⁷ In this case, a suit was filed by the plaintiffs for permanent injunction to restrain the defendants from infringing copyright of the plaintiffs, from passing off defendants' product as those of the plaintiffs, for rendition of accounts of profits, and for delivery up of all infringing materials and articles, etc. In the instant application made under order 39, rules 1 and 2, read with section 151 of the Code of Civil Procedure, 1908, the plaintiffs prayed for an *ad interim* injunction to restrain the defendants from manufacturing, selling, offering for sale, advertising, directly or indirectly, dealing in machines that were substantial imitations and reproduction of design, manuals and drawings of the plaintiffs' fodder production unit and thereby amounting to infringement of the plaintiffs' copyright therein, or from dealing in those machines made on the basis of information and knowledge disclosed to them by the plaintiffs in conditions of strict confidence, and from doing any other thing as was likely to lead to passing off the defendants' product as those of the plaintiffs.

According to the plaintiffs, John Richard Brady was an American national. He was a mechanical engineer and was the president and managing director of Fomcia Overseas S.A. Castcliana, Madrid, Spain. He conceived the idea of growing fresh green grass used as basic food for livestock in a compact unit capable of producing grass throughout the year irrespective of internal climatic conditions. He developed the original fodder production unit (FPU) in the year 1972. It was tested under extreme climatic conditions in various countries in the world. Steps were taken, from time to time, to improve the unit by optimising its size and achieving greater productivity. The plaintiffs further claimed that after extensive experimentation, an improved FPU was invented by Brady and he applied for grant of patent in India in relation to the same which was pending. The technical details of FPU were contained in catalogues which illustrated the same by technical drawings and other specifications. It was claimed by the plaintiffs that the drawings were the original artistic work in which Brady was the owner of the copyright and was,

therefore, entitled to exclusive right to publish and reproduce the drawings whether two dimensionally or three dimensionally.

It was further alleged that Brady collaborated and set up plaintiff No. 2, a joint venture company, Fomcia (India) Machine Pvt. Ltd. and that plaintiff No. 3, Sanjeevani Fodder Production Pvt. Ltd. was formed for the purposes of establishing and operating the first fodder production feed station as a prototype model commercial facility in India. The plaintiff claimed that it was decided by them that a phased programme would be adopted to manufacture the FPU in India for both domestic and export sales, and that to indigenise manufacture of the FPU, the plaintiffs sought quotations from defendant No. 1 for the supply of thermal panels manufactured by them. The panels required were of highly specialised type and to enable the defendants to send their quotations for the supply of the said components and to precisely match those components with FPU, all the technical material, detailed knowhow, drawings and specifications concerning the FPU were passed on to defendant No. 1 under the express condition that they must maintain strict confidentiality regarding the knowhow. The plaintiffs learn that in the month of November, 1985, the defendants were falsely representing that the innovation of a FPU manufactured by the defendants or on their behalf, without the consent, permission and authorisation from the plaintiffs. The plaintiffs also alleged that the machine produced by the defendants was entirely based upon disclosures made by the plaintiffs to the defendants and that, therefore, the defendants committed breach of confidence reposed in them and wrongfully converted and misappropriated the knowhow, information, drawings, designs and specifications disclosed to them under strict confidentiality and had also infringed the copyright of Brady by making the machine in three dimensional form from the two dimensional artistic work of the plaintiffs in drawings of the FPU.

The Delhi High Court noted that although the case really related to enforcement of copyright, particularly in the drawings of Brady and the enforcement of confidentiality of the relationship between the parties, the plaintiff as also the written statement suffered from a mixture of pleadings, generally applicable to both patent and copyright, in spite of different nature and attributes of the two rights.⁸⁸ The court did not finally express any opinion on the question of infringement of the copyright claimed by the plaintiffs in drawings of Brady by the production of the machine in question by the defendants, but it held that the plaintiffs had definitely made out a strong *prima facie* case of infringement of their copyright and of strict confidentiality under which the specifications, drawings and other technical information about FPU were supplied to the defendants. Therefore, an *ad interim* injunction was granted as prayed by the plaintiffs restraining the defendants from manufacturing, selling, offering for sale, advertising, directly or indirectly, dealing in machines that were substantial imitations and reproductions of the drawings of the plaintiffs' FPU or from using in any other manner whatsoever the knowhow, specifications, drawings and other technical information about the FPU disclosed

86. This was largely on the basis of section 53 (1) of the Copyright Act, 1957, which empowers the Registrar of Copyrights to "order that copies made out of India of the work which if made in India would infringe copyright, shall not be imported."

87. *Supra* note 21.

88. *Id.* at 378. See also *K.P.M. Saundhram v. M/s. Rattan Prakashan Mandir*, *supra* note 45.

to them by the plaintiffs till the final disposal of the suit.

Likewise, in *Pillalamarri Lakshminathan v. Ram Krishna Pictures, Vijayawada*,⁸⁹ a suit was instituted by the publishers for infringement of copyright in a book against the producers and directors of a film. It was held that it could not be said that the injunction was not the appropriate remedy. It was also held that since the publishers were accorded relief of damages, they could not claim relief of accounts. In *Shyam Lal Paharia v. Goya Prasad Gupta*,⁹⁰ it was admitted that the defendant had a copy of the plaintiff's book *Hisabi Machine*, the first edition of which had been published by the plaintiff himself. A copy of the book was, however, found with the defendant when the commissioner had gone to seize copies of the impugned book. The court also found other evidence of infringement of the plaintiff's copyright of 49 pages of his book by the defendant in his book. Under these circumstances, the court held that the defendant had infringed the plaintiff's copyright to the extent of 49 pages in his book. The impugned book of the defendant had been seized under the court's orders and the same was not allowed to be sold in the market. A small amount of Rs. 50 was also granted as damages to the plaintiff.

(c) Cases on Patents and Designs

In *Y.S. Prakash Rao v. Chief Secretary, Government of Andhra Pradesh, Hyderabad*,⁹¹ the petitioner had obtained patent in respect of Telugu typewriters. The government of Andhra Pradesh had evolved a standard key board which was nothing but replica of the key board invented by the petitioner. The government got the typewriters manufactured from companies other than the petitioner and thus committed infringement of petitioner's patent. On the question of damages, the Andhra Pradesh High Court held that the petitioner was in a position to get the typewriters manufactured from standard companies and was entitled to damages on the basis of royalty it might have received on the typewriter machines which could have been sold to the private parties. The petitioner company was also held entitled to damages for loss of goodwill and also interest @ 10% per annum. Another case worth mentioning here is *Tobu Enterprises (P) Ltd. v. Joginder Metal Works*,⁹² in which Delhi High Court held that a suit for permanent injunction restraining infringement of registered design and for rendition of accounts was maintainable. The court also held that the provisions of section 53 (Piracy of Registered Design) could not be interpreted so as to exclude any action for passing off and for rendition of accounts. The court observed that a person complaining of infringement of his design could certainly ask for accounts from the defendant to show the profits earned by the defendant by unlawfully using the design of the registered proprietor because the plaintiff might say that the profit earned by the defendant would be a loss sustained by him which he could claim as damages. Likewise, in *M/s. Niky Tasha (India) Pvt. Ltd. v. M/s. Faridabad Gas Gadgets Pvt. Ltd.*,⁹³ the court

observed that it was open to a plaintiff at any time after the institution of the suit for infringement of design to move for interlocutory injunction to prevent the defendant from infringing his design between then and the date of trial.

VII CONCLUSION PREVENTION OF IMPORTATION OF INFRINGING PRODUCTS

In their submissions/suggestions, the United States suggests that the procedures contemplated by them include "provisions enabling owners of intellectual property to enforce their rights by petitioning governments to prevent importation of infringing products." In this connection, it is submitted that in India as seen in *Penguin Books Ltd., England v. M/s. India Book Distributors*,⁹⁴ *M/s. Penguin Books Ltd., England* were able to stop the imports of books (into India by Indian parties) which infringed their copyright. Likewise, in *Gramophone Company of India Ltd. v. Birendra Bahadur*,⁹⁵ the Supreme Court held that the word 'import' in sections 51 and 53 of the Copyright Act, 1957 meant 'bringing into India from outside India' and that it was not limited to importation for commerce only but included importation for transit across the country. As a result of this interpretation, the court laid down an authority for the proposition that import of infringing material is to be stopped not only when the infringing material is to be used in India but also in the case when the infringing material is being taken through India to a foreign country. Thus, it is clear that in India the owner of the intellectual property has an enforceable right to prevent importation of infringing products as contemplated by the Americans.

There is another Supreme Court decision on the same point. In *American Home Products Corporation v. Mac Laboratories Pvt. Ltd.*,⁹⁶ the Supreme Court decided in favour of the American multinational and held that the intention of the American company to use trade mark through its Indian subsidiary, which was to be registered subsequently as the registered user of the said trade mark was *bona fide*. Therefore, the application filed under section 46(1)(a) of the Trade and Merchandise Marks Act, 1958 by the Indian company to have the trade mark in question removed from the register on the ground that the American company had not at any relevant time made use of the trade mark itself and that permitting the use of the trade mark in this manner through a registered user would amount to permitting trafficking in trade marks, was rejected.

The above analysis of the Indian law and cases shows the Indian position in regard to various accusations made before the Negotiating Group on Trade-related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods. The position in Indian law relating to intellectual property rights and their enforcement adequately meets the expectations/aspirations expressed by U.S.A., E.E.C. and Japan.

89. *Supra* note 41.

90. *Supra* note 34.

91. *Supra* note 34.

92. *Supra* note 43.

93. AIR 1985 Del. 136.

94. *Supra* note 21.

95. AIR 1984 SC 667.

96. AIR 1986 SC 137.

PRIVACY AND THE INDIAN LEGAL SYSTEM

Govind Mishra*

I

IN 1890, Charles Warren and Louis Brandeis published their celebrated article "The Right to Privacy" in the *Harvard Law Review*,¹ which is generally acknowledged as the take off point in the journey of the right to privacy. Commenting upon that article, Roscoe Pound observed that it did nothing less than add a chapter to the law.² Whenever any new concept or discipline has emerged, scholars try to trace its origin in the earliest historical documents.³ And, "privacy" has not been an exception to it.⁴

Professor Westin maintains that man's need for privacy is rooted in his animal origins and that men and animals share several basic mechanisms for claiming privacy among their own fellows.⁵ No doubt, there are similarities in the patterns of life of man, animal and plant. All forms of life eat, all classes of animal procreate. Even the plants and trees after they have grown up, bear fruits. There are dissimilarities also which make human life different from animal and plant lives. Rationality and freedom of choice are said to be distinctive properties of human life as compared to animal and plant lives. Thus, there are certain properties of human life which are not shared by animals such as feeling of shame, guilt, indignity, disrespect, etc. It is, therefore, submitted that the origin of privacy is rooted in the above unshared properties of human life which is natural, yet different from animal life. However, all moral and legal considerations are meaningful and applicable only in the context of human behaviour.

* Reader, Campus Law Centre, Faculty of Law, University of Delhi.

1. *4 Harv. L. Rev.* 193 (1890).
2. Zelman Cowan, *Individual Liberty and the Law* 80. However, in *Nuth Mall v. Zaka-oolah Beg and Kareem-oolah Beg*, SDA, NWP Rep 92 (1855), Begbie, Smith and Jackson JJ recognised the right to privacy in India. In *Manishankar Hargowan v. Trikani Narsi*, (1867) 5 Bom. HCR ACI 42, Tucker and Gibbs JJ held that an invasion of privacy was an infraction of a right for which person injured has remedy at law. In *Gokul Prasad v. Radho*, ILR 10 All. 358 (1888), Edge CJ held that substantial interference with such a right of privacy afforded a good cause of action. In the light of these cases, the observation of Roscoe Pound may be accepted as limited to the jurisdiction of the U.S.A. only.
3. Sociology is the last to join the family of social sciences. But antecedent and origin of sociology include the works of Plato and Aristotle.
4. a. Almost the first page of the Holy Bible, writes M.R. Konvitz, introduces us to the feeling of shame as a violation of privacy. After Adam and Eve had eaten the fruit of the tree of knowledge, "the eyes of both were opened, and they knew that they were naked, and they sewed fig leaves and made themselves aprons". M.R. Konvitz, "Privacy and the Law: A Philosophical Prelude", 31 *Law and Contemporary Problems* 272 (1966).
b. Roman legal system from the very beginning accepted the rules against personal injury (*injuria*) which include rights to feelings of human dignity and self-respect. A person could not be dishonoured or shamed.
c. Centuries ago eaves-dropping was regarded as a misdemeanor, involving an element of trespass. Offensive shadowing in a public place also came to be treated as wrong. Paul A. Freund, "Privacy: One Concept or Many," in J. Roland Pennock and John W. Chapman (eds.), *Privacy Norms XIII*, p. 182 (1971).
5. Alan F. Westin, *Privacy and Freedom* 8 (1970).

1990

PRIVACY

47

But human beings are individuated differently in different cultures. The value of a culture lies not only in raising and enlarging the internal man but also in shaping his external existence and advance towards high and great ideals.⁶ Thus, the growth of man's total personality is, to a great extent, predicated upon a sound political, economic and social institutions. In a totalitarian state, which traditionally attacks the idea of privacy as "immoral", "anti-social" and "part of the cult of individualism",⁷ privacy may not find favourable climate to grow. On the other hand, liberal democratic theory assumes that a good life for the individual must have substantial areas of interest apart from political participation—time devoted to sports, arts, literature and similar non-political pursuits. A liberal democratic system maintains a strong commitment to the family as a basic and autonomous unit responsible for important educational, religious and moral roles and, therefore, the family is allowed to assert claims to physical and legal privacy against both society and the state. As a result of religious diversity and ideas of toleration, most democratic systems make religious choice a "private concern", both law and custom forbid government controls over the nature and legitimacy of religious affiliation and allow maximum privacy for religious observance.⁸

The political ideology which finds its expression in the regulatory measures of human behaviour in a given society, which is divorced from the natural properties of man and cultural ethos of the society, is bound to be ineffective in the long run. As, for example, recent changes in Soviet law, writes M.C. Sealvad, clearly show a tendency to depart from the original idea of a free dissolubility of the marriage tie. "The evolution of Soviet law in various fields is undoubtedly due largely to the change in the form of the state which has developed into an absolute government in which the interests of the state are considered to be paramount. But the return in part to the old ideas in regard to the marriage tie indicates a recognition of the importance of the marriage institution and its need to Soviet society. Nothing could illustrate with greater emphasis the powerful impact which social views and culture have even on absolute governments determined to make a revolutionary break with the past." Further, the 19th All Union Communist Conference in the Soviet Union held in June, 1988 had on its agenda, "to uphold firmly personal and privacy rights" under judicial reform. It also aimed at free speech and unimpeded telephones.¹⁰

The importance of privacy as a human right and its need for legal protection has been acknowledged in the following three international documents:
(i) Article 12 of the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on December 10, 1948, reads:

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and

6. R. Pal, *History of Hindu Law* 88 (1958).

7. Alan F. Westin, *supra* note 5 at 23.

8. *Id.* at 24.

9. M.C. Sealvad, *Law and Culture* 13 (1965).

10. *Time*, June 27, 1988, pp. 10-11.

reputation. Every one has the right to the protection of the law against such interference or attacks.

(ii) Article 17 of the International Covenant on Civil and Political Rights provides:

No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

(iii) Article 8 of the European Convention for Protection of Human Rights and Fundamental Freedoms, 1950, provides:

1. Every one has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for protection of the rights and freedoms of others.

A number of international conferences¹¹ have been held emphasizing the need to protect privacy by law. In many countries, legal measures have been adopted to protect the right to privacy¹² and in many others, committees were appointed to investigate the problem connected with the privacy and make suitable recommendations.¹³ Despite its heightened importance, there is no consensus in the legal and philosophical literature on the definition of privacy.¹⁴ For some, privacy is a psychological state, a condition of "being-apart-from-others"¹⁵—closely related to alienation.¹⁶ To others, privacy is a form of power, "the control we have over information about ourselves";¹⁷ or "the condition under which there is control over acquaintance with one's personal affairs by the one enjoying it";¹⁸ or the individual's ability to control the circulation of information relating to him.¹⁹ Privacy is also defined as "the claim of individuals, groups, or institutions to determine for themselves when, how and to what extent, information about them is communicated

11. May 22-23, 1967, Stockholm, organised by the Swedish section of the International Commission of Jurists, April 14, 1970, Paris, a "round-table" discussion about Legal Data Processing and Human Rights, September 30—October 3, 1970, Brussels, an International Colloquy, as reported by A.H. Roberson (ed.), *The Right of Privacy* (1972).

