

DELHI LAW REVIEW — VOLUME XIX : 1997

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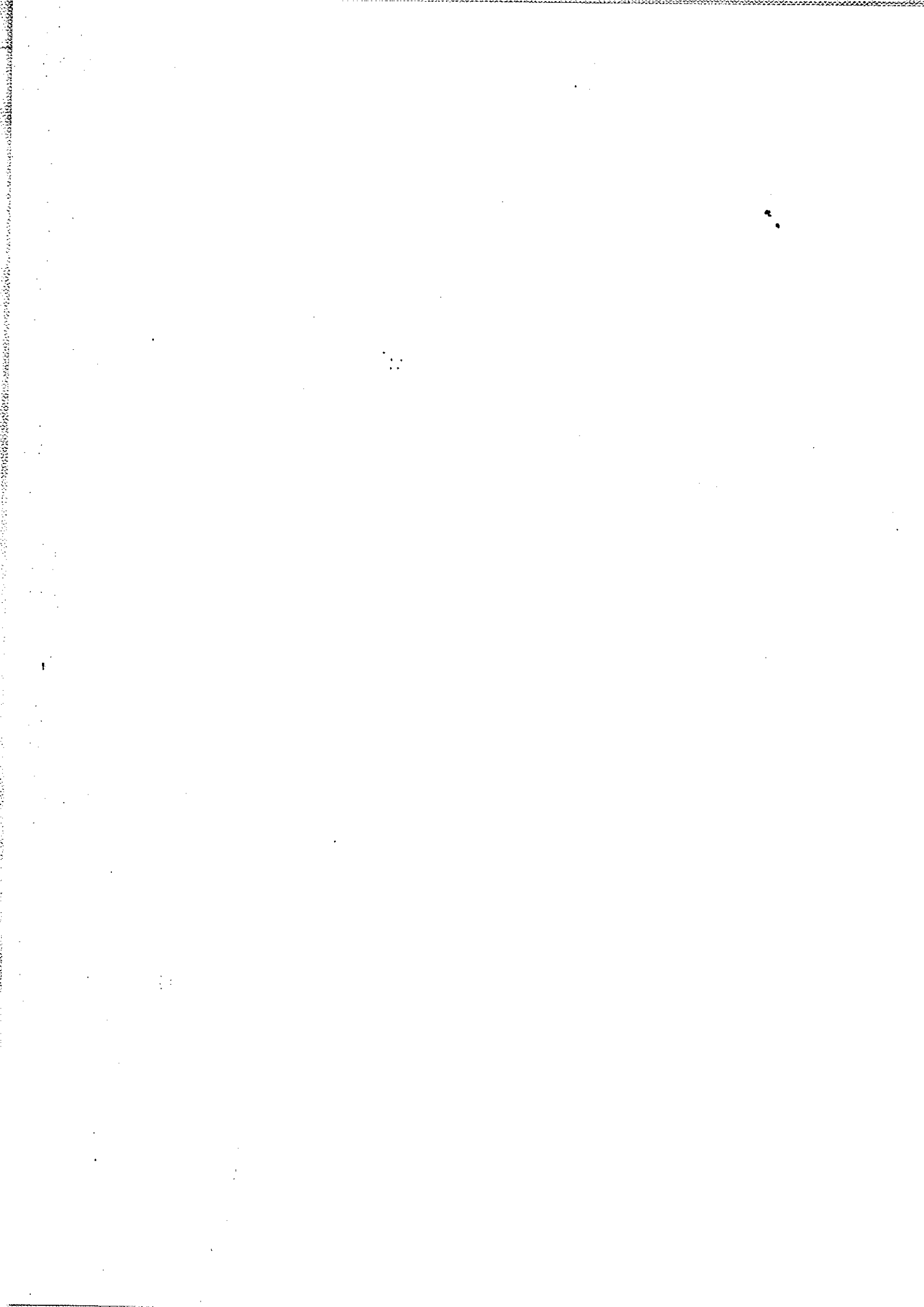
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DELHI LAW REVIEW

VOLUME XIX : 1997

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Editorial Note

As you are aware, Law Faculty has been publishing its own law journal which reflects the views of scholars on current legal problems. The Delhi Law Review, which has set the goal of excellence for itself, is one of the premier journals in the third-world countries. It has been continuously striving towards that goal and has managed to retain its position so far. The journal has been with us since 1972 except for a brief period of seven years between 1983-1989. It has been regularly publishing scholarly articles of its own teaching Faculty, as well as of its students, besides attracting good number of excellent articles from eminent scholars from other parts of India and abroad. It is hoped that this tradition will continue.

The Faculty proudly presents Vol. XIX of 1997 to its readers, which has tried to emulate and improve upon the standards of excellence set for itself in previous issues.

Professor B.P. Srivastava, a towering personality of the Faculty, retired in July 1997 after having served the Delhi University with distinction for a period of around 26 years. His brief profile has been penned by Professor B. Errabbi and appears in this volume. Another teacher, Mr. M.S. Shukla, has also retired in June 1998. The Faculty wishes them a meaningful and long active life.

Vol. XVIII of the journal was a special issue of 1996 which carried the articles presented at the Conference on "Legal Dimensions of Free Market Economy" organized by the Faculty under its DSA Programme. Because of that, R.V. Kelkar Memorial Lecture, organized in the memory of late Prof. R.V. Kelkar, delivered by Mr. P.P. Rao, senior Supreme Court lawyer on "Prisoners' Right to Life and Liberty" could not be published earlier and finds its rightful place in this issue. This year's R.V. Kelkar Memorial lecture, delivered by Hon'ble Justice Jaspal Singh of Delhi High Court on "Law of Rape in India" in March 1998 is also featured in this issue.

As a part of the Platinum Jubilee Celebrations of the University of Delhi, the Faculty organised a one day seminar on *Election Laws and Criminalization of Politics* in March this year. The Election Commissioner J.M. Lyngdoh delivered the inaugural address which is reproduced in this issue of the Review. This issue also carries an article written by a foreign scholar from Columbia University.

There are equally informative and scholarly articles and notes contributed by the colleagues from the Faculty. The students, which comprise a most important segment of the Faculty, deserve to be given their rightful representation in the Faculty's journal. This issue carries three articles contributed by students. The research endeavours by students will certainly help them to face the task of social engineering and to confront social problems with

a view to finding out solutions through their reading and writing. It certainly helps them to become good researchers, lawyers, judges etc. To all these authors and those who contributed book reviews, I personally extend my appreciation and thanks.

During this year, the Bar Council of India has circulated a new course-structure for LL.B. course. The Faculty of Law is in the process of implementing the restructured scheme after fulfilling all the statutory requirements.

At the end, I must thank my friend and colleague, Prof. B. Errabbi, the editor of this volume, who took all the pains to see that the volume lives up to its name. I also express my gratitude to the other members of the editorial board: Prof. Harish Chander, Prof. Lakshmi Jambholkar and Dr. J.L. Kaul.

It is my sincere hope that this issue of the Review will receive the desired response from its readers, and their constructive suggestions and contributions are welcome as they help in improving the Review further.

In conclusion I must thank Mr. Amit Sayal, Sita Fine Arts Pvt Ltd., for undertaking the Printing of the Journal, which he has done with meticulous care and caution. He deserves all our appreciations.