12. U.S.A., England, Germany, France and Switzerland.

13. Englund, *Report of the Committee on Privacy* (Chairman: K. Younger), Canada: *Privacy and Computers* a report for a task force, 1972, Israel: A Committee headed by Supreme Court Judge, I. Cahn, was appointed for the similar purpose; The Australian Law Reform Commission proposed a draft bill on "Publication Privacy", *Discussion Paper No. 1977*.

14. Richard B. Parker, "A Definition of Privacy," *Discussion Paper No. 275* (1974).

15. Weinstein, *The Uses of Privacy in the Good Life*, *Privacy Nomos XIII*, p. 94.

16. Fried, *An Anatomy of Values*, 140 (1970).

17. Gross, *Privacy and Autonomy*, *Privacy Nomos XIII*, p. 169.

18. A. Miller, *The Assault on Privacy*, 25 (1971).

to others."¹⁹ For still others, an important aspect of privacy is the freedom not to participate in the activities of others, a freedom which is lost when we are forced to hear the roar of automobile traffic or breathe polluted air.²⁰ "Privacy", says Clark Haynighurst, "is viewed, to a large extent, as a cultural norm which has been introduced into a variety of legal issues and which serves the purpose of providing a rallying point for those concerned about the encroachments of mass society on the individual. Its utility is thus much like that of "due process" or "equal protection" in galvanizing the legal system into recognizing and contesting specific threats to freedom - in this case, deep intrusions on human dignity by those in possession of economic or governmental power."²¹ They agree neither on the nature of privacy (is it a claim? an area of life? a condition of life?) nor on its characteristics (is it related to being known? to being sensed? to being interfered with?)²² However, given such diversity of opinion, it will not be out of place to trace briefly the manner in which the western scholars have defined privacy.

In 1888, noting for the first time, "a right to be let alone", Judge Thomas M. Cooley planted the seed for the legal profession's interest in privacy.²³ Two years later, Samuel Warren and Louis Brandeis cultivated the notion with the seminal analysis of the concept of privacy.²⁴ They argued:

Thus, in very early times, the law gave a remedy only for physical interference with life and property, for trespass *vi et armis*. Then the "right to life" served only to protect the subject from battery in its various forms: liberty meant freedom from actual restraint; and the right to property secured to the individual his lands and his cattle. Later, there came a recognition of man's spiritual nature of his feelings and his intellect. Gradually, the scope of these rights broadened; and now the right to life has come to mean the right to enjoy life - the right to be let alone....²⁵

They believed that the expansion of property rights constituted a "recognition of man's spiritual nature." The principle which protects personal writings and all other personal productions, not against theft and physical appropriation but against publication in any form is in reality not the principle of private property, but that of an inviolate personality.²⁶ Many psychologists and sociologists have also defined privacy almost in similar tone. Thus, Bates defines it as "a person's feeling that others should be excluded from some thing which is of concern to him and also recognition that others have right to do this."²⁷ Chapin defines it as "a value to be

19. Alan F. Westin, *Privacy and Freedom*, 7 (1968).

20. Ernest Van Den Haag, *On Privacy*, *Privacy Nomos XIII*, p. 161.

21. "Foreword", 31 *Law and Contemporary Problems* 251 (1966).

22. Ruth E. Gavison, *Privacy and Its Legal Protection* (Unpublished Ph.D. Thesis submitted to the University of Oxford in 1975).

23. Thomas Cooley, *Torts* 91 (2nd ed., 1888).

24. Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy", *supra* note 1.

25. *Ibid.*

26. *Id.* at 205.

27. A. Bates, "Privacy - A Useful Concept?" 42 *Social Forces* 432 (1964).

oneself; relief from the pressures of the presence of others."²⁸ Jourard defines it as the "outcome of a person's wish to withhold from others certain knowledge as to his past and present experience and action and his intention for the future; a desire to be an enigma to others or to control others' perceptions and belief about the self."²⁹

The above definitions have two common features: The equation of privacy with withdrawal, or the desire to be withdrawn, from public affairs and the assumption that privacy is voluntary and essentially involves individual self-control. It has, however, been criticized from an analytical perspective. Warren and Brandeis' interpretation of privacy as a "right to be let alone" that protects man's inviolate personality" is unsatisfying. Their definition is too imprecise for judicial construction and principled application, let alone incorporation into public policy.³⁰ The criticism, it appears, is too wide to be accepted fully. For instance, the U.S. Supreme Court in *Adair v. United States*,³¹ declaring a federal antilynch law statute unconstitutional as an "invasion of personal liberty" guaranteed by the Fifth Amendment, quoted with approval, from the treatise by Cooley:

It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason or is the result of whim, caprice, prejudice or malice. With his reasons neither the public nor third persons have any legal concern.³²

It has rightly been observed³³ that privacy has largely a negative meaning to many Americans in the same sense that Warren and Brandeis's characterization of it as "the right to be let alone" may misleadingly suggest a sense of aloofness and withdrawal from every day life. The opinions of Douglas and Goldberg JJ in *Griswold v. Connecticut*,³⁴ imply that privacy may also be the character of acts performed in public view, for example, joining the NAACP or performing an act of public worship in church. A person may be asserting his right of privacy when he dresses in an unorthodox way,³⁵ or when he 'loafs' in a public park.³⁶ A person may claim the right to be let alone when he acts publicly as when he acts privately. Davis suggested that privacy is an interest or condition which derives from and is automatically secured by the protection of more recognizable rights.³⁷ This approach is extreme in as much as it constitutes an absolute denial of a legal right

28. F.S. Chapin, "Some Housing Factors Related to Mental Hygiene," *J. Soc. Iss.* 164 (1951).

29. Sidney M. Jourard, "Some Psychological Aspects of Privacy," *31 Law and Contemporary Problems*, 307 (1966).

30. David M. O. Brian, *Privacy, Law and Public Policy* 5 (1979).

31. 208 U.S. 161 (1908).

32. *Ibid.*

33. William M. Beane, "The Right to Privacy and American Law," *31 Law and Contemporary Problems* 253 (1966).

34. 381 U.S. 479 (1965).

35. *People v. O. Gorman*, 274 N.Y.284, 8 N.E. 2d 862 (1937).

36. *Territory of Hawaii v. Aulaha*, 48 F.2d 171 (9th Cir.) 1931.

37. Frederick Davis, "What do we Mean by 'Right to Privacy'?" *4 South Dakota L. Rev. J. at 4-5* (1959).

and assumes that interests in privacy are not intrinsic but merely derivative from, and instrumental to, other individual rights.

In 1960, William Prosser, after having reviewed a large number of cases, observed:

It is not one tort, but a complex of four. The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff, in the phrase coined by Judge Cooley, to be let alone.³⁸

The four interests and torts Prosser found were described as follows:

1. Intrusion upon the plaintiff's seclusion or solitude or into his private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.
4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

Prosser's classification of privacy interests raised much controversy over the theoretical and legal foundations of privacy. If Prosser's analysis was correct, then Warren and Brandeis were wrong. Instead of a single interest, there were four interests represented by four torts, none of which bore a distinctive interest in privacy. By re-analyzing Prosser's classification, Bloustein attempted to show that the principle of "inviolable personality" was still the fundamental interest in privacy cases. He argued:

The injury is to our individuality to our dignity as individuals, and the legal remedy represents a social vindication of the human spirit thus threatened rather than a recompense for the loss suffered.³⁹

Like Warren and Brandeis, Bloustein assumed that privacy interests have an intrinsic value, and for this reason they involve more than mere protection of instrumental value, such as protection of property, reputation and mental suffering. It has rightly been commented that although Bloustein's critique usefully emphasizes that Prosser's re-examination cannot be accepted unconditionally, his definition, like that of Warren and Brandeis, remains imprecise. The problem with Bloustein's analysis, however, is not that his "explanation is so wide as to be meaningless"⁴⁰ but that he does not define and analyze privacy itself. Rather, his approach consists of a broad characterization of the reason privacy is of value at all,

38. William Prosser, "Privacy," 48 *Calif. L. Rev.* 389 (1960).

39. Edward Bloustein, "Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser," 39 *N.Y.U.L. Rev.* 962 (1964).

40. Gerald Dworkin, "The Common Law Protection of Privacy," 2 *U. Tas. L. Rev.* 418 at 433 (1967).

namely, that privacy is associated with human freedom and dignity. Hyman Gross's⁴¹ definition of privacy as "the condition of human life in which acquaintance with a person or with affairs of his life which are personal to him is limited" does not escape ambiguity although it gives a new dimension to the definition of privacy in terms of control over personal information about oneself which contradicts his analysis of privacy as a condition of life. This definition is too narrow and presupposes that privacy primarily involves control.

Charles Fried offers similar definition of privacy:

Privacy is not simply an absence of information about us in the minds of others; rather it is the control we have over information about ourselves...

The person who enjoys privacy is able to grant or deny access to others.... Privacy, thus is control over knowledge about oneself...⁴²

Alan F. Westin has defined privacy thus:

The claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others... The right of an individual to decide what information about himself should be communicated to others and under what circumstances viewed in terms of the relation of the individual to social participation, privacy is the voluntary and temporary withdrawal of a person from the general society through physical or psychological means, either in a state of solitude or small group intimacy or, when among larger groups, in a condition of anonymity and reserve.⁴³

Arthur Miller has also defined privacy as "the individual's ability to control the circulation of information relating to him."⁴⁴ Richard Parker has defined privacy in the following words:

Privacy is control over when and by whom the various parts of us can be sensed by others.... (more specifically,) control over who can see us, hear us, touch us, smell us, and taste us, in sum, control over who can sense us, is the core of concept of privacy. It is control over the sort of information found in dossiers and data banks.⁴⁵

In certain situations, for instance, when a private "eye" a photographer tracks an individual, that person's privacy may be invaded but in such an instance there is no communication or disclosure of personal information. Many privacy interests that have been constitutionally recognized involve neither dissemination nor acquisition of personal information. Examples range from cases involving music on public buses, loudspeakers on public streets and door to door salesmen to

41. Hyman Gross, "The Concept of Privacy", 42 N.Y.U.L. Rev. 36 (1967)

42. Charles Fried, "Privacy" 77 Yale L.J. 482-83 (1965).

43. Alan F. Westin, *supra* note 5 at 7-8.

44. Arthur Miller, *supra* note 18 at 25.

45. Richard B. Parker, "A Definition of Privacy", *supra* note 18 at 280-81.

decisions on the use of contraceptives and the permissibility of abortions. In all these instances, the interests in privacy have nothing to do with disclosures of personal information but rather with an individual's freedom to engage in private activities. Despite the above criticisms, the definitional approach to privacy as "control over personal information has been appealing for a number of reasons: It embraces a broad range of privacy interests; it appears appropriate and applicable to the problems associated with personal information held by the government agencies, and finally, it tends itself to normative arguments for legislating privacy safeguards."⁴⁶

The conclusions reached at the Nordic conference of jurists in May, 1967 give a considerable broader definition of the legal field covered by the concept of privacy. According to these conclusions, the right to privacy means the right of the individual to lead his own life protected against:

- a. Interference with his private, family and home life.
- b. Interference with his physical or mental integrity or his moral or intellectual freedom.
- c. Attacks on his honour or reputation.
- d. Being placed in a false light.
- e. The disclosure of irrelevant, embarrassing facts relating to his private life.
- f. The use of his name, identity or likeness.
- g. Spying, prying, watching and besetting.
- h. Interference with his correspondence.
- i. Misuse of his private communications, written or oral.
- h. Disclosure of information given or received by him in circumstances of professional confidence.⁴⁷

The Indian scholars⁴⁸ who have written articles on privacy, have preferred to rely upon the definition given by the western scholars rather than contributing their own. One of them, of course, initiated the question regarding the concept of privacy in India but concluded with the following observations:

Our ancient law in Dharmashastras also recognised the concept of privacy. Really, the law of privacy has been well-expounded in the commentaries of the old law. Kautilya in his Arthashastra has prescribed a detailed procedure to ensure right to privacy while ministers were consulted. But neither in ancient law nor in the present

46. David M. O'Brien, *supra* note 30 at 13.

47. A. H. Robertson, *supra* note 11 at 31.

48. B. Shanta Kumari, "Infringement of Privacy as an Actionable Tort", VIII *The Year Book of Legal Studies* 92 (1972); F.S. Nariman, "The Right to be Let Alone - A Fundamental Right", XVIII *The Indian Advocate* 76 (1977); Anirudh Prasad, "New Dimensions of the Right to Privacy under the Indian Constitution", XIV J.C.P.S. 252 (1980); Shrinivas Gupta, "Right to Privacy: A Kind of Personal Autonomy", *Lex et Juris* (August 30, 1988).

law the term 'privacy' has anywhere been defined nor any judicial pronouncement has so far come to make the position clear.⁴⁹

Because of certain common features in privacy, secrecy and confidentiality, the distinctive feature among them gets blurred. Privacy as a human right has got to be distinguished from 'secrecy' and 'confidentiality'. Secrecy is a means to an end while privacy is an end in itself. Confidentiality is reposed, secrecy is maintained and privacy is respected. The sole purpose of the detailed procedure prescribed in the Kautilya's *Arthashastra* for consulting the ministers is to ward off possible leakage or divulgence of the state policies in the statecraft the legacy of which is found even today in the provisions of the Indian Official Secrets Act, 1923. This was not to ensure any one's right to privacy. At times, secrecy is maintained to respect one's privacy. In fact, there are several statutes⁵⁰ in India which prohibit divulgence of information acquired in the course of one's official capacity. In all such cases, institutional secrecy is maintained to respect individual's privacy who have business relations with institutions. Uncertainty of meaning which thrives because of the conceptual vacuum surrounding the legal notion of privacy is partly because of *a priori* assumptions on the part of the western scholars and derivative status of 'privacy' as interpreted by the judiciary. Even the Warren and Brandeis' article⁵¹ was influenced by their personal grievance against the yellow press. Their work was thus something of a lawyer's catharsis rather than objective scholarship.⁵² Privacy, whether legal or meta-legal, cannot be conceived of without "exclusion". But it raises the question: Exclusion from what? And here is the rub. The end of any legal system is to promote the welfare and happiness of man and not to make him annoyed, embarrassed and unhappy. Viewed in the cross-cultural background, even the concepts of annoyance and embarrassment vary rather widely. The feelings of shame, indignity, disrespect, guilt, embarrassment, annoyance and inconvenience are properties of human nature. But the questions such as what is shameful or disrespect, etc. have got to be decided in the context of a particular culture. This is one of the reasons which defies a universally acceptable definition of privacy. There cannot be a common definition of privacy with uncommon human behaviour. Valmiki rightly defined privacy thus:

49. Shrivats Gupta, "Right to Privacy: A Kind of Personal Autonomy", *ibid.*

50. Section 44 read with the second schedule of the State Bank of India Act, 1955; secs. 11 and 15 of the Census Act, 1948; sec. 5 of the Bankers' Book Evidence Act, 1891; sec. 51 read with the first schedule of the National Bank for Agriculture and Rural Development Act, 1981; sec. 20 read with the schedule of the National Co-operative Development Corporation Act, 1962; sec. 4(3) of the International Monetary Fund and Bank Act, 1945; secs. 21 and 20 of the Industrial Disputes Act, 1947; sec. 38 read with the schedule of the Export-Import Bank of India Act, 1981; secs. 35 and 36 of the Children Act, 1960; secs. 80 and 80A of the Estate Duty Act, 1953; sec. 39 read with the first schedule of the Deposit Insurance and Credit Guarantee Corporation Act, 1961; sec. 41 read with the first schedule of the Agricultural Refinance and Development Corporation Act, 1963; sec. 13 read with the third schedule of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970; secs. 34A and 36AD of the Banking Regulation Act, 1949 and sec. 9 of the Capital Issues (Control) Act, 1947.

51. *Supra* note 1.

52. *Supra* note 21.

Na Greehani Na Yastrani Na Prakastirskriya,
Ne Dreesha Rajastkarah Vritamavararan Sriyah.⁵³

(Neither the shelter of a house nor the veil, neither high walls, nor honours such as these are the proper safeguards for a woman's modesty: it is her own conduct that should guard her.)