S.K. Verma *

Prof. B.P. Srivatsava *A Brief Profile of a Retiring Colleague*

As we bid farewell to Prof. B.P. Srivatsava on the eve of his retirement on 2.7.97, it is customary and indeed my privilege to present his brief profile, recounting his association with, and contribution to, the development of legal education in the country and in particular, in the Faculty of Law, Delhi University. After a bright academic career studded with excellence and the accompanying gold medals and scholarships, he joined the Faculty of Law, Lucknow University in 1956 as a lecturer. He was also a student of the Columbia Law School, New York, USA, for a year in 1964 where he went on a fellowship and a grant from the Columbia University and the Fulbright Foundation, respectively, and obtained the degree of M.C.L. (Master of Comparative Law). The Law Faculty, Delhi University has been fortunate to have him as a distinguished member of its teaching Faculty since 1970 where he spent most of his teaching career except for a three and a half year period from October 1979 to April, 1982 during which period he worked as a Professor of Law at the University of Dar es Salaam, Tanzania. Of his long and illustrious teaching career spanning over 41 years, he spent 26 years in the Delhi Law Faculty, winning acclaim and admiration of his students and colleagues alike for his teaching and scholastic abilities. He inspired several generations of students both at the LL.B. and LL.M. levels with his deep and profound knowledge, scholarship, dedication and sincerity. His wit, humour, and generous and helpful attitude had endeared him to his friends and colleagues. One of the striking features of his association with the Law Faculty has been that he never clamoured for, and held, positions of power. In fact he assiduously shunned such positions. He preferred to remain in the background and play the role of a friend, guide and philosopher which he performed with meticulous care and distinction whenever that was sought and needed from him not only by his friends and colleagues but also by some of the successive Deans of the Faculty and the Professors-in-Charge of Campus Law Centre. It was not in his nature to offer unsolicited advice, nor was it his temperament to interfere in the affairs of others unless his help, guidance and counsel were sought.

Another admirable feature of his character as a teacher, has been not only his strong belief in the rule of Law but also his ceaseless insistence on its observance by all concerned in the Faculty. He adopted steadfastly the brook no-nonsense approach to all demands for its relaxation whether it was by students or teachers. He was, indeed, a strict disciplinarian.

Prof. B.P. Srivatsava is a gifted draftsman. His expertise in drafting representations to the higher echelons of the university administration has been taken advantage of by many of his friends and colleagues. The University also

utilised his services for conducting several departmental enquires, thus reposing his confidence in his ability, integrity and legal acumen.

As a scholar, he is endowed with a sharp intellect and a rare gift of incisive analytical skills which, by dint of destiny, have not been utilised to their full potential. Those who have closer interaction with him will appreciate that it is no exaggeration to say that Prof. B. P. Srivatsava is analytical skills personified.

His contribution to the Indian legal literature has been modest. He wrote on various contemporary issues of constitutional law which include protection to civil servants, freedom of speech and obscene publication, prospective overruling, amendability of fundamental rights, the Bhopal settlement order and the conflict between social activism and judicial activism and the Tulsiram Patel case and its implication for the civil services etc. His writings, published in prestigious national and international law journals, have been marked by clarity of precision of language, originality and incisive analysis. Presently, he is engaged in writing a book on election law and a collaborative venture on constitutional law which is intended to be a part of Halsbury's Laws of India series being commissioned by the Butterworths India Ltd.

He had participated and contributed scholarly and thought provoking papers in several national as well as international seminars. He also delivered several lectures at the Indian Institute of Public Administration on Consumer Protection and consumer justice.

Although his retirement from service of the Delhi University will be a great loss to the Law Faculty, we comfort ourselves with the surmise that what will be our loss in the Faculty will be somebody's gain elsewhere.

Therefore, in conclusion, we pray the God Almighty for his long and active life. We assure him that we would continue to cherish with reverence the memories of his long association with us as a friend, colleague, guide and philosopher.

B. Errabbi*

Professor of Law, Faculty of Law, Delhi University.

ELECTION LAWS AND CRIMINALISATION OF POLITICS*

By

*Shri J.M. Lyngdoh***

Justice Naravati, Professor Verma and Friends,

Thank You enormously for inviting me to this Seminar and for trusting yourselves with someone like me for the next half-hour or so.

For a once-grossly illiterate ex-British colony, the miniscule minority of middle class English-educated lawyer-politicians of which scoured every constitutional model and assembled for us an impossibly inclusive and idealistic holdall around a nucleus of parliamentary democracy, we haven't done too badly. For example, agriculture is self-sufficient; the industrial base is among the world's top ten; the professional class is about the largest anywhere; India is almost unique among independent countries, with a continuously peaceful and constitutional transfer of power from one regime to another.

The trouble is that the Soviet-style autarky which India followed for long paid greater attention to conceptualising, system-building, dimensions of magnitude, quantity rather than quality had left out incentives, innovation, and practicability. With our natural proclivities, it meant just more and more rhetoric and ritual.

To make it worse, though the Soviet system unembarrassedly opted for full employment and subsidized and high-quality education apart from subsidized housing and health care, India didn't. So half the population is still illiterate and nearly 50 years into the Constitution of India, Article 45 of its Directive Principles of State Policy regarding provision for free and compulsory education within 10 years, has been conveniently forgotten; Article 47 of the same Directive Principles notwithstanding, Indian children are some of the most undernourished as Professor Amartya Sen, master of Trinity College, Cambridge keeps emphasizing. General health-care is near non-existent and

* This essay represents a slightly modified version of the inaugural address delivered by Hon'ble Shri J.M. Lyngdoh, Election Commissioner of India, at a seminar on "Election Laws and Criminalisation of Politics", organised by the Faculty of Law, Delhi University on 21 March, 1998.

** Election Commissioner of India.

what is, is of the poorest quality; general housing is abysmal (UNDP's Human Development Report 1997, in terms of human development indices longevity, education and reasonable income computes India as 138th in a list of 175 countries.) And amorphous and non-strategic planning and spreading the butter too thinly everywhere have meant-purposeless expenditure deteriorating into wholesale malpractice.

So politics, never aseptic at the best of times, anywhere, has in India become the investment with the highest returns, and therefore, associated with the survival of the fittest. It has been taken over by the rural majority whose rustic virtues of nepotism and bossism are anathema to the western-type urban democracy's principles of universalism, professionalism and impartiality. So, booth capturing, lying, cheating, forging, abducting, and murdering during elections and creaming off funds when holding office, have become political attractions. Financial bankruptcy of State Governments has become a later-day common place. And the undisputed supermacy of the market has obliterated differences in party ideology and facilitated horse-trading, defections..... And it hasn't helped that Capitalism has prevailed over Socialism in the world power-struggle, that the Soviet Union has disintegrated and that India has been forced to re-integrate with the market without preparation. Apart from unwittingly entering the second and the most vicious phase of colonial exploitation brought about by information technology, globalisation and the World Trade Organisation Regime.

The Indian Penal Code and the Criminal Procedure Code, designed to keep a Victorian India quiet, no longer suffice. Lord Macaulay, on his creation, the Indian Penal Code, said: "Our principle is simply this - uniformity when you can have it; diversity and you must have it; but in all cases certainty." The trouble is that crimes like the Hawala Scam are as uncertain as the Uncertainty Theory in quantum physics. And how do you deal with a malevolent George Soros who speculates on your currency to bring down your economy in ruins?

The Representation of the People Act, 1951, poorly drafted, is even more inadequate. Section 8 of the 1951 Act is the main provision on the disqualification for candidature for election to Parliament and State Legislatures. This Section divides offences into 3 groups, the groups being in descending order of disapprobation. For bribery or rape, for example, mere conviction disqualifies. For offences such as hoarding or profiteering or contravention of the Dowry Prohibition Act, conviction and a sentence of not less than 6 months are necessary. For residuary offences, a conviction and a sentence of not less than 2 years are required. The disqualification is 6 years for offences under Sub Section(1), the sentence of imprisonment plus 6 years for offences under Sub Sections (2) & (3).

But Section 8(1) lists only a few offences. And there are glaring absurdities. For example, the minimum punishment for rape under the Indian

Penal Code is 10 years' imprisonment whereas the disqualification for a convicted rapist electoral candidate is only 6 years. He can become an MP or MLA serving the last part of his sentence in jail.

Section 8 goes further and allows an MP or MLA, convicted of rape, for example, to file an appeal or apply for revision within 3 months and to remain MP or MLA until the appeal or application is disposed of. And usually, disposal here has been interpreted as final disposal by the highest court in the land. So it is like the Jarndyce and Jarndyce situation in Dickens' 'Bleak House' where litigation outlives parties, interests and even public memory. As though not enough, for whatever reason, this dispensation was allowed even to non-MPs and non MLAs till the 1998 Elections.