The word 'avarana' used in the above text means a shield or screen.⁵⁴ It connotes exclusion and, thus, may be understood as Sanskrit equivalent of privacy. The genius of Valmiki in indentifying privacy (avarana) with one's conduct adds dynamism to the concept and its definition may vary with varying modes of conduct. It may be understood in the same way as Stammer's celebrated phrase, "natural law with variable contents". Nakedness is not a matter of shame, annoyance or embarrassment for a member of the nudist club. Different legal systems, thus, emphasize different aspects and the customs related to privacy differ greatly from culture to culture, social system to social system and situation to situation. There are frontiers, writes Arnold Simmel, not artificially drawn within which men should be inviolable, these frontiers being defined in terms of rules so long and widely accepted that their observance has entered into the very conception of a normal human being. The frontiers mentioned are "not artificially drawn" because they are recognized in a given culture as legitimate boundaries of the personality.⁵⁵ This line of argument becomes clear if one keeps in mind the functional justification of privacy. According to Westin,⁵⁶ the functions of privacy in democratic societies can be grouped under the following four headings: (a) Personal autonomy; (b) Emotional release; (c) Self-evaluation; and (d) Limited and protected communication.

(a) Personal Autonomy

The most serious threat to the individual's autonomy is the possibility that some-one may penetrate the inner zone and learn his ultimate secrets either by physical or psychological means. This deliberate penetration of the individual's protective shell, his psychological armor, would leave him naked to ridicule and shame and would put him under the control of those who knew his secrets. The autonomy that privacy protects is also vital to the development of individuality and consciousness of individual choice in life. Leontine Young noted that "without privacy there is no individuality. There are types only. Who can know what he thinks and feels if he never has the opportunity to be alone with his thoughts and feelings?"⁵⁷ This development of individuality is particularly important in democratic societies since qualities of independent thought, diversity of views and non-conformity are considered desirable traits of individuals. Such independence requires time for sheltered experimentation and testing of ideas for preparation and

53. N. Raghunathan (Trans.), *III Srimad Valmiki Ramayanam* 344.

54. Wilson, *Sanskrit English Dictionary*.

55. Arnold Simmel, "Privacy", *12 International Encyclopedia of Social Sciences* 480.

56. Alan F. Westin, *supra* note 5 at 32.

57. Leontine Young, *Life Among the Giants* (1965), quoted by Alan F. Westin, *id.* at 34.

practice in thought and conduct without fear of ridicule or penalty and for the opportunity to alter opinions before making them public. The individual's sense that it is he who decides when to "go public" is a crucial aspect of his feeling of autonomy. Summing up the importance of privacy for political liberty, Clinton Rossiter stressed the feature of autonomy in the following words:

Privacy is a special kind of independence, which can be understood as an attempt to secure autonomy in at least a few personal and spiritual concerns, if necessary in defiance of all the pressures of modern society.... It takes to erect an unbreachable wall of dignity and reserve against the entire world. The free man is the private man, the man who still keeps some of his thoughts and judgements entirely to himself, who feels no overriding compulsion to share every thing of value with others, not even those he loves and trusts.⁵⁸

(b) Emotional Release

Social scientists agree that each person constantly plays a series of varied and multiple roles depending on his audience and behavioral situation.⁵⁹ On any given day, a man may move through the roles of stern father, loving husband, car-pool comedian, skilled lathe operator, union steward, water-cooler flirt, and American legion committee chairman—all psychologically different roles that he moves from scene to scene on the social stage. Like actors on the dramatic stage, Goffman noted,⁶⁰ individuals can sustain roles only for reasonable periods of time and no individual can play indefinitely, without relief, the variety of roles that life demands. There have to be moments "off stage" when the individuals can be "himself" tender, angry, irritable, lustful or dream-filled. Such moments may come in solitude; in the intimacy of family, peers or woman and man to man relaxation; in the anonymity of park or street or in a state of reserve while in group. Privacy in this aspect gives individuals, from factory workers to Presidents, a chance to lay their masks aside for rest. To be always "on" would destroy the human organism.

Another form of emotional release is provided by the protection privacy gives to minor non-compliance with social norms. Some norms are formally adopted - perhaps as law - which society really expects many persons to break. This ambivalence produces a situation in which almost everyone does break some social or institutional norms - for example, violating traffic laws, breaking sexual mores, cheating on expense accounts, overstating income-tax deductions or smoking in rest rooms when this is prohibited. Although society will usually punish the most flagrant abuses, it tolerates the great bulk of the violations as "permissible" deviations. If there were no privacy to permit society to ignore these deviations - if all transgressions were known—most persons in society would be under organizational discipline or in jail, or could be manipulated by threats of such action. The

58. Clinton Rossiter, *The Pattern of Liberty*, quoted by Alan F. Weston, *ibid.*

59. Goffman, *Presentation of Self* 56-57, quoted by Alan F. Weston, *ibid.*

60. *Ibid.*

firm expectation of having privacy for permissible deviations is a distinguishing characteristic of life in a free society. At a lesser but still important level, privacy also allows individuals to deviate temporarily from social etiquette when alone or among intimates, as by putting feet on desks, cursing, letting one's face go slack or scratching wherever one itches.

Another aspect of "release" is the "safety-valve" function afforded by privacy. Most persons need to give vent to their anger at "the system", "city hall", "the boss" and various others who exercise authority over them, and to do this in the intimacy of family or friendship circles or in private papers, without fear of being held responsible for such comments. This is very different from freedom of speech or press, which involves publicly voiced criticism without fear of interference by government and subject only to private suit. Rather, the aspect of release concerned here involves commentary that may be wholly unfair, frivolous, nasty and libelous, but is never socially measured because it is uttered in privacy. Without the aid of such release in accommodating the daily abrasions with authorities, most people would experience serious emotional pressure.

Surveillance of bodily and sexual functions by outsiders is practised with social approval only in what sociologists call "total institution,"—such as jails, mental institutions and monasteries—or on volunteers in medical or behavioral-science experiments. Even then, prisoners and patients usually complain about being watched and seek ways to escape the constant surveillance of guards.

(c) Self-evaluation

Every individual needs to integrate his experiences into a meaningful pattern and to exert his individuality on events. To carry on such self-evaluation, privacy is essential. This is particularly true of creative persons. Studies of creativity show that it is in reflective solitude and even "day dreaming" during moments of reserve that most creative "non-verbal" thought takes place. At such moments, the individual runs ideas and impressions through his mind in a flow of associations; the presence of others tends to inhibit this process. The evaluative function of privacy also has major moral dimension that exercise of conscience by which the individual "represses himself", while people often consider the moral consequences of their acts during the course of daily affairs, it is primarily in periods of privacy that they take a moral inventory of on-going conduct and measure current performance against personal ideals. For many persons, this process is a religious exercise. Religious contemplation, said Coe, was a time for "organizing the self" and William James called religion the experience of "individual men in their solitude".⁶¹ Thus, periods for rumination over past events and for communication with oneself have been said to be "institutionalized in all societies."⁶²

A final contribution of privacy to evaluation is its role in the proper timing

61. William James, *The Varieties of Religious Experience* 31 (1902), quoted by Alan F. Weston, *id.* at 37.

62. Alfred R. Lindesmith and A.L. Strauss, *Social Psychology* 435 (1956), quoted by Alan F. Weston, *ibid.*

of the decision to move from private reflection or intimate conversation to a more general publication of acts and thoughts. This is the process by which one tests his own evaluations against the responses of his peers. Given the delicacy of a person's relations with intimates and associates, deciding when and to what extent to disclose facts about himself—and to put others in the position of receiving such confidences—is a matter of enormous concern in personal interaction, almost as important as whether to disclose at all.

(d) Limited and Protected Communication

The greatest threat to civilized social life would be a situation in which each individual was utterly candid in his communications with others, saying exactly what he knew or felt at all times. The havoc done to interpersonal relations by children, saints, mental patients and adult "innocents" is legendary. Privacy for limited and protected communication has two general aspects. First, it provides the individual with the opportunity he needs for sharing confidences and intimacies with those he trusts—spouse, the family, personal friends and close associates at work. The individual discloses because he knows that breach of confidence violates social norms in a civilized society. In addition, the individual often wants to secure counsel from persons with whom he does not have to live daily after disclosing his confidences. He seeks professionally objective advice from persons whose status in society promises that they will not later use his distress to take advantage of him. To protect freedom of limited communication, such relationships—with doctors, lawyers, ministers, psychiatrists, psychologists and others—are given varying but important degrees of legal privilege against forced disclosure. The privacy given to the religious confessional in democratic societies is well-known, but the need for confession is so general that those without religious commitment have institutionalized their substitute in psychiatric and counselling services.

In its second general aspect, privacy through limited communication serves to set necessary boundaries of mental distance in interpersonal situations ranging from the most intimate to the most formal and public. In marriage, for example, husbands and wives need to retain island of privacy in the midst of their intimacy if they are to preserve a saving respect and mystery in the relation. These small matters, involving management of money, personal habits and outside activities, to the more serious levels of past experiences and inner secrets of personality. Successful marriages usually depend on the discovery of the ideal line between privacy and revelation and on the respect of both partners for that line. In work situations, mental distance is necessary so that the relations of superior and subordinate do not slip into an intimacy which would create a lack of respect and an impediment to directions and correction. Thus, physical arrangements shield supervisors from constant observation by subordinates and social etiquette forbids conversation or off-duty contacts that are "too close" for the work relationship. Similar distance is observed in relation between teacher and student, parent and child, minister and communicant and many others.

Having discussed the above functions of privacy, Westin further observes that privacy functions basically as an instrument for achieving individual goals of

self-realization.⁶⁵ As such, it is only part of the individual's complex and shifting system of social needs, part of the way he adjusts his emotional mechanism to the barrage of personal and social stimuli that he encounters in daily life. Individuals have needs for disclosure and companionship every bit as important as their need for privacy. To be left in privacy when one wants companionship is as uncomfortable as the inability to have privacy when one craves for it. This balance of privacy and disclosure will be powerfully influenced, of course, both by the societies' cultural norms and the particular individual's status and life situation. The basic point is that each individual must, within the larger context of his culture, status and personal situation, make a continuous adjustment between his needs for solitude and companionship, for intimacy and general social intercourse for anonymity and responsible participation in society for reserve and disclosure. A free society leaves this choice to the individual for this is the core of the "right of individual privacy"—the right of the individual to decide for himself with only extraordinary exceptions in the interests of society when and on what terms his acts should be revealed to the general public.⁶⁶

It is rather difficult to add anything more to such a detailed description of the functions of privacy as Westin mentioned as noted above. However, his entire description is predicated upon a civilized social life. He has not deliberated over the role of privacy in the transformation of a natural society to a civilized one. For, civilization itself is the progress towards a society of privacy. The savage's whole existence is public. Civilization is the process of setting man free from men.⁶⁷ The more one knows about a person, the greater one's power to damage him.⁶⁸ To sum up, the functional justification of privacy as a human right lies in protecting human beings against emotional disturbances of anxiety, humiliation, embarrassment,⁶⁹ disgrace,⁶⁸ inconvenience,⁶⁹ annoyance⁷⁰ shame and feeling of indignities. It protects morals and ideas of decency.⁷¹

II

India, it has been said, is far behind both the United Kingdom and the United States of America in active judicial enforcement or even public discussions of privacy laws.⁷² The lack of demand of public debate on the threat to the right to privacy may mislead a casual observer to believe that there are no laws safeguarding this human right in India.⁷³ In fact, it has not misled a casual observer only but also

64. *Id.* at 39-42.

65. Ayn Rand, *The Fountainhead* 660 (1986).

66. Stanley I. Benn, "Privacy, Freedom and Respect for Persons," *Privacy* Nomos XIII, p. 6.

67. Julius Stone, *Social Dimension of Law and Justice* 213 (1965).

68. *Cokil Prasad v. Radio*, *supra* note 2 at 388.

69. *Keshav Hartha v. Ganpat Hirachand*, 8 Bom HC ACI 87 (1871); *Srinivas Uppirav v. Reddy*, 9 Bom HC ACI 266 (1872) and *Bhagwan Das v. Sheikh Zamzurad Husain*, 119 IC 833 (1929).

70. *Kuvaji Premchand v. Bai Javer*, 6 Bom HC Rep 143 (1869).

71. *Kanbi Deva Karson v. Kanbi Bara Purja*, AIR 1953 Sau 67.

72. Richard P. Claude (ed.), *Comparative Human Rights* 150 (1976).

73. *Ibid.*

jurists,⁷⁴ journalists⁷⁵ and public men⁷⁶ to believe that there is no right to privacy in the Indian legal system.

Jagamadhas J., went one step further to maintain that the Constitution of India does not recognize right to privacy and there is no justification to import it by some process of strained construction.⁷⁷ Professor Baxi went to the extreme in subscribing to the view that privacy is alien to Indian culture.⁷⁸ The main reason, it appears, which gave rise to such a climate of opinion, is the lack of any serious research in the Indian law on the subject. It has rightly been observed:

No Indian scholar has yet synthesized existing privacy law so as to identify those principles which are now recessed in the vaults of the law libraries.⁷⁹

It is to dispel such erroneous climate of opinion and as an effort to clean a few layers of dust thus far accumulated on the vaults of law libraries, the present study undertakes a critical examination of the Indian legal system to highlight the safeguards it provides to the right to privacy.

Every society in course of its evolution gathers certain intellectual, ethical and spiritual values. The aggregate of these values can perhaps be said to be the culture of a society at a given period of time. The beliefs, the dogmas, the predilections and the antipathies of the people constituting the society have all a share in the formulations of these values.⁸⁰ Ancient Indian theory of knowledge based on the *Upanisads*, aims at the ultimate *Reality* of the universe. Perception deals with objects that come within the range of our senses in which field it is paramount. Inference, which is based on perception, is operative regarding things that are not so perceived but are accessible to the mind. But where perception, inference, etc. fail to give definite knowledge, scriptures like the *Upanisads* are our only guide. The methodology suggested in the *Upanisads* is called *Upanasana* or meditation. Its aim is gradually to withdraw the aspirant's mind from external things and direct it inward—to make him more and more introspective so that he may get rid of his dependence on the objective world.⁸¹ Meditation is not possible without concentration and concentration is possible if the person concentrating is not disturbed. Thus, from the very dawn of the Vedic culture, disturbing a meditating sage came to be regarded as a sin or a wrong of the highest order in the Indian society. The following text from the epic *Ramayana* illustrates it:

74. V.R. Krishna Iyer, *Justice and Beyond* 180 (1980); Zalman Cowen, *Individual Liberty and the Law* 80.

75. Ranjit Lal, *Vidya*, Feb. 1981, p. 9.

76. V.N. Gadgil (then Member of Parliament) had introduced "The Right to Privacy Bill, 1981" in Lok Sabha in March, 1981.

77. *M.P. Sharma v. Satish Chandra*, AIR 1954 SC 300 at 306-307.

78. K. K. Mathew, *Democracy, Equality and Freedom*, Intro. LXXIV, note 262 (1978).

79. Richard P. Claude (ed.), *Comparative Human Rights* supra note 72 at 150.

80. M.C. Sakalvad, *Law and Culture*, supra note 9 at 1.

81. S. Radhakrishnan (ed.), *The Cultural Heritage of India*, vol. 1, pp. 349-50 (1970).

Yanman lobhayase Rambhe kama kroth jayaminam,
Dash varsh sahasrani shalee sthasyasi durbhaga.⁸²

(In order to win over sex and anger I was meditating, you have disturbed my meditation as punishment for which you turn to be stone for ten thousand years.)

The *Manu Smriti* in its following text also supports the above view:

Ekaki chintayemniyan vivikie himamannah,
Ekaki chintayanohi paran shreyoadhigachchhati.

(One should meditate alone in a lonely place for only by meditating alone he will attain salvation).⁸³

The *Grihya Suktas* contain elaborate rules for the construction of a house. The house consisted of a number of rooms, such as a bed-room (*sanyaniya*), a store-room, a kitchen (*bhokta-sarana*), a hall or drawing room (*sabha*) and compound.⁸⁴ Apte maintains that a bed-room, a drawing-room, provision room and a nursery used to be the parts of a house.⁸⁵ The main door of the house was not supposed to face the door of another house and the construction of the house was to be so devised that the house-holder should not be seen by unholy persons while performing religious acts or while dining in his house.⁸⁶ Even in the selection of site for a dwelling house, the main consideration, it appears, was to avoid the sight of persons or things that formed impediments to the studies of the *vedas*.⁸⁷

A few conclusions that may be drawn from the above descriptions are that people wanted to exclude even the sight of unholy persons or strangers while performing religious acts and while dining. Further, the need or the purpose of having a separate bed-room or a nursery reflects a modicum of privacy in its rudimentary form, a fore-runner of the modern psychiatrist's thesis.⁸⁸

In Kautilya's *Arthashastra* also, elaborate rules regulating the construction of houses are prescribed. The rules prescribed run thus:

82. Ramanarayan Datta Shastri (ed.), *Valmiki Ramayana* 154.

83. Hargovind Shastri (ed.), *Manusmriti* 276.

84. Ram Gopal, *India of Vedic Kalpasuktas* 151.

85. V. M. Apte., *Social and Religious Life in the Grihya Suktas* 142.

86. *Id.* at 141.

87. *Id.* at 180.

88. Privacy in the bed-room is a necessity for both children and parents and faulty sleeping arrangements represent a subtle form of sexual abuse, observes psychiatrist Gabriel V. Laury of the State University of New York: "Such arrangements are generally made by well-meaning parents who are unaware that their child has become an individual with his own personality, his own sexuality, and with a right of modesty and privacy." "Privacy begins with birth", advises Sugar: "Keep an infant in a bed-room separate from yours. Psychiatrists generally agree that regular sleeping in a parent's bed can impair the child's psycho-sexual development. An infant who remains in his mother's bed up to a year may have trouble acquiring a sense of identity—separate from his mother, cautions Sugar. The child may develop anxiety, even panic, when separating from his mother. As a boy gets older, sleeping in his parent's bed may promote an unconscious wish to possess his mother and remove his father. A little girl can develop similar feelings for her father and against her mother. R. Howard and E. Lewis Martha, "Bedrooms", *Sexology Today* 41-42 (Sept., 1980).

The owners of houses may construct their houses in any other way they collectively like, but they shall avoid whatever is injurious. With a view to ward off the evil consequences of rain, the top of the roof shall be covered over with a broad mat, not blowable by the wind. Neither shall the roof to be such as will easily bend or break. Violation of this rule shall be punished with the first amendment. The same punishment shall be meted out for causing annoyance by constructing doors or windows facing those of others' houses, except when these houses are separated by the king's road or the high road....⁸⁹

With the exception of private rooms and parlours (angana) all other parts of houses as well as apartments where fire is ever kindled for worship or a mortar is situated shall be thrown open for common use.⁹⁰

It is evident from the above excerpts that the houses used to be divided into two main parts, viz. (a) private rooms and parlours meant for exclusive use of ladies and (b) the rest of the house open for common use. Here the phrase "common use" must be understood in a sense implying common use for the family members alone. The sanctity of the family house was secured by prohibiting persons to enter another's house (without the owner's consent) either during the day or night. The punishment prescribed for violation of such prohibition was the first amendment and the middle most amendment respectively.⁹¹ Further, any one who used to construct doors and windows facing others' houses causing annoyance to his neighbours was to be punished. One among the factors causing annoyance was the exposure of private rooms and parlours meant for exclusive use of ladies, for they were not supposed either to be seen by male (stranger) or go out of their houses. This prescription of *Arthashastra* is nothing but the contemporary customary right to privacy as adhered to by the Indian and British Indian courts which got codified under section 18 of the Indian Easements Act, 1882, also.⁹²

The ancient Indian society in general was duty-oriented and, therefore, the right of an individual can be inferred from the duties thus imposed. For example, the text, *na supitan prabodhayet* (a sleeping man ought not to be disturbed), imposes a general duty not to disturb any one's sleep. It may be inferred from the above text that every one enjoyed the right of undisturbed sleep. The *Manu Smriti* enjoins, "*shreyansan na prabodhayet*" (the elders should not be disturbed while sleeping).⁹³ In fact, even the laws of war as enshrined in the epic, *Mahabharata* prohibited killing

89. R. Shamasastry (Trans.), *Kautilya's Arthashastra* 189 (1961).

90. *Id.* at 190.

91. *Id.* at 261.

92. Section 18, Illustration (b) is worded thus:

By the custom of certain towns no owner or occupier of a house can open a new window therein so as substantially to invade his neighbour's privacy. A builds a house in the town near B's house. A thereupon acquires an easement that B shall not open new windows in his house so as to command a view of the portions of A's house which are ordinarily excluded from observation, and B acquires a like easement with respect to A's house.

93. Hargovind Shastri (ed.), *Manusmriti* 339.

of a person while sleeping.⁹⁴ A woman was not supposed to be seen by any male (stranger). This is amply supported by both the epics *Ramayana* and *Mahabharata*. But mere glance was not considered a wrong. It was the mental approach revealed through such glance that was the determining factor to establish whether a wrong was committed.⁹⁵ The practice of putting veil while stirring out of the house for ladies is also described in the epic.⁹⁶ Further, not only to see other women but to touch them was also considered a wrong.⁹⁷ Overhearing confidential talks and seeing others involved in such talks was meted out with rigorous punishment.⁹⁸ Impersonation was prohibited and penalized.⁹⁹ One who used to divulge the misdeeds of another when confidentially informed in a lonely place for keeping it secret was to be punished.¹⁰⁰ Once the King Pandu killed a he-deer while it was enjoying sex with a she-deer. The deer was none else but a transmigrated sage, named Kindam, who made his dying declaration as under:

Ahan hi Kindamonama tapasapratimo munih,
Vyapatra panmanushyaran mregega mathun macharam.¹⁰¹
(I am a sage named Kindam. To avoid the feeling of shame I became a deer and was enjoying sex with a she-deer).

The above text establishes that the feeling of shame is a peculiar property of human nature which distinguishes human sex from animal sex. It is the feeling of shame that drives human beings to a lonely place for the enjoyment of sex. The sage, Parasara, desired to have sexual intercourse with the girl known as Matsyagandha and signified his desire to her. This all happened near a river on both sides of which several people were having their bath. Matsyagandha replied:

Sabhavipashya Bhagwanparavare rishinshthan,
Avaryodrishyatorevith kathan tsvatsamagamah.¹⁰²

(Don't you see many sages standing on both sides of the river? How can I have sexual intercourse with you within the reach of their sight).

A review of the above authorities amply proves the prevalence of rules respecting the privacy of individuals in ancient Indian society. A person was not to be disturbed while meditating, sleeping or studying. Enjoyment of sex and food were recommended in a secluded place, away from the sight of others. Even the call of nature was attended in a secluded place where one may not be observed by others. Even the prisoners and slaves were protected in their daily avocations of sleeping, eating, sitting or excreting. A male was enjoined not to see, touch or meet other woman in a lonely place. Visits to others' house without the owner's consent at odd

94. Shreepad Damodar Satavalkar (ed.), *Mahabharata* 34 and 424.

95. Ramnarayan Datta Shastri (ed.), *Valmiki Ramayana* 775.

96. *Id.* at 1401 and 1402.

97. *Id.* at 496, 606, 915 and 963.

98. *Id.* at 1666.

99. *Id.* at 126.

100. *Id.* at 392.

101. Shreepad Damodar Satavalkar (ed.), *Mahabharata* 595.

102. *Id.* at 301.

hours and during nights were prohibited. The practice of veiling eyes among a section of women was also in existence. Information given in confidence was not supposed to be divulged. The *Mitakshara* enjoins that one who wears other's garments shall be punished.¹⁰³ It may be relevant to mention here that the considerations as to what information ought to be withheld by an individual entered into the very ethical code of conduct prescribed in the ancient Indian society. The following texts exemplify this:

Susiddh moukhadan dharman grechhochchhidran cha maithunam,
Kubhuktan kushruan chairva matimannaprakashye.¹⁰⁴

(The medicine the effectiveness of which has been tested or proved, acts pertaining to religion, defect of one's family, sexual matters, eating prohibited food and hearing insulting words ought not to be made open by a prudent man).

Darekhu kinchit swajanekehu kinchid gopyan vayasyekehu,
Sutekhu kinchit, yuktan na va yuktan maidan vichinaya,
Veda dvipashchinma haton annurodhat.¹⁰⁵

(One ought to keep secret something from his wife, something from his relatives, something from his friends and something from his son. When asked by his elders, a prudent man should reply after having taken into consideration whether such disclosure of confidential matter is proper).

In 1888, Edge CJ of the Allahabad High Court had observed:

In my opinion, the fact that there is no such custom of privacy known to the law of England can have no bearing on the question whether there can be in India an usage or custom of privacy valid in law. The conditions of domestic life in the two countries have from remote times been essentially different, and in my opinion, it is owing to that difference in the conditions of domestic life alone that a custom which appears to me to be a perfectly reasonable one in India should be unknown in England.¹⁰⁶

Urging the right to privacy for the British nationals on the basis of the Indian cases, Percy H. Winfield, in 1931, made an appeal to the House of Commons wherein he said:

The Indian cases have been referred to not of course, for the purpose of urging their application to the different particular circumstances which prevail in England, but as an illustration of pliability of Indian law where the need of protecting privacy has been felt. It will be seen when we pass to consider personal privacy that our law probably lags

103. I. R. Chhapure (Trans), *The Mitakshara*, verse 238, p. 364.
104. Rupnarain Pandey (Trans), *Charakya's Dhanra* 103.
105. Ramchandra Jha, (ed.), *Panchatantra* 180.
106. *Gokul Prasad v. Radho*, *supra* note 2.

behind the needs of a community in which intrusion on privacy is apt to take offensive forms owing to the modern development of instantaneous photography and of method of advertisement which, to say the least of them, are totally indifferent to the feelings of private individuals.¹⁰⁷

The customary right to privacy, referred to above, has been upheld by several High Courts in India even today.¹⁰⁸ For almost a century, the criminal law in India has embodied some of the modern constitutional safeguards which the other nations did not apply as national standards until the 1960's.¹⁰⁹ The Indian Penal Code¹¹⁰ makes it a crime to intrude upon the privacy of a woman. It was neither imported from England nor a creation of the genius of Thomas Babington Macaulay but only a codification of a long established tradition of the Indian people. The penal provisions not only guarantee one's right to life¹¹¹ but also protect him against infliction of any pain, disease or infirmity.¹¹² The prohibition of the use of criminal force¹¹³ is to protect one from injury, fear and annoyance.¹¹⁴ In making an arrest, the police officer has been authorised actually to touch or confine the body of the person to be arrested,¹¹⁵ but the provision does not make it mandatory that for effecting the arrest, the police officer should actually touch or confine the body of the person to be arrested before a person can be taken in custody; submission to the custody by word or action is sufficient.¹¹⁶ Handcuffing and iron bar have been outlawed by the Supreme Court except in exceptional circumstance,¹¹⁷ of course, that too with the approval of the presiding judge. However, the power to arrest is not unrestricted. If the police officers (or any other person having authority to arrest) maliciously confine persons knowing that in doing so they are acting contrary to law, they are liable to be punished.¹¹⁸ There are several other statutes¹¹⁹ which make vexatious and unnecessary detention or arrest of an individual punishable if there exists no reasonable ground of suspicion.

107. P. H. Winfield, "Privacy", 47 LQR 23 at 29-30 (1931).

108. *Ganesh Lal v. Smt. Rasool Fatima*, AIR 1977 All 118; *Bhagwinda Chuni Lal Senak v. Heeralal Gorthandas Sewak*, AIR 1942 Bom. 217; *Achhar Singh v. Pritoo*, ILR 1974 Him. 876; *Gulab Chand Gappa Lal Sarawgi v. Manik Chand Gulab Chand Sarawgi*, AIR 1960 M.P. 265; *Keshao Sahu v. Dasarath Sahu*, AIR 1961 Ori. 154; *Syed Habib Hussain v. Karnal Chand*, AIR 1969 Raj. 31; *Kaur Sain v. Bibi Bhirinder Kaur*, AIR 1971 P & H 489.

109. The United States Supreme Court decided *Miranda v. Arizona*, 384 U.S. 436 (1966), which is less stringent in some regards as compared to sec. 164(3) of the Code of Criminal Procedure, 1898 and sec. 25 and 26 of the Indian Evidence Act, 1872. The latter prohibits the admissibility of any confession of guilt made to a police officer "unless it be made in the immediate presence of a Magistrate."

110. The Indian Penal Code, 1860, sec. 509.

111. *Id.* sec. 302.

112. *Id.* sec. 319 read with sec. 321.

113. *Id.*, sec. 352.

114. *Id.* sec. 350.

115. The Code of Criminal Procedure, 1973, sec. 46.

116. AIR 1960 SC 1125 at 1131.

117. *Prem Shankar v. Delhi Administration*, AIR 1980 SC 1535 at 1541-43.

118. The Indian Penal Code, 1860, sec. 220.
119. The Opium Act, 1878, sec. 18; the Central Excises and Salt Act, 1944, sec. 22; the Medicinal and Toilet Preparations (Excise Duties) Act, 1955, sec. 17; the Gold Control Act 1968, sec. 94; the Foreign Exchange Regulation Act, 1973, sec. 58 and the Customs Act, 1962, sec. 136.

The relevancy of a confession in criminal proceedings depends on whether or not the confession had been made because of any inducement, threat or promise.¹²⁰ The exclusion of confessions made to a police officer¹²¹ or while in the custody of a police officer¹²² from permissible evidence is not only to ward off the malpractices of police officers in extorting confessions from the accused in order to gain credit by securing convictions,¹²³ but also to manifest the legislative policy that the confession must always be made by the accused out of his free will. Further, it has been provided that no influence by means of any promise, threat or otherwise shall be used on an accused person to induce him to disclose or withhold any matter within his knowledge.¹²⁴ The Indian legal system thus projects an individual as a free willing entity. It further ensures that the consent of an individual as and when required to be exercised must be free.¹²⁵ Consent is said to be free when it is not caused by coercion, undue influence, fraud, misrepresentation and mistake.¹²⁶ The free consent is a condition precedent for the validity of a contract.¹²⁷ A fundamental legal principle embodied in the maxim, *volenti non fit iniuria* (i.e. damage suffered by consent is not a cause of action) usually relied upon in tort cases, as a general defence, also requires 'consent' to be free.¹²⁸ Consent obtained by fraud or compulsion does not serve as a good defence in tort cases.¹²⁹ In certain cases, consent is a defence in the criminal proceedings as well.¹³⁰

If any commission, corporation or other body constituted under an Act collects information in respect of any industry or commercial concern or any undertaking required under the Act from the owner of such industry, commercial concern or the undertaking, the information thus collected shall not be disclosed without the consent of the owner.¹³¹ There are several statutes¹³² which require the consent of the occupier or owner (as the case may be) to be obtained prior to any entry made into any dwelling house, building or the like premises. The wife is not permitted to disclose any communication made by her husband without his consent and the husband cannot disclose any communication made by his wife unless she

consents.¹³³ An advocate is not permitted to disclose any communication made to him in the course and for the purpose of his professional employment without his client's express consent.¹³⁴ Thus, all possible precautions seem to have been taken in the Indian legal system in providing safeguards to an individual against his annoyance or vexation. Several statutes, over and above criminal law, make vexatious and unnecessary entrance into the house, searches and seizures and arrests punishable.¹³⁵

Much before the Constitution of India, the right to freedom of religion was well protected in the Indian legal system. Chapter XV of the Indian Penal Code, 1860, dealing with offences relating to religion, presupposes the existence of such a right. Any one who outrages the religious feeling of others or insults or attempts to insult the religious beliefs of any class is liable to be punished.¹³⁶ Even causing disturbance to religious assembly engaged in worship or other religious ceremonies is prohibited and made punishable.¹³⁷ The religious feeling of an individual, thus, is well protected in the system.¹³⁸ Those subject to the Army Act and Air Force Act, performing religious duties have been extended to the Army Act and Air Force Act, performing religious duties have been extended to the naval officers and the members of the crew even on their respective ships.¹³⁹ Even for prisoners of war¹⁴⁰ and protected persons,¹⁴¹ due facilities for performance of their religious duties have been provided. Religion, as a matter of faith, is so personal that it cannot be shared by even one's nearest and dearest. If the wife is obstructed in the observance of her religious duties by her husband, she is entitled to obtain a decree for the dissolution of her marriage.¹⁴² The foregoing provisions establish it beyond any doubt that an individual enjoys complete autonomy in matters of religious faith in the Indian legal system.