The Election Commission has recommended that persons convicted for 1 year for any offence whatsoever be disqualified. But we need to go further. All those formally charged by a court in cases of moral turpitude and heinous offences like murder, dacoity and rioting should be disqualified. And disqualification should encompass those without justifiable means of livelihood, (not ostensible Victorian England naively assumed the possibility of full employment and castigated the poor for their 'lezziness') tax evaders, Government dues evaders, drug-traffickers, prostitution-racketeers, smugglers and bootleggers. A committee of District Judge, District Magistrate, Superintendent of Police and representatives of the Press should ensure the police maintain proper record of such persons.

Sections 8A, 9 and 10A are disqualifications for corrupt practices, for dismissal for corruption or for disloyalty and failure to lodge an account of election expenses, respectively.

Sections 9A and 10 are temporary disqualifications for subsisting Government contracts and for holding office in a company in the capital of which the appropriate Government has at least a 25% share.

A voter is disqualified under Section 11A for being convicted for offences which include bribery and undue influence or personating. As well as for corrupt practices as understood in the Representation of People Act, 1951.

The Election Commission has recommended enhanced punishment for electoral offences in Chapter IXA of the Indian Penal Code and Chapter III of Part VII of the Representation of People Act, 1951 since the present punishment is inadequate. Details on this have been given to the seminar organizers for distribution. But even provisions as they are are not being properly enforced in the absence of police personnel at many polling stations. (In States like Bihar, polling stations without policemen are taken over by booth-capturers and Presiding Officers are frightened into collusion). The Home Ministry made its own contribution to the first round voting chaos in Bihar by making a gratuitous law and order review a day before in Patna, and

directing the State Government to use patrolling parties instead of static deputations at polling stations, after pushing out as many policemen as possible to Assam, on the sly. For each Parliamentary constituency at the rate of 2 policemen per polling booth 3,000 men are required. The total force provided by the Home Ministry is about 800 companies (IGPs who retired before I joined Service are still retaining their jeeps and constables), works out to about 56,000 men for the whole country. Even allowing for staggered polls and shifting forces between the State, the number is woefully inadequate. Most States hold their own police in contempt and want only Central police forces to man their polling stations, counting centres and ballot-box strong-rooms. But what is more serious is that if a candidate is guilty of the corrupt practice of spending more than the prescribed limit, the Election Commission can do nothing against him. The only remedy is for his rival to file an election petition before the High Court. But case-congestion in courts often does not allow disposal within 5 years, thereby nullifying the petition. There would be some relief, at least, if the Representation of People Act, 1951 could specifically debar State Governments from withdrawing election-related cases as part of their patronage.

The Representation of People Act, 1951 confines its scope to the conduct of elections. It has no control over defections. But mass-post-electoral defections have been manipulated by a brute majority Government under the Constitution of India in the guise of the Tenth Schedule. And formally legalized and even encouraged, defections are so cancerous to current Indian politics that they should be removed from the Constitution. And defection, without qualification, ought to be made an offence of criminal breach of mandate under the Indian Penal Code. This should be in addition to the defector's losing his seat in Parliament or the Assembly.

Operating within a huge vacuum, the Election Commission in the 1998 General Election requested political parties, in a meeting as well as through the media, not to field criminals. And people were asked through the media not to vote for criminals. As many as 3 ministers from Bihar were kept under house arrest to restrain them from interfering with the polls. Some candidates were also arrested. Candidates were made to file sworn affidavits stating they had not been convicted of the various offences under section 8 of the Act. One candidate who gave a false declaration was later disqualified. To facilitate the filing of accurate election petitions before the High Court, candidates were, for the first time, required to file expenditure accounts in 3 parts showing personal expenditure, party expenditure and expenditure by friends etc. within 30 days of the declaration of the results. Copies of these were made freely available to everyone. And since Justice Kuldip Singh's Common Cause Judgement had allowed the Election Commission to take expenditure accounts from political parties also, this year the Election Commission will be able to match a party's account of expenditure on a candidate 'A' with his account of the party's

expenditure on him. Though frankly, the level of expenditure in the 1998 Elections was much less because of very limited use of loudspeakers and practically no use of posters; on the other hand the expenditure ceiling had increased. Computerisation in Election Commission was accelerated to monitor round-wise counting results to ensure no cheating in counting. But an increasingly crude polity and progressive harshness and intrusion into ground details by the Election Commission can only mean the end of democracy altogether.

In conclusion, I would like to submit the following reform proposals for the purpose of discussion by the participants of the Seminar.

ELECTORAL OFFENCES
EXISTING AND PROPOSED PUNISHMENTS

Section	Nature of offences	whether cognisable or non-cognisable	whether it should be cognisable or non-cognisable in future	existing punishment	Proposed punishment
1	2	3	4	5	6
I. INDIAN PENAL CODE					
171/B/171/E	Bribery at elections	Non-cognisable	Cognisable	Imprisonment upto one year or fine, or both	Imprisonment upto 3 years or fine or both
	Bribery by treating	-do-	-do-	Fine only	Imprisonment upto 6 months or fine or both
171/C/171/E	Undue influence at elections	-do-	-do-	Imprisonment upto one year or fine or both	Imprisonment upto 3 years or fine or both
171/D/171/E	Presentation at an election	Cognisable	-do-	Imprisonment upto one year, or fine or both	As at present
171/G	False statement in connection with an election	Non-cognisable		Fine	Imprisonment upto 3 years or fine or both.

	1	2	3	4	5	6
171/H	Illegal payments in connection with an election	Non-cognisable	Non-cognisable	Fine upto five hundred rupees	Imprisonment for a minimum period of 1 year and extending upto 5 years and fine.	
171/I	Failure to keep election accounts	-do-	-do-	Fine upto five hundred rupees extending upto	Imprisonment for minimum period of six months and 1 year and fine	
II - REPRESENTATION OF THE PEOPLE ACT, 1950						
31	Making false declaration	Non-cognisable	Non-cognisable	Imprisonment upto one year or fine or both	Imprisonment upto 2 years or fine or both.	
32	Breach of official duty in connection with the preparation, etc.	-do-	-do-	Fine upto five hundred rupees	Imprisonment for 3 months minimum and upto 2 years and fine.	
REPRESENTATION OF THE PEOPLE ACT, 1951						
125	Promoting enmity between classes in connection with election	Cognisable	Cognisable	Imprisonment upto 3 years or fine or both	Imprisonment for minimum period of 6 months and extending upto 3 years and fine.	
126	Prohibition of public meetings on the day preceding the election day and on the election day.	Non-Cognisable	Cognisable	Fine upto Rs. 250/-	Imprisonment upto 3 years and fine.	
127	Disturbances at election meetings	-do-	-do-	Imprisonment upto 3 months, or fine upto Rs. 1000/- or both.	Imprisonment upto 1 year and fine	
127A	Restriction on the printing of pamphlets, posters, etc.	-do-	Non-Cognisable	Imprisonment upto six months or fine upto Rs. 2000/- or both.	Imprisonment upto 2 year or fine or both	
128	Maintenance of secrecy of voting	Non-cognisable	Cognisable	Imprisonment upto 3 months or fine or both	Imprisonment upto 1 year or fine or both	
129	Officers, etc., at elections not to act for candidates or to influence voting.	Cognisable	-do-	Imprisonment upto 6 months or fine or both	Imprisonment upto 3 years or fine or both	

	1	2	3	4	5	6
130	Prohibition of canvassing in or near polling stations	-do-	-do-	Fine upto Rs. 250/-	Imprisonment upto 1 year or fine or both.	
131	Penalty for disorderly conduct in or near polling stations.	-do-	-do-	Imprisonment upto 3 months or fine or both	Imprisonment upto 1 year or fine or both	
132	Penalty for misconduct at the polling station	-do-	-do-	Imprisonment upto 3 months or fine or both	Imprisonment upto 1 year or fine or both	
132A	Penalty for failure to observe procedure for voting	Non-cognisable	-do-	Ballot paper liable to be cancelled	Imprisonment upto 3 year or fine or both.	
133	Penalty for illegal hiring of procuring of conveyances at election	-do-	-do-	Fine upto Rs. 1000/-	Imprisonment upto 3 years or minimum Rs. 1000/- & Rs. 5000/- or both	
134	Breach of official duty in connection with elections	Cognisable	Cognisable	Fine upto Rs. 500/-	Imprisonment upto 3 year or fine or both.	
134A	Penalty for Government servants for acting as election agent, polling agent or counting agent	Non-cognisable	Cognisable	Imprisonment upto 3 months or fine or both	Imprisonment upto 1 year or fine or both	
135	Removal of ballot papers from polling station	Cognisable	Cognisable	Imprisonment upto one year or with fine upto 500/- or both.	Imprisonment for a year	
135A	Offence of booth capturing	Non-cognisable	Cognisable	Imprisonment upto 6 months or fine upto 500/- or both.	Imprisonment for a term from 1 year to 5 years and fine.	
136	Other offences	Cognisable	Cognisable	Imprisonment for a term upto 2 years or fine or both.	Imprisonment upto 3 years or fine or 1000/- to Rs. 5000/- or both	
137	Any other person	Cognisable	Cognisable	Imprisonment upto 6 months or fine or both.	Imprisonment upto 2 years or fine or both	

LAW OF RAPE IN INDIA : SOME REFLECTIONS*

Mr. Justice Jaspal Singh**

It is said that a good teacher affects eternity; he can never tell where his influence stops. Prof. Kelkar was one such teacher. Simple and unassuming he had the charm of a cheerful temperament. I last came out of his class room as his student more than forty years ago. It is still sun-shine. He was really worth a thousand priests. My thanks to Prof. Verma for having provided me with the opportunity to deliver this lecture organised in his sweet memory.

I propose to speak to you today on certain aspects of law of rape. These are stray thoughts. I have made an effort to arrange them, and believing that the more one says, the less people remember; the fewer the words, the greater the profit, I propose to be very brief.

In *Sudesh Jhaku v. K.C.J. & Others*¹ while suggesting to the Law Commission and the Legislature to give a fresh look to the law of Rape. I said:²

"And, if they really decide to look into it, what about defining the offense in gender-neutral terms? I think law reform community will have no objection to it"

In that context, I felt the necessity of quoting the following passage from the "Note, Rape & Rape Laws : Sexism in Society & the law" appearing in 1973 in the 61 California Law Review:

Men who are sexually assaulted shall have the same protection as female victims, and women who sexually assault men or other women should be liable for conviction as conventional rapists. Considering rape as a sexual assault rather than as a special crime against women might do much to place rape law in a healthier perspective and to reduce the mythical elements that have tended to make rape laws a means of reinforcing the status of women as sexual possessions."

It would not be possible to deny that a male too may, in certain cases, be subjected to sexual assault by the person born from his own ribs and such assaults by the female species of the hamasapiens may be mentally and physically as shattering as where the victim is a woman. It is an age of

This is a slightly modified version of Prof. R. V. Kelkar Memorial Lecture delivered by honourable Mr. Justice Jaspal Singh. The lecture was organised under the auspices of the Faculty of Law, University of Delhi on March 28, 1998.

Judge, High Court of Delhi.

(1996) 62 Delhi Law Times, 563

2 Id. at 574.

aggressive man and aggressive woman. I do not think, the subject has stirred the legal community in India so far though this has been a subject of discussion in Europe and in the United States of America in particular. I am confident that this voice will not remain in the wilderness for long.

In *Sudesh Jhaku's case*³ it was contended, *inter alia*, that, as in section 375 of the Indian Penal Code, the words "sexual intercourse" and "penetration" have not been defined, and that, therefore, read in conjunction they should be taken to mean penetration of any part of male's body or any foreign object into any part of female's body without her consent. It was argued that there was need for expanded understanding of rape in the law and that it was time to give a goodbye to the traditional approach which, it was contended, reflected male views and male standards. The argument was rejected and one of the grounds of rejection was that the change could be brought about not through interpretative process of the courts but through legislation by artificially extending the definition of rape. However, the judgement makes an impassioned plea for change. The following observations are pertinent:⁴

"The concept of crime undoubtedly keeps on changing with the change in political, economic and social set up of the country. The Constitution, therefore, confers powers both on Central and State Legislatures to make laws in this regard. Such right includes power to define a crime and provide for its punishment. Let the Legislature intervene and go into the soul of the matter. Rape is a serious matter though, unfortunately, it is not attracting serious discussion. Not even in law schools⁵. The seriousness of the offense with respect to oral intercourse or vaginal penetration otherwise than with penis is not realised though involves an act of sadism which is likely to cause the victim far greater pain and physical damage than rape itself⁶. Take for example, vaginal penetration by a bottle. In such case the shock, trauma and long-term psychological damage to the victim will be at least as serious as that which befalls rape victims and yet it would not be rape as defined in Section 375. Admittedly it would also be not an offense under Section 377 of the Code. It would thus be an offense punishable under Section 354 of the Code which provides maximum sentence of only two years. Does it not, to use the words of *Wordsworth*, display "voluptuous unconcern" of the ground realities. This surely fails to protect the integrity of woman and shows a bias against them

See supra n. 1.

See supra n. 1 at pp. 573-574

Susan Estrich, *Teaching Rape Law*, The Yale Law Journal (1992)

Jennifer Tenkin, *Towards a Modern Law of Rape*, The Modern Law Review (1982)

a bias continuing right from the days when the law of rape was concerned with theft of virginity and protection of property rights.⁷ And when we think of integrity of the person violation of which "society cannot and must not tolerate" we think not only of women clad in chiffon, draped in misty soft powder sprinkled with a swansdown puff challenging to sink ships and stop heart beats, though they also are no less important, but of also those bare-faced a la Bankim Chandra's imprisoned within the confines of female subordination and restricted life chances.

I strongly feel that even if rape is taken to mean sexual intercourse without consent and "sexual intercourse" is confined to natural intercourse, the legislature must come out with a provision in the Indian Penal Code providing equally stringent punishment for non-consensual sexual penetration such as insertion of foreign objects into the vagina. The present law besides ignoring the larger issues of humiliation, degradation and violence reduces to a mockery a female's right to her bodily integrity.

Yet another thing which disturbed my judicial conscience in *Sudesh Jhaku's case* was the plight of very young and seriously traumatised children required to appear as witness in an open court. I observed⁸:

"I hope that while the child is in the witness box every effort will be made by the learned trial judge to lessen her ordeal and that he will take care that nothing is said or done which causes unnecessary distress to her. The Prosecutor in his zeal might undervalue the child's feelings, there is need to keep a check on it. The defence counsel undoubtedly have a primary duty to their clients but they owe a duty towards the court and the judicial system also. They are expected to avoid needless abuse and harassment of the witness. If the court notices any departure from his course of conduct, it should rise to the occasion promptly and effectively. Child sexual abuse being one of the most serious and damaging criminal offences, the trial judge shall handle the proceedings with considerable sensitivity and ensure that the trial is fairly conducted. He should take care that questions asked are not complex or confusing. Questions containing a negative or double negative should be better avoided. The feasibility of giving breaks during questioning may also be kept in mind though such breaks need not be long. If the Prosecution establishes to the satisfaction of the court that to obtain a full and candid account from the child witness the use of a screen would be necessary, the court may be inclined

favourably to provide such a screen. I may notice that the reason for such a step may not necessarily be a fear of the accused. It may of the courtroom itself. However, here is a word of caution. Since demeanour of a witness is always of some importance, the screen, if provided, should not come in the way of the trial judge to notice it. One thing more before I draw the curtain. It relates to child support persons in the courtroom. On that Mr. Jaitely had drawn my attention to the *Report of the Special Adviser to the Minister of National Health and Welfare on Child Sexual Abuse in Canada. Reaching for Solutions 1991*. In fact the guidelines delineated above have drawn inspiration from the said Report and as regards the child support this is what it states:

"There are situations in which it is desirable to have a social worker or other friendly but "neutral" adult visible to the child, or even sitting beside a young child who is testifying. While some judges have permitted this, others have not. There have been cases where the judge has ordered supportive persons to leave the courtroom, along with other members of "the public". I am leaving the matter to the good sense of the learned trial judge. However, one thing is certain. The proceedings have to be in the camera."