Formed out of an instinctive nature of man to love and procreate,¹⁴³ the family groups based on the privacy of relations between husband and wife and their children.¹⁴⁴ Although with the growth of welfare state and the trend towards expansion of individual rights, the state is taking an active and, often, a command-

120. The Indian Evidence Act, 1872, sec. 24.
 121. *Id.*, sec. 25.
 122. *Id.*, sec. 26.
 123. *Queen Empress v. Babulal*, (1884) 6 AU 509 cited by Woodroff and Ameer Ali, *Law of Evidence*, vol. I, p. 585.
 124. The Code of Criminal Procedure, 1973, sec. 316.
 125. Distinctive fracture between "will" and "consent" lies in the decisional aspect of the latter which is wanting in "will", though both pertain to an individual's volition.
 126. The Indian Contract Act, 1872, sec. 14.
 127. *Id.*, sec. 10.
 128. *Broom's Legal Maxims* 181 (1969).
 129. R.K. Bangia, *The Law of Torts*, 39 (1989).
 130. The Indian Penal Code, secs. 87-92.
 131. The Tariff Commission Act, 1951, sec. 2; the Collection of Statistics Act, 1953, sec. 7 and the Monopolies and Restrictive Trade Practices Act, 1969, sec. 60.
 132. The Oriental Gas Company Act, 1857, sec. 2; the Indian Works of Defence Act, 1903, sec. 4; the Cantonment Act, 1924, sec. 247; the Road Transport Corporations Act, 1950, sec. 42; the Slum Areas (Improvement and Clearance) Act, 1956, sec. 27 and the National Waterways Act, 1982, sec. 10.

133. The Indian Evidence Act, 1872, sec. 122.
 134. *Id.*, sec. 126.
 135. The Opium Act, 1878, sec. 18; the Glanders and Farcy Act, 1899, sec. 12; the Dowry Act, 1910, sec. 12; the Ancient Monuments Preservation Act, 1904, sec. 17; the Indian Forest Act, 1927, sec. 62; the Central Excises and Salt Act, 1944, sec. 22; the Medicinal and Toilet Preparations (Excise Duties) Act, 1955, sec. 17; the Foreign Exchange Regulation Act, 1973, sec. 58 and the Customs Act, 1962, sec. 136.
 136. The Indian Penal Code, 1860, sec. 295-A.
 137. *Id.*, sec. 296.
 138. *Id.*, sec. 290.
 139. The Air Force Act, 1950, sec. 66; the Army Act, 1950, sec. 64; the Border Security Force Act, 1968, sec. 41 and the Manoeuvres, Field Firing and Artillery Practice Act, 1938, sec. 3.
 140. The Indian Navy (Discipline) Act, 1934, sec. 1-A.
 141. The Geneva Conventions Act, 1960, article 34 read with third schedule.
 142. *Id.*, article 27 read with fourth schedule.
 143. The Dissolution of Muslim Marriages Act, 1939, sec. 2.
 144. H.S. Gour, *Penal Law of India*, vol. I, p. 3.
 145. W. Friedmann, *Law in a Changing Society* 172.

ing role in the regulation of family life yet the protection of the institution of family and its inviolability is considered as indispensable in any orderly society. And the Indian legal system is no exception to it. It ensures every man to enjoy complete freedom within his house. Trespass may be justified either by the authority or consent of the person concerned or the authority of law.¹⁴⁶ Even where entry into a dwelling house is authorised by or under an Act, such entry is not made without the consent of its occupier or owner.¹⁴⁷ In some Acts, seven days' previous notice to the owner or occupier is required to be given before the intended entry into the dwelling house.¹⁴⁸ In some others, it is only after giving reasonable notice to the occupier or owner that entry is allowed.¹⁴⁹ The entries thus authorised by or under an Act are further regulated keeping in view the convenience of the inmates of the dwelling houses. Most of the entries are required to be made only during the day-time¹⁵⁰ or reasonable time¹⁵¹ or in the reasonable hour in the day time.¹⁵² Whenever a dwelling house is entered, due regard ought to be paid to the social and religious customs and usages of the occupants.¹⁵³

Barring the above authorised entries into the dwelling house, the crime of 'house trespass'¹⁵⁴ (which is punishable¹⁵⁵ under the Indian Penal Code) preserves the inviolability of one's dwelling house. The underlying purpose of chapter XXX of the Code is to penalise extra-marital sex. But, for the offences mentioned in the chapter, no court can take cognizance except upon a complaint made by some person aggrieved by the offence.¹⁵⁶ It has been observed that the offences referred to in the section are of private character and the object of the section is to limit the persons by whom proceedings can be initiated and ensure that it is not in the power of any and every body to drag such offences in a court of justice.¹⁵⁷ The inviolability of the family life is further protected under the Indian Evidence Act which provides that no person shall be compelled to disclose any communication made between husband and wife.¹⁵⁸ The underlying basis of the above provision is that the

146. B. S. Sinha, *An Introduction to Law of Torts through Indian Cases* 155.
147. The Orient Gas Company Act, 1857, sec. 2; the Cantonments Act, 1924, sec. 247; the Road Transport Corporations Act, 1950, sec. 42; the Slum Areas (Improvements and Clearance) Act, 1956, sec. 57; the National Waterways (Allahabad-Haldia Stretch of the Ganga-Bhagirathi, Hooghli River) Act, 1982, sec. 10.
148. The Indian Works of Defence Act, 1903, sec. 4 and the Northern India Canal and Drainage Act, 1873, sec. 14.
149. The Electricity Supply Act, 1948, sec. 74; the Metro Railways (Construction of Works) Act, 1978, sec. 24.
150. The Code of Civil Procedure, 1908, secs. 55 and 62; the Slum Areas (Improvement and Clearance) Act, 1956, sec. 26; the Cantonments Act, 1924, sec. 246; the Road Transport Corporations Act, 1950, sec. 42.
151. The National Waterways (Allahabad-Haldia Stretch of the Ganga-Bhagirathi, Hooghli River) Act, 1982, sec. 10; the Electricity Supply Act, 1948, sec. 74.
152. The Metro Railways (Construction of Works) Act, 1978, sec. 24.
153. The Cantonments Act, 1924, sec. 248.
154. The Indian Penal Code, 1860, sec. 442.
155. *Id.*, sec. 448.
156. The Code of Criminal Procedure, 1973, sec. 198.
157. *A/R. Manual*, vol. 13, p. 398 (4th ed., 1979).
158. The Indian Evidence Act, 1872, sec. 122.

admission of such testimony have a powerful tendency to disturb the peace of families and weaken, if not to destroy, the mutual confidence upon which the happiness of the married life depends. The prohibition rests on no technicality that can be waived at will but is founded on a principle of higher import which no court is entitled to relax.¹⁵⁹ The protection is not confined to cases where the communication sought to be given in evidence is of a strictly confidential character, but the seal of the law is placed on all communications of whatever nature which pass between the husband and wife. It continues even after the marriage has been dissolved by death or divorce.¹⁶⁰

There are provisions prohibiting the employment of children below fourteen years of age in any hazardous industry or workshop. The parents or guardians of such children are liable to penal consequences if they agree to pledge the labour of such child.¹⁶¹ It is significant to note that the above restriction in respect of the child labour does not hold good if the child is employed in a workshop wherein any process is carried on entirely with the aid of his family members without employing outside hired labourers.¹⁶² Such relaxation speaks nothing else except inviolability of family life in the Indian legal system.

Regard being had to the delicate and confidential nature of relationship between the client and the lawyer, the patient and the doctor and the like, the Indian legal system obligates the professionals not to reveal the confidential information obtained in the course of their professional functions. An advocate is not permitted to disclose any communication made to him in the course, and for the purpose, of his employment as an advocate without the express consent of his client. The contents or condition of any document with which he has become acquainted in the course of his professional employment or any advice given are also not to be disclosed by him. The obligation thus imposed on him continues even after his employment has ceased.¹⁶³ The interpreters and the clerks or servants of such advocates are also under the same obligation.¹⁶⁴ Further, no one is to be compelled to disclose to the court any confidential communication which has taken place between him and his legal professional adviser.¹⁶⁵

Commenting upon the above provisions, it has been observed that the rule is established for the protection not of the legal adviser but of the client and the privilege, therefore, may only be waived by the latter. It is founded on the impossibility of conducting legal business without professional assistance and on the necessity in order to render that assistance effectual, of securing the fullest and most unreserved communication between the client and his legal adviser.¹⁶⁶ Simi-

159. *Ram Chandra v. Emperor*, 1933 Bom. 153; 35 Bom L. R. 174.
160. Woodroff and Ameer Ali, *Law of Evidence*, vol. 3, p. 2402 (12th ed., 1968).
161. The Children (Pledging of Labour) Act, 1933, sec. 4.
162. The Employment of Children Act, 1938, sec. 3 read with schedule; the Beedi and Cigar Workers (Condition of Employment) Act, 1966, sec. 43.
163. The Indian Evidence Act, 1872, sec. 126.
164. *Id.*, sec. 127.
165. *Id.*, sec. 129.
166. Woodroff and Ameer Ali, *Law of Evidence*, vol. 3, *supra* note 160 at 2531.

lary, the respect for human dignity is the principal objective of the medical profession.¹⁶⁷ Confidences concerning individual or domestic life entrusted by patients to a physician and defects in the disposition or character of the patient observed during medical attendance should never be revealed unless their revelation is required by the laws of the state.¹⁶⁸ To publish without permission photographs or case reports of the patients in any medical or other journal in a manner by which their identity could be made out is prohibited.¹⁶⁹ Every dentist has a duty to keep all the information of a personal nature which he comes to know about a patient directly or indirectly in the course of professional practice in utmost confidence.¹⁷⁰ The Chartered Accountants Act, 1949 provides that if a chartered accountant discloses information acquired in the course of his professional engagement to any person other than his client, without his consent or otherwise than as required by any law for the time being in force, he shall be guilty of conduct rendering him unfit to be a member of the institute.¹⁷¹ For the practising cost accountant as well, it is a professional misconduct to disclose information acquired in the course of his professional engagement to any person other than the client, without the consent of such client, or otherwise than as required by any law for the time being in force.¹⁷² If any cost accountant is found guilty of such a misconduct, the council shall forward the case to the High Court for proper and adequate action along with its own comments.¹⁷³

The Indian legal system provides measures to ensure an individual's free choice at an election. The officers and the staff employed in conducting the election including members of a police force attached thereto, have been prohibited from persuading any person to give or not to give his vote at an election or to influence the voting of any person in any manner. The violation of the above prohibition entails penal consequences.¹⁷⁴ Interference or an attempt to interfere with the free exercise of any electoral right amounts to the offence of undue influence at an election¹⁷⁵ which has been made punishable.¹⁷⁶ Elaborate provisions have been made to prevent personation of electors.¹⁷⁷ An indelible ink mark is to be put on the elector's left forefinger before he is allowed to vote. In case he refuses such marking, he may not be allowed to vote or he may not be issued any ballot paper at all.¹⁷⁸ Any one who commits the offence of personation at an election is punishable under the criminal law as well.¹⁷⁹ The most important aspect of the election law in India (for

167. The Code of Medical Ethics, reg. 2, p. 2.
 168. *Id.*, reg. 11, p. 4.
 169. *Id.*, reg. 11 and 14, p. 11.
 170. The Dentist (Code of Ethics) Regulations, 1976, reg. 4(g).
 171. The Chartered Accountants Act, 1949, sec. 22 read with schedule (g).
 172. The Cost and Works Accountant Act, 1959, sec. 22 read with second schedule.
 173. *Id.*, sec. 21 (5).
 174. The Representation of the People Act, 1951, sec. 129.
 175. The Indian Penal Code 1860, sec. 171C.
 176. *Id.*, sec. 171F.
 177. The Representation of the People Act, 1951, sec. 61.
 178. The Conduct of Election Rules, 1961, rule 37.
 179. The Indian Penal Code, 1860, sec. 171D read with sec. 17F.

the present purpose) is that which immunises an individual from even being questioned as to whom he has voted for at an election. In case of dispute, it has been provided that no witness or other person shall be required to state for whom he has voted at an election.¹⁸⁰

Under almost a century old statutes,¹⁸¹ the Indian legal system provided for inviolability of mails and messages of an individual. Anybody employed to carry and deliver the postal article (which expression has been defined to include a letter, post card, newspaper, book, pattern or sample packet, parcel and every article or thing transmissible by post),¹⁸² if found guilty of carelessness endangering the safety of postal articles or causing delay in its conveyance or delivery is liable for punishment.¹⁸³ Detaining the mails or postal articles or even opening the mail bag in course of transmission by post by any person without due authority under the Indian Post Office Act or any other Act for the time being in force, is made punishable.¹⁸⁴ If any officer of the post office, contrary to his duty, opens any postal article in the course of transmission by post or wilfully detains or delays such postal article, he is liable for punishment.¹⁸⁵ Similarly, the Indian Telegraph Act prescribes additional punishment for one who unlawfully tries to learn the contents of any message given for transmission in the telegraph office.¹⁸⁶ A telegraph officer is under a duty not to disclose the contents of any telegram to any person other than the sender or the addressee or the authorised representative of either.¹⁸⁷ It is only the sender or the addressee or their duly authorised representative who is permitted either to inspect or obtain copies of the telegrams kept as record in the telegraph office.¹⁸⁸ The Indian Telegraph Act, 1885 was amended by the Parliament in 1972 which authorises certain officers to intercept such messages or stop their transmission if it was considered to be in the interest of the country or the public for the maintenance of friendly relations with foreign states, etc.¹⁸⁹

Commenting upon the above amendment, it has observed¹⁹⁰ that the right of privacy in India suffered a set back in 1972. It is submitted that the amendment may be rationalised if it is thought of as imposing a reasonable restriction on the right in question keeping in view the paramount interest of national security risks and friendly relations with foreign countries. But the most obnoxious and controversial provision of the Act, which has missed the learned commentator's attention is the emergency power of the state. Both the Acts empower the state to intercept mails and messages during public emergency.¹⁹¹ In sub-section (2) of section 26 of the

180. The Representation of the People Act, 1951, sec. 94.
 181. The Indian Post Office Act, 1898 and the Indian Telegraph Act, 1885.
 182. The Indian Post Office Act, 1898, sec. 2(6).
 183. *Id.*, sec. 49.
 184. *Id.*, sec. 67.
 185. *Id.*, sec. 53.
 186. The Indian Telegraph Act, 1885, sec. 24.
 187. The Indian Telegraph Rules, 1951, rule 7.
 188. *Id.*, rr. 165 and 166.
 189. The Indian Telegraph (Amendment) Act, 1972, sec. 2.
 190. Richard P. Claude (ed.), *Comparative Human Rights* 80 (1976).
 191. The Indian Telegraph Act, 1885, sec. 5 and the Indian Post Office Act, 1898, sec. 26.

Post Office Act (which corresponds to sub-sec. (2) of section 5 of the Indian Telegraph Act, 1885), it is provided that if any doubt arises as to the existence of a public emergency or as to whether any act done under that provision was in the interest of public safety or tranquility, a certificate of the central government or the state government shall be conclusive proof on the point.¹⁹² Both the sections make the issue of a certificate by the government conclusive proof of the existence of public emergency and thereby making it non-justiciable which is the hall-mark of its infirmity and misgivings. Serious objections have been raised from responsible quarters which have sought the repeal of the above two sections. A petition was presented to the Lok Sabha by the People's Union for Civil Liberties of this effect.¹⁹³ Even when section 26 was enacted, P. Ananda Charlu, who was the member of the Select Committee, penned a strong note of dissent. In its thirty-eighth report, submitted in February, 1968, the Law Commission expressed misgivings about the constitutional validity of section 26. The Commission suggested deletion of sub-section (2) relating to certificates and its substitution by a new sub-section, according to which the power under the section could be exercised only in the interest of the security of the state, public order, friendly relations with foreign nations or preventing incitement to commission of an offence.¹⁹⁴ Thus, as the position stands to-day, subject to the overriding powers of the state during public emergency, inviolability of mails and messages is well protected in the Indian legal system in normal and general circumstances.