Why am I mentioning it when it is already there in the judgment? I am constrained to mention it because despite my best efforts, the Delhi High Court has done nothing in that direction and the child witness continues to suffer harassment and indignities. The lack of attention to children's rights in the new order is particularly disturbing when one considers that sexual maltreatment of children which is increasing at an alarming pace, essentially goes unnoticed. Right to be free from sexual exploitation has to be perceived as a human right and requires immediate attention. It is unfortunate that what is suggested by one wing of the judiciary to ameliorate their condition is ignored by its other wing.

The Supreme Court has been saying time and again that the courts are expected to show great responsibility while trying an accused on charges of rape and that they must deal with such cases utmost sensitivity¹⁰. The Supreme Court in 1996, and perhaps for the first time, decried casting of stigma on the victim on account of her having been promiscuous in the past. In *The State of Punjab v. Gurmit Singh & Ors.*¹¹ It observed¹²

⁷ See Bracton, *The laws and Customs of England*, Vol. II FO 147

⁸ Susan Estrich, *Teaching Rape Law*, *The Yale Law Journal* (1992)

⁹ See supra n. 1 at 576

¹⁰ *State of A.P. v. Gangula Sanya Murthy*, 1997 Cr. L.J., 774

¹¹ A.I.R. 1996 S.C. 1393 See also *State of A.P. v. Gangula Sanya Murthy*, 1997 Criminal L.J. 774 (SC).

¹² *Id.* at 1403.

"Even if the prosecutrix, in a given case, has been promiscuous in her sexual behaviour earlier, she has right to refuse to submit herself to sexual intercourse to anyone and everyone.... no stigma.... should be cast against such a witness by the courts, for after all it is the accused and not the victim who is on trial in the court."

In 1988, that is, almost eight years before the judgement of the Supreme Court in *Gurnit Singh's case*, an Additional District and Sessions Judge of Delhi while dealing with the question had observed in *State v. Parminder Singh etc.*¹³

"In fact, general evidence of person's sexual history - her "chastity" - is of very little value. Chief Justice Bray of the *South Australian Supreme Court* pointed out in 1977 that no reasonable person could believe that "a willingness to have sexual intercourse outside marriage with *someone* is equal to (a willingness to) have sexual intercourse outside marriage with *anyone*" (*R. V. Gunj exparte stephenson* (1977) 17b S.A.S.R. 166 at 167). Prior consensual activity, without regard to surrounding circumstances, does not suggest subsequent consent. Contemporary sexual behaviour comes in many varieties reflecting differing degrees of interpersonal commitment.

The assumption underlying an interference from, say, reputation for a propensity to consent, to consent with the accused, is that the former evidence shows some character trait, some stable element of personality, which is likely to produce generally consistent behaviour across varying situations. But while this assumption has a great deal in common with traditional personality theory in psychology,¹⁴ empirical research has failed to verify the existence of personal disposition or even that behaviour is consistent across different situations¹⁵. Modern psychology, while not rejecting the existence of character traits, emphasises the importance of situation factors. Behaviour of an individual in a given instance is likely to be determined by an interaction between "psychic structure" and "situation". Psychological studies suggest that, in the absence of comprehensive information about an individual's history and personality, the chances of accurate prediction are very low unless the individual is placed in substantially similar situations. It follows that a woman's reputation with respect to "chastity" is of little use in deciding whether she consented to intercourse with the accused."

¹³ Sessions Case No. 5/85 decided by Jaspal Singh, Additional Sessions Judge on May 19, 1988

¹⁴ G. Allport, 'Personality - A Psychological Interpretation (New York, 1937)

¹⁵ H. Hartshorn & M.A. Magy, "Studies in Deceit" (N.Y. 1928); W. Mischel, "Personality and Assessment" (N.Y. 1968)

Despite what the Supreme Court has said on the point, one finds some judges of the High Courts still viewing such victims with "the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion". Reliefs are still being granted to the persons accused of commission of rape on the mere allegation that the victim was "a lady of loose and licentious character"¹⁶

What is further disconcerting is that while the Penal Code has been amended to provide more stringent punishment to the persons guilty of commission of rape and while the Supreme Court has also been advocating deterrent punishment in such cases, some judges have felt that awarding of compensation to the victim would be adequate punishment. Reference in this connection may be made to a Division Bench judgement of the Bombay High Court in *Suresh Balkrishna Nakhava v. State of Maharashtra*¹⁷ wherein a minor was raped repeatedly and impregnated and yet sentence was reduced to six months R.I. and a fine of Rs. 1000/- firstly on the ground that the victim, though minor, was a consenting party and secondly because the accused had deposited some amount for future maintenance of the victim. What makes the order most unfortunate is that the victim was not even considered fit to participate in the negotiations though by that time she had attained majority and her views were not even invited. It may not be out of place to mention that the Supreme Court in *Gurnit Singh's case*¹⁸ had declined to award compensation as no scheme for grant of compensation had been formulated in terms of *Delhi Domestic Working Womens' Forum v. Union of India*¹⁹

I think it is time to not only give a fresh look to the law but also to sufficiently train the judges. It is only the judges who can make the law respectable and they must realise that it is the spirit and not the form of law that keeps justice alive. It was not for nothing that *Cardozo*.²⁰ *Jerome Frank* and *Harold Lasswell* who were the precursors of a flowering of Freudian empirical research in judicial behaviour shifted the focus of attention away from law as an impersonal ideological entity to the human judges. Cardozo has rightly observed that deep below consciousness are other forces, the likes and dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge but then a judge has to be trained to overcome these predilections and prejudices. If he has what is styled as the judicial

¹⁶ *Rohit Bansal v. State of Delhi* Crl. Misc. (Main) No.2619 of 1996 decided by a single judge of Delhi High Court on January 13, 1997

¹⁷ 1998 Cri. L.J., 284

¹⁸ See supra n. 11

¹⁹ 1995 (1) SCC 14

²⁰ Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven, Yale University Press, 1921)

temperament, he may well emancipate himself from what ails an ordinary mortal. Some judges, I am sorry to say, display lack of that temperament too.

I honestly feel that what to talk of common man, even professional understanding of the phenomenon of rape, the psychology of the rapist and the needs of the victim is still inadequate. Let us encourage research and understanding in this sphere. But, at the same time, let me, for particular attention of young women students refer to a controversial best seller by *Kavita Raijpe* called "*The Morning After: Sex, Fear and Feminism on Campus*". It describes how young women on campuses are being encouraged to constantly see themselves as victims in every sexual encounter. This, she argues, is ironically the result of a mushrooming of date-rape workshops, sexual harassment, peer-counselling groups and women's centre hot lines on campuses. Ironic, because feminism which should have been a liberating influence on the sexuality, is in fact helping to produce self-images of victimisation in women. Let all concerned give a thought to it.

PRISONERS' RIGHT TO LIFE AND LIBERTY*

by

P. P. Rao **

My friend and former colleague, Prof. Raghunath Kelkar, was born in the month of March over 70 years ago. He did his Law Degree course from Kohlapur Law College and obtained his post-graduate Degree from Bombay University. In 1955 he joined this prestigious University and, in due course, rose to become a Professor of Law. I joined the Faculty in 1961. During my stint of about six years as a Lecturer, our friendship matured into fraternal relationship. He had a magnetic personality with charming manners. He was intelligent and well-read. As a fresher in the Faculty, I received guidance from Kelkar. His appreciation of my case comments and short articles published now and then encouraged me to work more. He was often seen in the company of Prof. K. Ponnuswamy and Prof. B. Sivaramayya. All four of us used to frequent the Coffee House during the breaks between classes. There was no topic under the sun which we did not discuss, from the latest literature to the latest movie in Plaza or Odeon.

Kelkar had a disciplined mind and a strong sense of duty. He used to spend long hours in the library and also participate in seminars and panel discussions with thorough preparation. He was conscientious teacher and a painstaking researcher. I remember the trouble he took to collect primary material about persons released under the Probation of Offenders Act, 1958, from several institutions, unmindful of the strain on his meagre savings and time. He had an original mind and a positive approach to life. Till the end he tried to live upto the best traditions of the teaching profession.

In 1967 I was in a serious dilemma, unable to leave my permanent job in the Law Faculty when late Mr. N.C. Chatterjee, Senior Advocate, advised me to join the Bar. Kelkar told me not to miss the opportunity of joining the chambers of such an illustrious leader of the Bar who was keen to take me under his wings. His advice helped me to take the plunge into the legal profession. He showed me a bigger flat to shift, keeping in view my requirement of additional space for practice. I lived in that flat for 22 years before shifting to my own house.

During the Emergency, Kelkar suffered a lot. After the Emergency, one day he came and presented to me a copy of the first edition of his book "*Outlines of Criminal Procedure*". I noticed his sense of fulfilment and congratulated him on

* Prof. R. V. Kelkar Memorial Lecture organised under the auspices of the Faculty of Law, University of Delhi on Saturday, March 02, 1996

** Senior Advocate, Supreme Court of India

his first major publication. The second edition is proof of the demand for the book. Again in 1984, I received an autographed copy of the second edition which I have preserved as a precious memento. His book 'Lectures on Criminal Procedure' was also popular.

Whenever I needed any guidance in Criminal law, Kelkar was always there to help. In *Mr. A.R. Antulay's* case, I needed the note of the First Law Commission headed by Macaulay on Sections 161 to 165 of the Indian Penal Code. It was not available in the Supreme Court Bar Library. I rang up Mr. Kelkar. He located it over night and gave it to me. A friend in need is a friend indeed! Unfortunately, his health began to fail and eventually his life was cut short. On November 18, 1986, the legal community lost a sincere and dedicated teacher in Mr. Kelkar. The following lines from Cardinal Newman's portrait of a gentleman seem to fit Kelkar:-

"He is one who never inflicts pain. He may be right or wrong in his opinion, but he is too clear-headed to be unjust, he is as simple as he is forcible, and as brief as he is decisive. Nowhere shall we find greater candour, consideration, indulgence; he throws himself into the minds of his opponents, he accounts for their mistakes. He knows the weakness of human reason as well as its strength, its province and its limits."

PRISONS AND PRISONERS

Last December I was in Port Blair. I saw the infamous Cellular Jail and acquainted myself with the conditions of prisoners who were incarcerated there during the freedom struggle. Among them was Vir Savarkar, a revolutionary of the highest order. His name is permanently associated with the cell in which he was kept for almost a decade. Later I also attended the sound and light show after sunset. It gave an idea of the inhuman conditions in which several freedom fighters were kept for long periods. Among them were Hindus, Muslims, Sikhs and Christians belonging to different parts and speaking different languages. The largest number was of Bengalis, followed by Punjabis. Vir Savarkar did not know, for over two years, that his own brother was also lodged in another cell in the same jail. I saw the execution chamber. The noose is hanging loosely. The collapsible wooden planks on which the condemned prisoner was made to stand while the noose was put around his neck, the lever operated by the executioner as well as the deep pit into which the body would fall on pressing the lever are all intact. It was a grim scene. We can never redeem the debt we owe to those heroes and martyrs.

The framers of the Constitution were by and large political leaders and political sufferers who had first-hand experience of prison life. Pt. Jawahar Lal Nehru, Maulana Azad, Dr. Rajendra Prasad, C. Rajagopalachari, Sardar Vallabhbhai Patel, Sarojini Naidu, Gobind Ballabh Pant, to name a few, had languished in prisons during the struggle for Independence. They knew the value of personal liberty.

The Universal Declaration of Human Rights, 1948 recognised the inherent dignity of human beings. Art. 3 of the Declaration says "Every one has the right to life, liberty and security of person. Art. 5 declares that no one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment. Art. 8 reads: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the Constitution or by law." Art. 9 affirms: "No one shall be subjected to arbitrary arrest, detention or exile." Art. 10 says that "everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." Art. 11 is equally important. It says: "everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for the defence."

FUNDAMENTAL RIGHTS OF PRISONERS

The Constitution of India by incorporating the basic human rights in Part III and guaranteeing their enforcement through the superior Judiciary has made the law of prisoners more civilised. Article 21 declares that no person shall be deprived of his life or personal liberty except according to procedure established by law. Article 22 guarantees protection against arrest and detention in certain cases. It says that no person who is arrested shall be detained in the custody without being informed, as soon as may, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by a legal practitioner of his choice.¹ It requires that every person who is arrested and detained in custody shall be produced before the nearest Magistrate within a period of 24 hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the Magistrate and no such person shall be detained in custody beyond the said period without the authority of a Magistrate.² It mandates that no law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless an Advisory Board is satisfied that there is sufficient cause for such detention.³ There are several other safeguards incorporated in Art. 22 such as the right to know the grounds of detention and the right to make a representation⁴ etc. Each one of them is a valuable human right.

¹ See Article 22(1) of the Constitution of India

² Article 22(2)

³ Article 22(4)

⁴ Article 22(5) declares:

"When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order, shall, as

Prisoners may be classified as detenus, undertrial prisoners and convicts. The question whether prisoners are entitled to the fundamental right to life and personal liberty came up for consideration in *State of Maharashtra v. Prabhakar Pandurang Sanzgiri*.⁵ While in detention under the Defence of India Rules, 1962, Sanzgiri wrote a book of scientific interest and sought permission from the State Govt. to send the manuscript out of the jail for publication. On rejection of his request, he filed a Writ Petition which was allowed by the Bombay High Court. The Govt. preferred an appeal contending that the Bombay Conditions of Detention Order, 1951 conferred only certain privileges on the detenu; publication of book was not one of them. Therefore, the detenu had no right to publish the book. The Supreme Court rejected the contention and held that the conditions are restrictions on the personal liberty of a detenu; not privileges conferred on him.⁶ Subject to the conditions contained in the Order, the liberty remains unaffected.⁷ There was no condition in the 1951 Order prohibiting a detenu from writing a book or sending it for publication. The State of Maharashtra infringed the personal liberty of the detenu.⁸ The Court observed that if the argument of the State Govt. were to be accepted, it would mean that the detenu could be starved to death if there was no condition of providing food to the detenu.⁹

D. Bhuvan Mohan Patnaik's case¹⁰, raised a lively issue. The petitioners were laxative prisoners undergoing sentences in the Central Jail at Visakhapatnam. Live wire mechanism was installed on the top of the compound wall of the jail in order to prevent any attempt on the part of the prisoners to escape by scaling the walls. The live wire was fixed at a height of 14' from ground level. It had no direct contact with the wall and no possibility of leakage of current through the wall. The prison walls themselves were situated at a distance of 20 feet from the cells where the prisoners were lodged. All prisoners were warned of the existence of the live wire. In a petition filed in the Supreme Court they contended that under Section 224 IPC if a prisoner escaped, the maximum sentence of imprisonment that could be awarded was two years whereas a prisoner lodged in the jail who attempted to escape by scaling the wall is subjected to the penalty of instantaneous death without any

soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order."