Yet another but related aspect is the provision regarding *in camera* trial which stands as an admission on the part of the administration of justice of those qualities of individuals which inhibit them to speak out certain facts in front of general public coupled with a policy consideration that certain matters of intimate and personal nature or prejudicial to the safety of the state¹⁹⁵ ought not to be discussed in general public. Majority of the Acts which provide for *in camera* proceedings relate to, and deal with, the matrimonial causes.¹⁹⁶ In some cases,¹⁹⁷ proceedings may be conducted *in camera* if (a) either party so desires, or (b) if the court thinks fit to do so. If either party should desire the proceedings to take place *in camera*, the court has no discretion to refuse such desire. Even when neither party so desires it is open to the court in its discretion to hear and conduct such proceedings *in camera*. In some cases, it is entirely left to the discretion of the court alone to conduct the proceedings *in camera*.¹⁹⁸ On the other hand, in one case, it is the

discretion of the parties alone to request for *in camera* proceedings and no reference to the court's discretion is mentioned.¹⁹⁹

The Code of Criminal Procedure empowers the presiding judge or magistrate to exclude the general public or any particular individual from any enquiry or trial of any case, at any stage at his discretion.²⁰⁰ The Lunacy Act provides for the consideration of the petition in private in the presence of the petitioner or his or her representative and such other persons as thought fit.²⁰¹ Under the Monopolies and Restrictive Trade Practice Act, it is provided that if the commission is satisfied of the confidential nature of any offence or for any other reason, it may hear proceeding in private, give directions as to the persons who may be present there and prohibit any publication of evidence given before it.²⁰²

Much of the significance of the trial *in camera* will be lost if the proceedings are allowed to be published to the knowledge of the general public. The courts, therefore, have been empowered to prohibit any publication of such proceedings without obtaining their prior permission. The Hindu Marriage Act provides that no person shall be allowed to print or publish any matter in relation to the proceeding *in camera* without obtaining prior permission of the court.²⁰³ Any publication of such proceeding *in camera* without obtaining prior permission of the court will amount to contempt of the court.²⁰⁴ In the Customs Act, however, a special provision pursuant to the recommendation of the Law Commission in its 47th report, providing for public censure of persons convicted of offences under the Act, has been inserted empowering the court to publish the name, place of business or residence of persons convicted under the Act.²⁰⁵ But for this special provision, the court generally has no power to publish the name or place of business or residence of any person, convicted under the Act, leading to the disclosure of his identification. Had it not been so, insertion of the above provision would not have been thought of. Under the Children Act, if any one makes any despatch to any newspaper or magazine disclosing the name, address or school or any other particulars which may lead to the identification of the child involved in any proceeding under the Act including the publication of his photograph he would be punishable.²⁰⁶

The Indian legal system, thus, provides for trial *in camera* for four categories of cases, viz., (a) matrimonial cases, (b) cases involving lunacy, (c) cases involving trade secrets, and (d) cases involving safety of the state. Barring the last two categories, the justification for holding trial of cases involving lunacy *in camera* is that these cases are considered private or domestic with which the public, in general, have no concern. Similarly, the matrimonial cases are kept out of publicity

192. The Indian Post Office Act, 1898, sec. 26 (2) and the Indian Telegraph Act, 1885, sec. 5 (2).
193. *The Hindustan Times*, April 9, 1982.

194. H.R. Khanna, "Intercepting letters: Invasion of the Right to Privacy", *The Statesman*, Sept. 15, 1981.

195. The Indian Official Secrets Act, 1923, sec. 14.

196. The Convert's Marriage Dissolution Act, 1866, sec. 14; the Indian Divorce Act, 1869, sec. 53; the Parsi Marriage and Divorce Act, 1936, sec. 43; the Special Marriage Act, 1954, sec. 33 and the Hindu Marriage Act, 1955, sec. 22.

197. The Special Marriage Act, 1954, sec. 33; the Hindu Marriage Act, 1955, sec. 22.

198. The Convert's Marriage Dissolution Act, 1866, sec. 14 and the Indian Divorce Act, 1869, sec. 53.

199. The Parsi Marriage and Divorce Act, 1936, sec. 43.
200. The Code of Criminal Procedure, 1973, sec. 327.

201. The Indian Lunacy Act, 1912, sec. 9.

202. The Monopolies and Restrictive Trade Practices Act, 1969, sec. 17.

203. The Hindu Marriage Act, 1955, sec. 22.

204. The Contempt of Courts Act, 1971, sec. 7.

205. The Customs Act, 1962, sec. 135B.

206. The Children Act, 1960, sec. 36.

because they involve sordid details of domestic life and, therefore, embarrassing to parties.²⁰⁷

The Constitution of India, in its Preamble, *inter alia*, secures equality of status to all citizens and assures their dignity.²⁰⁸ Dignity of an individual has been adjudged as an essential feature of the Constitution.²⁰⁹ The Constitution, further, guarantees a person equality before the law and the equal protection of the laws,²¹⁰ Equality among the equals, however, is the quintessence of the judicial interpretation of article 14.²¹¹ Such interpretation is obviously based on an assumption that men are not equal. It is a truism that men have always been unequal. Men, no doubt, have similar thoughts, desires and wants but at the same time they have entirely different thoughts, desires and wants. They have identical needs but different needs as well. Differentiation has progressed in the same measure as civilization or, to be more exact, civilization itself is nothing more than the accentuation of dissimilarities between the individuals. Nevertheless, the idea of equality is a product of civilization. Buddha proclaimed the equality of men at the time when inequality was strongly felt.²¹² Again, the idea of equality cannot be disengaged from the idea of solidarity. The more men differ one from another in this world, the greater becomes their mutual usefulness and there comes a better understanding of the fact that individual activities, though different, are nevertheless socially equal since they all contribute to social solidarity.²¹³ It is in this view of the matter, the right to be different which is inherent in man, does not run counter to article 14 of the Constitution, it is rather well comprehended in it.

As elsewhere submitted,²¹⁴ keeping in view the societal and political contents of article 19 (1) (a) of the Constitution, it cannot be contemplated that it creates a zone of privacy for Indian citizens. Freedom of speech and expression guaranteed under article 19 (1) (a) includes freedom of press.²¹⁵ Although press has been responsible for giving rise to privacy as a legal concern in America,²¹⁶ privacy in India being judicially neglected, there is no case law developed in this area, restricting the press to intrude upon the privacy of the citizen. There is no code of conduct for journalists prescribed by the Press Council of India on lines similar to those of advocates, medical practitioners and chartered accountants. It is, therefore, only in rare circumstances that the court happens to lay down any code of conduct for the profession of journalism. However, a Division Bench of Delhi High Court advised journalists not to write about personal controversies where no public issue was involved as that would be "unjournalistic and derogatory to the dignity of the profession." The court observed:

207. *Narash v. State of Maharashtra*, AIR 1967 SC 1 at 25.

208. Preamble to the Constitution of India.

209. *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461.

210. Constitution of India, art. 14.

211. *Saikh Chandra v. Union of India*, AIR 1953 SC 250 at 252.

212. Radhabind Pal, *History of Hindu Law*, 242.

213. *Ibid*.

214. For detailed discussion and analysis of cases in this area, see Govind Mishra, "Privacy: A Fundamental Right under the Indian Constitution," 8 & 9 *Del L. Rev.* 134 (1979-1980).

215. *Romesh Thapper v. State of Madras*, AIR 1950 SC 124.

It makes us sad to find that our journalists can spare so much space in their newspapers as to give undue publicity to causes which are purely private in nature and are of no public importance.²¹⁷

Article 20 (3) of the Constitution lays down that no person accused of an offence shall be compelled to be a witness against himself. Born out of a feeling of revulsion against the inquisitorial methods adopted, and the barbarous sentences imposed by the Court of Star Chamber in the exercise of its criminal jurisdiction, the privilege against self-incrimination, bringing about the abolition of the Star Chamber, travelled across the Atlantic Ocean and settled in the United States of America as its common law.²¹⁸ This privilege against self-incrimination, according to Griswold, is one of the great landmarks in man's struggle to make himself civilized.²¹⁹ In India, section 3 of Act 15 of 1852 recognized that the accused in a criminal proceeding was not a competent or compellable witness for or against himself.²²⁰ The Supreme Court, explaining the scope of article 20 (3), observed:

The prohibitive sweep of Art. 20 (3) goes back to the stage of police interrogation—not . . . commencing in court only. It extends to and protects the accused in regard to other offences pending or imminent, which may deter him from voluntary disclosure. The phrase compelled testimony must be read as evidence procured not merely by physical threats or violence but by physic torture, atmospheric pressure, environmental coercion, firing interrogative, prolixity, overbearing and intimidatory methods and the like. Even when relevant questions are loaded with guilty inference in the event of an answer being supplied, the tendency to incriminate springs into existence. Arts. 20 (3) and 22 (1) in a way may be telescoped by making it prudent for the police to permit the advocate of the accused, if there be one, to be present at the time he is examined.²²¹

The Constitution further guarantees to every person the protection of life or personal liberty.²²² The right to life has been glossed over by the Supreme Court to include the right to live with dignity and all that goes along with it.²²³ Thus it has rightly been observed that an intrusion (of one's persons privacy) is demeaning to individuality and is an affront to personal dignity.²²⁴ The Supreme Court has observed:

216. Edward J. Bloustein, "Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser", *supra* note 39 at 971.

217. *The Hindustan Times*, Feb. 16, 1986.

218. Wigmore on Evidence, vol. 8, pp. 301-3.

219. Griswold, *Fifth Amendment Today*. He further observes:

We do not make even the most hardened criminal sign his death warrant, or dig his own grave, or pull the lever that springs the trap on which he stands. We have, through the course of history, developed a considerable feeling of the dignity and intrinsic importance of the individual man... neither torture nor an Oath nor the threat of punishment such as imprisonment for contempt should be used to compel him to provide the evidence to accuse for to convict himself.

220. H.M. Seervai, *Constitutional Law of India*, vol. I, p. 449 (2nd ed., 1975).

221. *Nandini Satpathy v. P. L. Dani*, AIR 1978 SC 1025 at 1046.

222. Constitution of India, art. 21.

223. *Francis Cordeiro v. Union Territory of Delhi*, AIR 1981 SC 746 at 753.

224. Edward J. Bloustein, *supra* note 39 at 973.

The policy of the law is that each individual, accused included, by virtue of his guaranteed dignity, has a right to a private enclave where he may lead a free life without overbearing investigatory invasion or even crypto-coercion.²²⁵

Yet another provision of the Constitution which upholds the autonomy of an individual and assures his dignity is the provision which prohibits traffic in human beings and *begar* and other similar forms of forced labour.²²⁶ It would include traffic in women and children for immoral or other purposes.²²⁷ The Suppression of Immoral Traffic in Women and Girls Act, 1956 is a law made by Parliament under article 35 of the Constitution for the purpose of punishing acts which result in traffic in human beings. In a case under section 15 (6) of the Act, Anantanarayanan J observed:

Here, we have an instance of the officer accompanied by witnesses, proceeding into the bed-room of a young girl and pushing open a closed door without even the civility of a knock or the warning to her to prepare for the intrusion. Such conduct would be quite inexcusable unless the officer thereby hopes to gather the evidence which is essential for proof of any charge. But, since prostitution is not an offence, I am really quite unable to see how the officer and party were justified in thus bursting into the bed-room of a girl and surprising P. W. I and the third accused together in a state of undress.

There can be no doubt that such conduct implies an outrage on the modesty of the girl, and I must reiterate that the modesty of prostitute is entitled to equal protection, with that of any other woman. The technique of such raids must be totally altered; otherwise grave abuses of the law might enter into the very attempt to enforce the law. I put it to the learned public prosecutor whether the officer would similarly think himself justified, in proceeding into a bath-room where a young girl suspected to be a prostitute was having a bath in the hope of finding incriminating evidence, the learned Public Prosecutor was compelled to concede that as raids were conducted at present, such an incident would conceivably occur.²²⁸

In a similar case, the Kerala High Court observed:

The conduct of the police officer in proceeding into the bed-room of the revision petitioner and entering through the back door without the civility of a knock on the front door, which was locked inside, or warning the revision petitioner for the intrusion would be a misuse of his powers in the instant case.²²⁹

225. *Nandini Saipathy v. P.L. Dani*, *supra* note 221 at 1045.

226. Constitution of India, art. 23.

227. *Raj Bahadur v. Legal Remembrancer*, AIR 1953 Cal 522.

228. *In re Retnamala*, AIR 1962 Mad. 31 at 35. Also *Bai Radha v. State of Gujarat*, AIR 1970 SC 1396.

229. *T. Jacob v. State of Kerala*, AIR 1971 Ker. 166.

The Constitution guarantees freedom of conscience and the right to profess, practise and propagate religion to all persons subject to public order, morality and health.²³⁰ Religion cannot be disengaged from individualism.²³¹ In the words of Professor P.K. Tripathi, the Constitution accepts the principles of giving primacy to the individual, placing him before and above religion and recognizing freedom of religion only as incidental to his well-being and liberty.²³² Religion symbolises seclusion and exclusiveness.²³³

A careful analysis of the foregoing textual provisions of the Indian Constitution propels a concept of man which coincides with Douglas J's "principle of individuality"²³⁴ and runs parallel to Edward J. Bloustein's principle of "inviolate

230. Constitution of India, art. 25.

231. Putszky says that when a community reaches a stage in which life as afforded by it precludes all high hopes and the mere bettering of the individual lot presents itself as an object of a subordinate and precarious nature, men's minds revert to their inward aspiration and the striving after individual perfection and the ordering of life according to ideal considerations are left as the only worthy and appropriate tasks. Hence, indifference to the cares of the world and disregard of material profits and advantages more and more gain ground in the highest strata of the society as well as in the lowest; and it may indeed be said that from the very moment of the formation of a conquer, the assertion of the independence of the intimate world of inward individual sentiment over the social life becomes a characteristic phenomenon. These aspirations among persons of a higher position who are troubled by no worldly care assume the shape of philosophy, and among the oppressed classes, that of religion: Putszky, *Theory of Law and Civil Society* 175 (emphasis added) quoted by Radhakrishna Pal, *History of Hindu Law* 111.

232. P.K. Tripathi, *Secularism: Constitutional Provision and Judicial Review*, 8 *JLL* 1 at 7 (1966).

233. "Religion in the early consanguineous society, was at first the result of fear or admiration, afterwards the consequence of a covering spirit of blind submission to tradition and finally a symbol of seclusion and exclusiveness"; Radhakrishna Pal, *History of Hindu Law* 243 (emphasis added).

234. Douglas J's principle of individuality is:

a. The first facet of the principle is the right of personal choice: the individual should be free to pursue his own goals, to develop his talents and abilities the way he deems most fitting, and to realise his potential as a human being. "If people are let alone in those choices" that freedom "will pay dividends in character and integrity."

b. The right to privacy also guards one's right to be different. Douglas opposed governmental wiretapping, searches and seizures and collection of personal information because such governmental surveillance would instill a fear of being overheard and thereby stifle dissent and induce subservience. Hence Douglas's principle of individuality ensures the individual's freedom to be different in his ideas and life style. "The democratic way of life," Douglas suggested, "rejects standardized thought. It rejects orthodoxy." "The presence of the orthodox compels society to re-assess its values and stimulates the diversity that is necessary for progress." "Without the freedom to expose the failings and abuses and frustrations of the status quo, existing conditions would be or become insufferable."

c. Douglas's privacy opinions uniformly protect the sanctity of the human body and the inviolability of the individual conscience. In a case in which a conviction was obtained partially on the basis of a blood test performed on an unconscious defendant, Douglas described "the indignity to the individual that results when his body is 'invaded and assaulted by the police.'" Similarly, in Douglas's view, the Fifth Amendment right of silence protects individual conscience against coercive invasion by the government. Douglas believed in the "sanctity of the person," and therefore strove to prevent the indignity (that is) suffered when a lawless hand is laid upon him. "To Douglas, 'Man is a child of God... (is) accountable not to the state but to his own conscience and to his God'." S.S. Adler, "Towards a Constitutional Theory of Individuality: The Privacy Opinion of Justice Douglas," 87 *Yale L.J.* 1579 at 1579-90 (1978).

personality²²⁵ and the doctrine of individuality formulated by John Stuart Mill.²²⁶

In *M. P. Sharma v. Satish Chandra*,²²⁷ the validity of section 96 of the Code of Criminal Procedure, 1898, (which authorised search and seizure as an aid to criminal process) was challenged as violative of articles 20(3) and (19) (1) (f) of the Constitution. Upholding the constitutional validity of the section, the court held that the "power of search and seizure is in any system of jurisprudence an overriding power of the state for the protection of social security and that power is necessarily regulated by law." Jagannathdas J, speaking for the court, observed:

When the Constitution makers have thought fit not to subject such regulation to Constitutional limitations by recognition of a fundamental right to privacy, analogous to the American Fourth Amendment, we have no justification to import it into a totally different fundamental right, by some process of strained construction.²²⁸

It is submitted that an amendment, on the lines of the Fourth Amendment to the U.S. Constitution, was moved by Kazi Syed Karimuddin in the Constituent Assembly²²⁹ which was negatived but significant statement of B. R. Ambedkar²³⁰

225. Bloustein observes:

Take the principle of "inviolable personality" to posit the individual's independence, dignity and integrity; it defines man's essence as a unique and self-determining being. It is because our western ethico-religious tradition posits such dignity and independence of will in the individual that the common law secures to a man "literary and artistic property" - the right to determine "to what extent his thoughts, sentiments, emotions shall be communicated to others".... The fundamental fact is that our Western Culture defines individuality as including the right to be free from certain types of intrusions. This measure of personal isolation and personal control over the conditions of its abandonment is of the very essence of personal freedom and dignity, is part of what our culture means by these concepts. A man whose home may be entered at the will of another, whose conversation may be overheard at the will of another, whose marital and familial intimacies may be overseen at the will of another is less of a man and has less human dignity on that count. He who may intrude upon another at will is the master of the other in fact, intrusion is a primary weapon of the tyrant... The man who is compelled to live every minute of his life among others and whose every need, thought, desire, fancy or gratification is subject to public scrutiny, has been deprived of his individuality and human dignity. Such an individual merges with the mass. His opinions being public, tend never to be different, his aspirations, being known, tend always to be conventionally accepted ones; his feelings, being openly exhibited, tend to lose their quality of unique personal warmth and to become the feelings of every man. Such a being, although sentient, is fungible; he is not an individual....; supra note 39 at 962.

226. Mill formulates his doctrine of individuality as "the right of the moral nature to develop itself in its own way"; John Stuart Mill, *On Liberty* (1965).

227. AIR 1954 SC 300.

228. *Id.* at 306-307.

229. He had stated:

Mr. Vice President, Sir, I beg to move: That in Article 14, the following be added as clause (4): "(4) The right of the people to be secure in their persons houses, papers and effects against unreasonable searches and seizures shall not be violated and no warrants shall issue but upon probable cause supported by oath or affirmation and particularly describing the place to be searched and the person or things to be seized."

230. VII CAD 794.

B. R. Ambedkar said:

I am however prepared to accept amendment No. 512 moved by Mr. Karimuddin. I think it is a useful provision and may find a place in our Constitution. There is nothing novel in it because the whole of the clause as suggested by him is to be found in the criminal procedure code so that it might be said in a sense that this is already the law of the land.... I am, therefore, prepared to accept his amendment: VII CAD 796 (emphasis added.)

supporting the amendment would not have justified his Lordship's above observation. Although only an *obiter*, the above observation has influenced the successive judicial opinions denying the right to privacy its judicial patronage. No right can be absolute. But a reasonable restriction on a right should not be taken as abrogation of such right. The cases show²⁴¹ that a police officer searching a dwelling house without a warrant must take precautions. Prior to search, he should record reasons why the search cannot be made after obtaining a warrant and state what he expects to find as a result of the search. Strict compliance with this procedure is required in law to avoid humiliation and reckless search in disregard of citizen's right.

In *Kharak Singh v. State of U.P.*,²⁴² the sole question for determination by the court was whether 'surveillance' under chapter XX of the U.P. Police Regulations constituted an infringement of the citizen's fundamental rights guaranteed by Part III of the Constitution. The deliberations of the court mainly rested on two articles of the Constitution, viz. articles 19 (1) (d) and 21, against which the U.P. Police Regulation was examined. The court held that since regulation 226(6), which authorised domiciliary visits, was violative of article 21 as there was no law on which the same could be justified, it was unconstitutional. The court further observed:

Having given the matter our best consideration we are clearly of the opinion that the freedom guaranteed by Art. 19(1) (d) is not infringed by a watch being kept over the movements of the suspect. Nor do we consider that Art. 21 has any relevance in the context as was sought to be suggested by learned counsel for the petitioner. As already pointed out, the right of privacy is not a guaranteed right under our Constitution and therefore the attempt to ascertain the movements of an individual which is merely a manner in which privacy is invaded is not an infringement of a fundamental right guaranteed by Part III.²⁴³

*Govind v. State of M.P.*²⁴⁴ raised identical factual situation as the *Kharak Singh* case. In the *Kharak Singh* case, the U.P. Police Regulations had no support of any law while in the *Govind* case, the impugned regulations 855 and 856 were framed by the government of Madhya Pradesh under section 46(2) (c) of the Police Act and hence were held to have the force of law. After quoting American authority on the point, Mathew J observed:

The right to privacy in any event will necessarily have to go through a process of case by case development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can character-

241. *State of Rajasthan v. Rahman*, AIR 1960 SC 210.

242. AIR 1963 SC 1295.

243. *Id.* at 1303. For criticisms of the case, see Govard Mishra, "Privacy: A Fundamental Right under the Indian Constitution", supra note 214.

244. AIR 1975 SC 1378.

ize as a fundamental right, we do not think that the right is absolute.²⁴⁵

His lordship further observed:

Even if we hold that Article 19 (1) (d) guarantees to a citizen a right to privacy in his movement as an emanation from that Article and is itself a fundamental right, the question will arise whether regulation 856 is a law imposing reasonable restriction in public interest on the freedom of movement falling within Article 19 (5); or, even if it be assumed that Article 19(5) does not apply in terms, as the right to privacy of movement cannot be absolute, a law imposing reasonable restriction upon it for compelling interest of state must be upheld as valid.²⁴⁶

Mathew J, it appears, was influenced by the opinion of Douglas J in *Grissold v. Connecticut*²⁴⁷ which found the source of right to privacy in various guaranteed rights said to create zones of privacy.

As applied to the Indian constitutional scheme, the penumbral theory suffers from an inherent limitation, specially in this particular instance. The interpretation given to article 19(1) (a) of the Constitution, as submitted earlier, does not protect anything or everything that is uttered by the citizen. What is whispered in the ear of wife by her husband in the dead of night or when some one is singing in the bath-room is not included in the contents of speech protected under article 19(1)(a). It is outside the purview of the protection afforded by the article. The speech contemplated to be protected under this article, as submitted earlier²⁴⁸ has societal and political content. How can it be said to create a zone of privacy?

Further, Mathew J had assumed article 19 (1) (d) of the Constitution as the source of right to privacy. It may be recalled that the majority opinion in the *Kharak Singh* case maintained that the attempt to ascertain the movement of an individual which was merely a manner in which privacy was invaded was not an infringement of a fundamental right guaranteed by Part III. Even the dissenting opinion of Subba Rao J had concluded that article 19(1) (d) was not the source of privacy. Assuming that the assumption of Mathew J was based on an interpretation of the term "freely"

245. *Id.* at 1385.

246. *Id.* at 1386.

247. Douglas J observed:

The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from these guarantees that help give them life and substance.... various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, papers and effects against unreasonable searches and seizures." The Fifth Amendment in its "Self-incrimination" clause enables the citizen to create a zone of privacy which the government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

supra note 34 at 484.

248. *Supra* note 214.

which includes psychological inhibition, the right to movement cannot be said to include privacy. If at all, privacy is said to be inferred, it is from the qualifying word 'freely' and not from the qualified word 'movement' in article 19 (1) (d).

Had Mathew J not been wedded to the penumbral theory of Douglas J, he would have paved the way for right to privacy in India when he observed:

Rights and freedoms of citizens are set forth in the Constitution in order to guarantee that the individual, his personality and those things stamped with his personality shall be free from official interference except where a reasonable basis for intrusion exists. "Liberty against government", a phrase coined by Professor Corwin, expressed this idea forcefully. In this sense, many of the fundamental rights of citizens can be described as contributing to the right to privacy.²⁴⁹

Among those things stamped with the personality of an individual are his dignity, right to be different and to be treated equally among equals,²⁵⁰ right to be free from psychological and physical compulsion and forced labour,²⁵¹ and freedom of conscience and the right freely to profess, practise and propagate religion.²⁵² The Supreme Court has established the view that the term 'life' in article 21 of the Constitution includes one's dignity and all those that go along with it.²⁵³ Mathew J in his above observation, came very near to this view but he preferred to derive privacy from "liberty", "speech", and "movement" rather than reading it into "life" in article 21 of the Constitution. But the contribution of Mathew J lies in salvaging the right to privacy and giving it an assumed existence in the scheme of fundamental rights as against its non-existence in two earlier decisions mentioned above. Commenting upon the *Gowind* case, Nariman rightly observed:

The right to privacy had two rounds in Court—first before a Bench of 8 then before a Bench of 6. In both it had been worsened. It could not have survived a third bout. It was thought that privacy as a fundamental right had been buried - a more appropriately, burnt to a cinder. But the ashes of lost freedoms are ever smouldering. In *Gowind* the cherished right has risen Phoenix-like from the ashes..... Neatly side stepping the ratio of larger benches the Court has given the right a new base of life.²⁵⁴

He further observed that the decision in the *Gowind* case would not go down as a landmark in the development of Indian constitutional law. But it will help to point the way. With dexterous judicial steering and mild understatement, the Supreme Court has given to the right of privacy a foothold in the fundamental rights

249. AIR 1975 SC 1378 at 1385.

250. Constitution of India, art. 14.

251. *Id.*, arts. 20(3) and 23.

252. *Id.*, art. 25.

253. *Francis Corvile Mullin v. Union Territory of Delhi*, *supra* note 223.

254. F.S. Nariman, "The Right to be Let Alone - A Fundamental Right", XVII *The Indian Advocate* *supra* note 48 at 80-81.

chapter. But it has done more. It has set the tone.²⁵⁵ In *Malak Singh v. State of Punjab*, two principal questions raised for consideration of the court were: (a) Whether a person was entitled to be given an opportunity to show cause before his name was included in the surveillance register; and (b) whether in the instant case the appellants' names were included in the register without any ground for reasonably believing them to be habitual offenders or receivers of stolen property as required by rule 23.4(3) (b) of the Punjab Police Rules. The *vires* of the Punjab Police Rules, which provide for the maintenance of surveillance register, was, however, not challenged by the appellants. As regards the first question, the court answered that making an entry in the surveillance register was so utterly administrative that the rules of *audi alteram partem* could not be applied. The application of the rule in this case would defeat the very object of the rule providing for surveillance. Answering the second question, the court seems to have taken the view that it might not be necessary to supply the grounds of belief to the persons whose names were entered in the surveillance register. It might become necessary in some cases to satisfy the court when an entry was challenged on the ground that there was no justification to entertain such belief. Rejecting the appeals, the court made following observations regarding the mode of surveillance:

But all this does not mean that the police have a licence to enter the names of whoever they like (dislike?) in the surveillance register, nor can the surveillance be such as to squeeze the fundamental freedoms guaranteed to all citizens or to obstruct the free exercise and enjoyment of those freedoms; nor can the surveillance so intrude as to offend the dignity of the individual. Surveillance of persons who do not fall within the categories mentioned in Rule 23.4 or for reasons un-connected with the prevention of crime, or excessive surveillance falling beyond the limits prescribed by the rules, will entitle a citizen to the Court's protection which the court will not hesitate to give. The very rules which prescribe the conditions for making entries in the surveillance register and the mode of surveillance, appear to recognise the caution and care with which the police officers are required to proceed... Surveillance, therefore, has to be unobtrusive and within bounds...²⁵⁷

Organised crime cannot be successfully fought without close watch of suspects. But, surveillance may be intrusive and it may so seriously encroach on the privacy of a citizen as to infringe his fundamental right to personal liberty guaranteed by Art. 21 of the Constitution and the freedom of movement guaranteed by Art. 19 (1) (d).²⁵⁸

It may be observed that impermissible surveillance as stipulated in the Punjab Police Rules implicitly protects the right to privacy. Subjecting the power

255. *Id.* at 82-83.

257. AIR 1981 SC 760 at 763-64.

258. *Id.* at 763.

of the police officer to enter one's name in surveillance register only on reasonable ground is also pointer in the same direction. However, the decision does not take the law any further than where it was left by the *Gowind* case.

III

Ordinarily, fundamental and human rights do not evoke ready response from our politicians unless they serve a political purpose. The Karnataka telephone-tapping incident brought the issue of individual's right to privacy to public attention leading to the resignation of Ramkrishna Hegde, the then Chief Minister of the State. It was observed that the readiness and glee with which the central government released the list of those whose telephones were being tapped was well matched by the chuckle with which Hedge tried to turn the table on the Rajiv Gandhi government by asking it to institute an inquiry at the all-India level.²⁵⁹ Despite its political undercurrent, the event is significant in so far as the opposition and the ruling party both expressed their common concern against telephone-tapping, an acknowledgement of the existence of right to privacy in our system.

The Ministry of Law, Government of India, while rejecting a proposal made by the Indian Council of Medical Research (ICMR) for a legislation to ban sexual intercourse by Indian citizen with foreigners to prevent the spread of AIDS in the country, expressed its opinion that such legislation would violate the provisions of article 21 of the Constitution which gives people the right to life and liberty including the right to privacy.²⁶⁰ It is significant to note that the Ministry of Law located the right to privacy in article 21 of the Constitution. However, the Preamble to the Constitution of India assures the dignity of the individual. The state is directed to recognize and enforce international law as a matter of state policy. It is in these commands of the Constitution also lies the necessary basis for affording constitutional protection to the right to privacy.

The diverse facets of right to privacy protected in the Indian legal system (much before the Constitution came into force) may much favourably be compared with the contents of the right to privacy determined and deliberated over by the Nordic Conference held in Stockholm in 1967. Intensity of privacy consciousness and desirability of its protection may be assessed in such provisions of Indian legal system which make intrusion of privacy a crime rather than a tort. The richness of the Indian life style as manifested in our scriptures has even today contributed to the world by giving a message of peace through transcendental meditation. Regard being had to our glorious heritage, our legal and constitutional system, to maintain either that right to privacy is not protected in our system or that privacy is a prerogative of English-speaking world, will amount to an admission of ignorance either of the Indian legal system or our culture.

259. *The Hindustan Times*, Aug. 13, 1988.

260. *The Hindustan Times*, June 10, 1988.

NOTES AND COMMENTS

CIVIL SERVICES—SUPREME COURT HELPS 'OPERATION CLEAN-UP'

A Comment on *Tulsi Ram Patel* Case*

THE MOMENTOUS decision of the Supreme Court in *Union of India v. Tulsi Ram Patel*¹ has been assailed not only by leaders of almost all the political parties—the leftist, the rightist, left of the centre, right of the centre and the middle-roader—the trade union leaders and the leaders of the civil servants' organisations but even by the retired judges of the Supreme Court and eminent jurists. It appears that the 'holding' in the case is one of the most misunderstood or little understood ones on the subject of civil services. One is not so much worried about the understanding or misunderstanding of the case and its consequent criticism by politicians, trade union leaders and the like because, by and large, they offer their comments without reading the judgments and their motivation and their objectives are usually political. But one is certainly concerned, and at times even alarmed, when such attacks come from eminent judges, jurists and scholars who not only profess to be, but are also known as, the champions of social justice, no matter what it means.

In the humble opinion of this author, which would be gradually unfolded, the holding of the case is both (i) anti-civil servant and pro-state and (ii) pro-civil servant and anti-state, depending upon whether we are looking at the judgment through a microscope or through a telescope. Microscopic look magnifies and gives us the immediate effect whereas the telescopic look tells us the far or remote or even the final effect. The immediate effect would certainly help the government in its 'operation clean-up' without waste of time, but in the final analysis, we will discover that the Supreme Court has given more to the civil servants than it has taken away.

I SUMMARY OF THE MAJOR 'HOLDING'

The court, by a majority of 4:1, in effect held that a civil servant had no right to hearing either at the stage of inquiry, if any, or thereafter when any of the three major penalties, viz. dismissal, removal or reversion, was being imposed upon him under any of the sub-clauses (a), (b) and (c) of the second proviso to clause (2) of article 311 of the Constitution. The court, on the basis of the above premise, over-

* This paper was presented at a seminar jointly organised by the Faculty of Law, University of Delhi and United Lawyers Association, New Delhi immediately after the Supreme Court delivered its judgment in *Union of India v. Tulsi Ram Patel*, *infra* note 1. Some cases decided later have been added in it to bring it up to date without affecting the original text.