⁵ (1996), 1 SCR 702

⁶ Id. at 708

⁷ Ibid

⁸ Ibid

⁹ Ibid

¹⁰ *Bhuvan Mohan Patnaik v. State of A.P.*, (1975) 2 SCR 24

trial and without observing any procedure established by law. After giving serious thought to the contention, the Court held that whatever be the nature and extent of the prisoners' fundamental right to life and personal liberty, they have no fundamental freedom to escape from lawful custody. Therefore, they cannot complain of the installation of a live wire mechanism.¹¹ Incidentally, the Court declared that convicts are not by mere reason of conviction, deprived of all the fundamental rights which they otherwise possessed including protection of life and liberty guaranteed by Art. 21.¹²

SOLITARY CONFINEMENT

*Sunil Batra v. Delhi Administration*¹³ is a landmark judgment by a Constitution Bench in the area of fundamental rights of prisoners. Under Section 30(2) of the Prisoners Act, 1949 every prisoner under sentence of death shall be confined to a cell apart from all other prisoners and shall be placed by day and by night under the charge of a guard. Sunil Batra was sentenced to death having been found guilty of a gruesome murder compounded with robbery. He challenged the same invoking Articles 14, 19 and 21. The plight of a prisoner kept in solitary confinement is pathetic. In the words of V.R. Krishna Iyer, J.

"Grin walls glare at him from all sides night and day; his food is inserted into the room and his excretory needs must be fulfilled within the same space. No pillow to rest his restless head, no light inside, save the bulb that burns blindly through the night from outside. No human face or voice or view except the warder's constant compulsory intrusion into the prisoner's privacy and the routine revolutions of officials' visitations, punctuated by a few regulated visits of permitted relatives or friends, with iron bars and peering warder's presence in between. No exercise except a generous half hour, morning and evening, in a small, walled enclosure from where he may do asanas with Nature were he Wordsworth or Whitman or practise communion speechless sorrow were he but common clay. A few books, yes, newspaper? No. Talk to others? No. Save echoes of one's own soliloquies; no sight of others except the stone mery in pathetic fallacy."¹⁴

The Supreme Court upheld the contention of Batra and declared:

¹¹ Id at 30

¹² Id at 26 and 27

¹³ (1979) 1 SCR 392

¹⁴ Id. at 424

"Part III of the Constitution does not part company with the prisoner at the gates, and judicial oversight protects the prisoner's shrunken fundamental rights, if flouted, frowned upon or frozen by the prison authority. Is a person under death sentence or underrtrial unilaterally dubbed dangerous liable to suffer extra torment too deep for tears? Emphatically no..... The convict is not sentenced to imprisonment. He is not sentenced to solitary confinement. He is a guest in custody, in the safe keeping of the host-jailor until the terminal hour of terrestrial firewell whisks him away to the halter. This is trusteeship in the hands of the Superintendent, not imprisonment in the true sense."¹⁵

BAR FETTERS

In another part of the same judgment, the Supreme Court dealt with the case of *Charles Sobraj*. His grievance was against the disablement, by bar fetters of underrtrials and for unlimited duration. The Judges visited the Tihar Jail and saw Sobraj standing in chains in the yard, with iron on wrists, iron on the ankles, iron on waist and iron to link up firmly rivetted at appropriate places. There were a number of underrtrial prisoners with bar fetters in the jail and many of them were minors.

Reacting sharply to the plea of prison authorities based on security aspect, the Court observed:

"Assuming a few are likely to escape, would you shoot a hundred prisoners or whip everyone every day or fetter all suspect to prevent one jumping jail? These wild apprehensions have no value in our human order, if Articles 14, 19 and 21 are the prime actors in the constitutional play..... Life and liberty are precious values. Arbitrary action which tortuously tears into the flesh of a living man is too serious to be reconciled with Articles 14 or 19 or even by way of abundant caution."¹⁶

The Court laid down a set of conditions precedent for placing bar fetters on prisoners. These are applicable to all prisoners.

HANDCUFFS

In *Prem Shankar Shukla v. Delhi Administration*,¹⁷ the complaint was against handcuffing of underrtrial prisoners by escorts while taking them from the jail to Court and back as a matter of routine. This provided the occasion for

¹⁵ Id. at 428 and 451

¹⁶ Id. at 472 and 475

¹⁷ (1980) 3 SCR 855

the Supreme Court to emphasise that the guarantee of human dignity forms part of a constitutional culture. The Court declared that handcuffing is prima facie inhuman and, therefore, unreasonable.

"Absent fair procedure and objective monitoring to inflict 'irons' is to resort to zoological strategies repugnant to Art. 21..... Insurance against escape does not compulsorily require handcuffing. There are other measures whereby an escort can keep safe custody of a detenu without the indignity and cruelty implicit in handcuffs or other iron contraptions."¹⁸

In *Citizens for Democracy v. State of Assam & Ors.*,¹⁹ the Supreme Court received a letter from Mr. Kuldip Nayar, an eminent journalist and President of Citizens for Democracy, stating that he found to his horror in the Government Hospital, Guwahati, seven TADA detenus put in one room, handcuffed to their bed despite the fact that the room in which they were locked had bars and was locked. Outside a posse of policemen stood with guns on their shoulders. He was told by the detenus that they had to pay for their medicine from their own pockets. He approached the Court to intervene in the matter. The Court treated the letter as a Writ Petition on behalf of the detenus and called upon the State of Assam to reply. The State pleaded that the detenus were hardcore ULFA activists and earlier as many as fifty one detenus had escaped from custody including eleven terrorists from different hospitals and seven of them had escaped from Guwahati Medical College Hospital. Relying on the law declared in *Prem Shankar Shukla*²⁰ and *Suniti Barua*,²¹ the Court held that the detenus cannot be in a worse condition while in hospital under treatment as patients as compared to the jail, because while in jail, they were not handcuffed. The handcuffing and in addition tying the patients-prisoners with ropes when lodged in the hospital is inhuman and in utter violation of the human rights guaranteed under the International law and the law of the land.²² The Court observed that in order to safeguard against any attempt to escape extra armed guards can be deployed around the ward of the hospital where the detenus are lodged.²³ The Court issued a general direction that such handcuffing should be resorted to only with the permission of the Magistrate concerned granted after being satisfied that a particular prisoner is likely to jump jail or break out of the

¹⁸ Id. at 872

¹⁹ (1995) 3 SCC 743

²⁰ See Supra n. 17

²¹ See Supra n. 13

²² See Supra n. 19 at 750

²³ Ibid

custody.²⁴ I had the privilege of assisting the Court in this case on the request of the Court.

EXECUTION OF DEATH SENTENCE

One of the questions considered in *Deena @ Deen Dayal v. UOI & Ors*²⁵ was whether a sentence of death can be executed in a cruel, or degrading manner. The Court held that hanging by rope does not violate Art. 21 because it causes no greater pain than any other known method of executing the death sentence and that it involves no barbarity, torture or degradation.²⁶ The Court declared:

"The concern of law has to be to ensure that the various steps which are attendant upon or incidental to the execution of any sentence, more so the death sentence, do not constitute punishments by themselves. If a prisoner is sentenced to death, it is lawful to execute that punishment and that only. He cannot be subjected to humiliation, torture or degradation before the execution of that sentence, not even as necessary steps in the execution of that sentence. That would amount to inflicting a punishment on the prisoner which does not have the authority of law. Humanness is the hallmark of civilised laws. Therefore, torture, brutality, barbarity, humiliation and degradation of any kind is impermissible in the execution of any sentence."²⁷

In *Attorney General of India v. Lachma Devi & Ors.*²⁸ the Court declared that the execution of death sentence by public hanging would be a barbaric practice, clearly violative of Art. 21 of the Constitution. Very rarely, the Attorney General moves the Court suo motu challenging the judgement of a High Court. In this case, the Rajasthan High Court had directed execution of death sentence by public hanging at the stadium ground or Ramliia ground of Jaipur after giving wide-spread publicity through the media of the date, time and place of such execution. However, by a subsequent order the Court directed that the execution of the death sentence should be carried out in terms of the procedure provided in the Rules mentioned in the Jail Manual only, unless by that time any amendment was made in the rules. The Jail Manual did not contain any provision permitting public hanging. The Court declared:

"The direction for execution of the death sentence by public hanging is, to our mind, unconstitutional and we may make it clear that if any Jail

²⁴ Id at 751

²⁵ (1984) 1 SCR 1

²⁶ Id. at 58 and 59

²⁷ Id. at 59

²⁸ (1989) Suppl 1 SCC 264

PRISONERS' RIGHT TO LIFE AND LIBERTY

Manual were to provide public hanging, we would declare it to be violative of Article 21 of the Constitution. It is undoubtedly true that the crime of which the accused have been found guilty.... is barbaric and a disgrace and shame on any civilised society which no society should tolerate; but a barbaric crime does not have to be visited with a barbaric penalty such as public hanging. We should wholly and unconditionally delete the direction given by the High Court in regard to the execution of the death sentence by public hanging."²⁹

This pronouncement underlines that a condemned prisoner is entitled to die with dignity and he cannot be subjected to any barbaric manner of execution of death sentence. You are all aware of the reports about the manner in which Zulfikar Ali Bhutto was hanged.