1. *Union of India v. Tulsi Ram Patel*, AIR 1985 SC 1416.

ruled an earlier decision of a Bench comprising of Krishna Iyer, A. C. Gupta and Fazl Ali JJ in *Divisional Personnel Officer, Southern Railway v. T. R. Challaippan*.² In that case, the Supreme Court had held that rule 14 of the Railway Servants Rules which provided that 'the disciplinary authority may consider the circumstances of the case and make such orders thereon as it deems fit' obliged the authority to give a hearing to the delinquent employee when a penalty was proposed to be inflicted in cases covered by the three sub-clauses of the second proviso. The court further held that article 14, and the principles of natural justice including *audi alteram partem* rule which are now associated with it, had no application to cases covered by the three sub-clauses of the second proviso which expressly exclude that rule.

Applying the principles so declared, the court upheld the termination of the following class of civil servants:

(i) *Sub-clause (a) of the second proviso to clause (2) of article 311*

Tulsi Ram Patel, an auditor in the Regional Audit Office, M. R. S. Jabalpur, was compulsorily retired by way of punishment on the ground that he had injured his boss on the head with an iron rod and was convicted under Section 332 of I.P.C.

(ii) *Sub-clause (b) of the second proviso to clause (2) of article 311*

Some members of the CISF (Central Industrial Security Force) were dismissed for their indulgence in agitational acts, violent indiscipline and incitement to disobey lawful orders, etc., which necessitated calling of the army resulting in exchange of fire between the indisciplined section of the CISF and the army in which, besides other casualties, an army major and two army jawans were killed.

(iii) *Sub-clause (b) of the second proviso to clause (2) of article 311*

Railway servants (many belonging to all-India lococomuting staff) were dismissed or removed for their participation in the illegal all-India strike of the railway employees.

(iv) *Sub-clause (c) of second proviso to clause (2) of article 311*

Some members of the M.P. police force were dismissed/removed for indulging in violent demonstration or rioting demanding release of their two colleagues who were arrested in connection with an incident at the annual *mela* at Gwalior in which one man was burnt alive.

The common factors in all the above cases were: (1) All were civil servants; (2) terminations were made under the second proviso to article 311 (2) and (3) the civil servants were not heard either at the stage of inquiry, if any conducted, or at the time of imposition of the penalty.

II SUMMARY OF THE RELEVANT CONSTITUTIONAL PROVISIONS AND THE SERVICE RULES

(a) Constitutional Provisions

Article 310, in substance, provides that the civil servants hold office during

2. AIR 1975 SC 2216.

the pleasure of the President or the Governor, as the case may be. In other words, it means that the President and the Governor can terminate the services of the civil servants at their pleasure. Article 311 places a two-fold restriction on the above power of dismissal at pleasure: Clause (1) provides that no civil servant can be dismissed or removed by an authority subordinate to that by which he was appointed and clause (2) incorporates the principles of natural justice, i.e. right to be heard, by providing that no civil servant "shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges." There are two provisos attached to clause (2). The first proviso makes it clear that after the inquiry conducted under clause (2) is over and a penalty is proposed to be inflicted on the delinquent employee, it shall not be necessary to give any opportunity to the employee of making representation against the penalty proposed. The second proviso containing three sub-clauses provides that clause (2) shall not apply:

- (a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or
 - (b) where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry; or
 - (c) where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to hold such inquiry.
- Clause (3) is linked with the clause (b) above. It provides:
- If, in respect of any such person as aforesaid, a question arises whether it is reasonably practicable to hold such inquiry as is referred to in clause (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank shall be final.

(b) Service Rules

The rules for various services made either under article 309 of the Constitution or relevant Acts of the state legislatures generally reproduce or substantially incorporate the provisions of article 311. One provision is common in almost all the service rules which incorporate the provisions of sub-clauses (a), (b) and (c) of the second proviso to article 311 (2). The usual provision as incorporated after clause (c) provision is in the following language:

The disciplinary authority may consider the circumstances of the case and pass such order thereon as it deems fit.

III INTERPRETATION OF THE ABOVE PROVISIONS

(a) The Microscopic Look

The major 'holding' in the case has been summarised earlier which

authoritatively declares that the principle of *audi alteram partem* does not apply where major penalties are proposed to be imposed on a delinquent employee by resort to the power of dismissal, removal or reduction in rank covered by sub-clauses (a), (b) and (c) of the second proviso to clause (2) of article 311. There has not been much of a controversy regarding the exclusion of the 'right to be heard' rule at what was earlier known as the stage of inquiry. Once the authority exercises its power/discretion given to it by the Constitution under sub-clause (b) of the second proviso, that it is not reasonably practicable to hold such inquiry (i.e., as described in clause (2) of article 311), he can proceed to make his own inquiry *ex parte* into the alleged misconduct of the employee concerned. In the application of sub-clause (a), the disciplinary authority has less arduous task to perform compared to his responsibility under sub-clause (b). He has only to decide whether the employee, who has been convicted of a criminal charge, has to be visited with any of the three major penalties. In reaching this decision, the right to be heard rule stands excluded.

Turning to sub-clause (c) of the second proviso, the court pointed out the differences between it and the previous two sub-clauses (a) and (b), both with regard to the nature of power and also the repository of the power. In sub-clause (c), the power is conferred on the President or the Governor. It is he who has to be satisfied (although constitutionally, i.e. through his cabinet) that in the interest of the security of the state, it is not expedient to hold such an inquiry. Unlike the authority in sub-clause (b), he has not to record reasons for his satisfaction, which in the nature of things has to be subjective. The court almost conceded that the President's/Governor's decision was not subject to judicial review. The court resisted all temptations to make a categorical statement, on the strength of some earlier observations of some of the judges of the Supreme Court, that it could review the President's satisfaction/decision on the ground of *malafides* or whether the decision was taken in the interest of the security of state. The court simply observed that on the basis of all the records placed before it, it was satisfied that the decision was not *malafide* or that it was not in the interest of security of the state.

To sum up, there are two stages at which the decision has to be taken:

1. Whether the employee had to be visited with punishment? This decision is to be taken in case of sub-clause (a) on conviction of the employee on a criminal charge; in case of sub-clause (b), the authority after deciding that it is not reasonably practicable to hold clause (2)-type inquiry, finds the employee guilty of the alleged misconduct; in case of sub-clause (c), the President or the Governor finds the employee guilty of the alleged misconduct without holding clause (2)-type inquiry in the interest of the security of state.

2. After deciding the first question in the affirmative, the question has to be decided which of the three penalties, viz. dismissal, removal or reduction in rank, is to be inflicted on the delinquent employee.

As discussed earlier, there is a sort of consensus that 'right to be heard' rule is excluded when first decision is to be taken. The controversy is in relation to the second stage, i.e., whether 'right to be heard' rule is applicable before deciding the

issue of quantum of punishment. The Supreme Court in the *Challappan* case³ interpreted rule 14 of the Railway Servants Rules (quoted earlier) that it imported the rule of natural justice. It observed:

The statutory provision... merely imports a rule of natural justice in enjoining that before taking final action in the matter the delinquent employee should be heard and the circumstances of the case may be objectively considered. This is in keeping with the sense of justice and fair-play.⁴

The Supreme Court in the *Tulsiram Patel* case over-ruled the *Challappan* case and held that 'right to be heard' rule had been expressly taken away by the second proviso to article 311 (2) at every stage of the disciplinary proceeding. A power has been conferred on the relevant authority to dispense with the 'rule of hearing'. This power flew from the Constitution and could not be taken away or circumscribed by any law or rule. The immediate effect (on microscopic look) of the decision is that a delinquent civil servant is not only denied the benefit of the *audi alteram partem* rule at the stage of inquiry into his alleged misconduct and also at the stage of taking the decision as to whether he should be punished or not on the basis of his guilt or conviction on a criminal charge, but he is also denied right to be heard even as to the quantum or extent of punishment which is proposed to be inflicted upon him. The decision thus, on the face of it, appears to be anti-civil servant and pro-state power and indirectly helps the government to weed out the corrupt and inefficient elements from the services without wasting time in elaborate inquiry contemplated by clause (2) of article 311. It is on this count that the decision has been criticised and even dubbed as retrograde. Krishna Iyer J, as reported in the newspapers, has much to say against this decision. His adverse comments on the decision are quite understandable. It over-rules the *Challappan* decision to which he was a party and the *Challappan* decision is considered to be in consonance with social justice.

In the *Challappan* case, the end product, was correct but the decision was wrong. For the wrong decision, the three judges who decided the case cannot be blamed. They were led to make the error by wrong arguments or the absence of vital arguments by the counsel for the railways. We all know that under our judicial process, fortunately or unfortunately, a judge sits only as an umpire. He is supposed to be both ignorant of the facts in the case as well as neutral to the application of law to the facts when established. The lawyers who represent the parties must state the grounds and tell the law on the basis of which they are challenging or defending any action. This way, the counsel help the court in the correct interpretation of statutes and formulation of principles of law, besides reaching a correct decision. But in a particular case, if the counsel has failed to plead a vital ground or refer to a vital law, the judge, even if he is aware of this failure or omission on the part of

the counsel, cannot on his own invoke the ground not taken by the counsel to decide an issue in the case.

Many of us may not be knowing that we could not have that dynamic interpretation of article 21 by P.N. Bhargava J. (as he then was) by which he infused life into the lifeless word 'procedure' had the court, on the first hearing of the *Maneka Gandhi*⁵ case, not allowed the petitioner to invoke article 21 as another ground of attack. In the original petition, only article 14 was invoked. The counsel in the case argued that the word 'procedure' meant a fair, reasonable and just procedure. This gave an opportunity to the learned judge to evolve, formulate and lay down the historic principles we are all familiar with. In the *Challappan* case, the counsel did not argue that a power which was conferred by the Constitution cannot be circumscribed by any rule. The court was only asked to interpret rule 14 that it did not incorporate the rule of natural justice. The court did not accept this argument and held otherwise. In the *Tulsiram Patel* case, the argument to exclude the rule of natural justice from the service rules was based on the ground of the second proviso to article 311(2) and so accepted and as a necessary consequence, the *Challappan* case had to be over-ruled. The end product of the *Challappan* case, which was correct in the opinion of this author, will be taken up below.

(b) The Telescopic Look

The rights which have been denied to a civil servant because of the second proviso to article 311(2), in the first instance, have been given back to him at the subsequent stages. This the Supreme Court has done even at the cost of apparent contradictions and logic. Madon J observed:

The phrase "this clause shall not apply" is mandatory and not directory. It is in the nature of a Constitutional prohibitory injunction restraining the disciplinary authority from holding an inquiry under Article 311(2) or from giving any kind of opportunity to the concerned government servant. There is thus no scope for introducing into the second proviso some kind of inquiry or opportunity by a process of inference or implication... The conclusion which flows from the express language of the second proviso is inevitable and there is no escape from it. It may appear harsh but... the second proviso has been inserted in the Constitution as a matter of public policy and in public interest and for public good.... Sympathy and commiseration cannot be allowed to outweigh considerations of public policy, concern for public interest, regard for public good and the peremptory dictate of a Constitutional prohibition.... After all, it is not as if a government servant is without any remedy when the second proviso has been applied to him. There are two remedies open to him, namely, departmental appeal and judicial review (emphasis added).⁶

3. *Ibid.*

4. *Id.* at 2225.

5. *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

6. *Union of India v. Tulsiram Patel*, *supra* note 1 at 1450-51.

The learned judge repeated his observation :

[C]lause (2) of Article 311 embodies in express words the *audi alteram partem* rule. This principle of natural justice having been expressly excluded by a Constitutional provision, namely, the second proviso to clause (2) of Article 311, there is no scope for reintroducing it by a side-door to provide once again the same inquiry which the constitutional provision has expressly prohibited.⁷

After having said so, the court brought back by the side-door what it held was prohibited by the proviso. The court held that a government servant was not wholly without any opportunity where the second proviso applied. Though there was no prior opportunity to a government servant to defend himself against the charges made against him, he had the opportunity to show in appeal filed by him that the charges made against him were not true. This would be a sufficient compliance with the requirements of natural justice.⁸ The court not only gives the 'right to be heard', the only right which is guaranteed by article 311(2) and denied by the second proviso, but indirectly confers additional rights (i) to challenge the penalty on the ground of harshness and being disproportionate to the guilt and (ii) to challenge the decision of the disciplinary authority to dispense with clause (2)-type of inquiry (a) on the ground that it was not 'reasonably impracticable' to hold the inquiry and (b) on the ground that the decision of the authority was arbitrary, *malafide* and perverse. The contradiction in the judgment is writ large when it interprets clause (3) to article 311. The clause makes the decision of the disciplinary authority final when it decided under sub-clause (b) of the second proviso that it was not reasonably practicable to hold such inquiry. The court held that this finality given to the decision was not binding on the court and in a proper case the court could strike down the order dispensing with the inquiry and also the penalty imposed. Perhaps one may not object to court having assumed the power of judicial review even where the Constitution has made any decision final.

The real difficulty arises in accepting the view of the court where it held that an inquiry, which had been denied under sub-clause (b), could be asked for when the employee files a departmental appeal. If the circumstances have changed, then, according to the court, the appellate authority must hold the inquiry and hear the employee. So the natural justice was not an essential requirement when the case was decided first but it became an essential principle to be observed at the subsequent stages. The court further observed that the quantum of punishment was subject to review both in the departmental appeal and also by the courts. There cannot be any quarrel with this view. All arbitrary actions must be reviewed and if in any particular case the court finds the penalty imposed to be harsh and disproportionate to the guilt of the employee, the court must give relief. In the

Challappan case, the penalty of removal/dismissal from job of the railway points-man, a lowly paid employee, was not only harsh but utterly disproportionate to his guilt of drunken and disorderly behaviour for which he was convicted but put on probation. The Supreme Court could have struck down the penalty on this ground alone but it preferred to give relief to the employee on the ground of denial of natural justice as required by rule 14 which, as we have said earlier, was a wrong reasoning for a right decision. Thus, in the final analysis, we find that, contrary to the belief being propagated, the civil servant is the 'gainer' in this case. He has more rights—rights in addition to what is given to him by article 311.

IV SOCIAL JUSTICE AND THE DECISION

Social justice does not necessarily mean that the court must always give a decision, even by twisting the law or, if need be, ignoring it, in favour of the 'weaker party' in the case, no matter who that weaker party was or what his guilt or misconduct was. Social justice means justice to those who deserve justice but have been denied. Even in such a case, we should always remember that we are governed by rule of law. Society may accept, and has accepted, decisions of the Supreme Court, even where they were given under a doubtful jurisdiction/power, where such decision served the ends of social justice. We have accepted *Rudal Sah*,⁹ *Deekhandan*,¹⁰ *Asiad Workers*,¹¹ *Bandhua Mukti Morcha*¹² and the like, where the court passed orders of the nature which were considered earlier to be outside its powers. But does social justice also mean to take a sympathetic and compassionate view and adopt a benevolent construction in cases involving multipliers and such other class of employees who hold the entire society to ransom in the name of trade unionism? Hopefully, it does not.

V DICHOTOMY NEEDS A FRESH LOOK

The dichotomy created by the Supreme Court in the *Tulsiram Patel* in the interpretation of the exclusionary provision of the three sub-clauses of the second proviso to clause (2) of article 311, whereby it meant that the observance of the principles of natural justice stood prohibited when the case against the public servant was taken first, but it became an essential requirement at subsequent stage in departmental appeals, was reiterated and followed in some subsequent cases by the Supreme Court.¹³ In *Satyawir Singh v. Union of India*, the court perhaps to dispel the misgiving that the *Tulsiram Patel* decision was anti-civil servant, observed:

It is important to note that the majority judgment in *Tulsiram Patel*'s case is more beneficial to civil servants and confers greater rights upon them than *Challappan*'s case (AIR 1975 SC 2216) did. According to *Challappan*'s case, a civil servant to whom a service rule

9. *Rudal Sah v. State of Bihar*, AIR 1983 SC 1086.

10. *Deekhandan Prasad v. State of Bihar*, AIR 1984 SC 1560.

11. *Peoples' Union for Democratic Rights v. Union of India*, AIR 1982 SC 1913.

12. *Bandhua Mukti Morcha v. Union of India*, AIR 1984 SC 802.

13. *Satyawir Singh v. Union of India*, AIR 1986 SC 555; *A.K. Sen v. Union of India*, AIR 1986 SC 335 and *S.A. Sawant v. State of Maharashtra*, AIR 1986 SC 617.

7. *Id.* at 1462.

8. *Id.* at 1463.