CUSTODIAL CRIME

In *Raghubir Singh v. State of Haryana*,³⁰ the Court came across a case of murder of a suspect in police lock-up. Following a theft in some Officer's house, the police took into custody a few suspects and began to torture them as part of the process of investigation. One of the tortured suspects succumbed to his injuries. Medical examination revealed that death was caused due to asphyxiation. The police investigator was convicted under section 302, I.P.C. and awarded life sentence. The Supreme Court while dismissing the Special Leave Petition expressed its concern about the violation of human rights in police lock up. The court observed:

"We are deeply disturbed by the diabolical recurrence of police torture resulting in a terrible scare in the minds of common citizens that their lives and liberty are under a new peril when the guardians of the law gore human rights to death. The vulnerability of human rights assumes a traumatic, torturesome poignancy; the violation is perpetrated by the Police arm of the State whose function is to protect the citizen and not to commit gruesome offences against them as has happened in this case. Police lock-ups, if reports in newspapers have a streak of credence, are becoming more and more awesome cells. This development is disastrous to our human rights awareness and humanist constitutional order."³¹

²⁹ Id. at 264 and 265

³⁰ (1980) 3 SCC 70

³¹ Id. at 71

WOMEN PRISONERS

In *Sheela Barse v. State of Maharashtra*,³² the Petitioner, a Journalist, in a letter addressed to the Court complained of custodial violations of rights of women prisoners while confined in the lock-up. She had interviewed some women prisoners lodged in the Bombay Central Jail and learnt that they had been assaulted by the police. The Court treated the letter as a Writ Petition and called upon the I.G. prisons, Maharashtra, the I.G. police and the Superintendent of the Central Jail to answer. The Court also directed the director of college of Social Work, Bombay, to visit the Jail, interview the prisoners named in the complaint and submit a report. After perusing the report the Court directed that there should be separate lock ups for female suspects which should only be guarded by female constables. Female suspects should not be kept in a police lock-up in which male suspects are detained. Interrogation of females should be carried out only in the presence of female police officers/constables.³³ The Sessions judge should make surprise visits to the police lock-ups in the city periodically.³⁴ The magistrate before whom an arrested person is produced should inquire from him or her whether he or she had any complaint of torture or mal-treatment in police custody.³⁵ The prisoners should be provided legal assistance.³⁶

Right to health is a fundamental right flowing from Art. 21. It is available to all persons including prisoners. In *Pt. Parmanand Katara vs. Union of India*³⁷ the Supreme Court held that the State has an obligation to the patient whether he be an innocent person or be criminal liable to punishment under the laws of the society to preserve life. The laws do not contemplate death by negligence which tantamounts to legal punishment.³⁸ Under Art. 21 a doctor at the Government hospital is duty bound to extend medical assistance for preserving life.³⁹

*Tikaram & another v. State of Maharashtra*⁴⁰ is a case of alleged custodial rape. It is widely known as Mathura rape case. Mathura was a teenage girl at the relevant time. Her parents died when she was a child. She was living with her

³² (1983) 2 SCC 96

³³ *Id.* at 103

³⁴ *Ibid.*

³⁵ *Id.* at 104

³⁶ *Id.* at 103

³⁷ A.I.R. 1989 S.C. 2039

³⁸ *Id.* at 2043

³⁹ *Ibid.*

⁴⁰ (1979) 1 SCR 810

brother Gama. She developed intimacy with one Ashok. They decided to marry and left the place. Gama lodged a report at the police station alleging that Ashok and his people had kidnapped Mathura. The Head Constable called all of them to the police station. After talking to them he sent out Ashok and others, but asked Mathura to wait. Ashok and others waited outside the police station for Mathura to join them. The Head Constable took Mathura into a fatrine and raped her. Thereafter another constable fondled her private parts, but could not rape her as he was highly intoxicated. After some time Ashok and others grew suspicious and shouted. A crowd gathered at the police station. A complaint was lodged and she was examined by a doctor. The presence of semen was noticed on the girl's clothes. The two Policemen were tried for rape. They were acquitted by the Trial Court, but on appeal the High Court convicted them. The Supreme Court allowed their appeal taking the view that sexual inter-course took place with her consent.⁴¹ The judgment of the Supreme Court was severely criticised by women activists and others. Later on the law was amended by inserting section 114A in the Evidence Act providing for presumption as to absence of consent in certain prosecutions for rape. If the woman alleged to have been raped states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent. This presumption will arise only where sexual inter-course by the accused is proved and the question is whether it was with or without the consent of the woman. Simultaneously the Criminal Procedure Code was also amended providing for a trial in rape cases in camera.

PROCEDURAL SAFEGUARDS

In *Madhav Hoskot v. State of Maharashtra*⁴² the Supreme Court dealt with another facet of fair and reasonable procedure. The petitioner who was a Reader in Saurashtra University started issuing counterfeit degrees and was prosecuted for various offences including forgery. The Court convicted him but let him off lightly by sentencing him to simple imprisonment till the rising of the Court and some fine. Cross appeals were filed, one by the State for enhancement of sentence and the other challenging the conviction and sentence. The High Court allowed the State appeal and enhanced the sentence to three years R.I. while dismissing the appeal against conviction. This was in November, 1973. The appellant filed a special leave petition in the Supreme Court four years later. He explained the delay stating that a copy of the judgment pronounced in 1973 was granted to him by the High Court in 1978. The Court pointed out that the history of personal liberty is largely the history of procedural safeguards and one component of fair procedure is at least a single right of appeal on facts against

⁴¹ *Id.* 817

⁴² (1979) 1 SCR 192

conviction which is provided in the Criminal Procedure Code.⁴³ Article 21 mandates service of a copy of the judgement to the prisoner in time to file an appeal and providing free legal service to a prisoner who is indigent.⁴⁴ While dismissing the Special Leave Petition the Court gave general directions to trial courts and jail authorities.

In the area of basic human rights, the Supreme Court has made significant contribution by giving very liberal interpretation to the provisions of Part-III and in particular the fundamental right to life and personal liberty. No other fundamental right has received such expansive interpretation as this most basic right. However, it is a matter of deep regret that it is this very right which is violated most. Increasing incidence of custodial crime is a matter of serious concern to every citizen of India. The revelations in the on going inquiry into the custodial death of Rajan Pillai seem to indicate a deplorable state of affairs in the capital's most widely known jail. As more and more VIPs are being lodged in Tihar Jail, one has reason to hope that the conditions will improve. The Supreme Court alone cannot ensure protection of this precious right. It also depends on the Government, the police and the jail authorities.

So far I have dealt with the rights of prisoners as they exist in books, i.e. in the Constitution and the Judgments of the Supreme Court. Law on paper and the law in operation on ground are not always identical. The need for prison reforms has been felt since long. The National Police Commission (1977-80) looked into issues like arrest, detention in custody, interrogation of women and delay in investigation (which contributes to undue detention in custody of non-convicted persons). Besides highlighting the need to adhere to the law, the Police Commission made wide ranging suggestions for amendment of the law and procedures to cut down delays at the investigation and trial stage and to obviate custodial 'violence and lock-up illegalities. The NPC favoured a system of periodic visits to inspect and report on police lock-ups. The All India Committee on Jail Reforms (1980-83) chaired by Justice A.N. Mulla in his report observed that : "Overcrowded prisons, the prolonged detention of undertrial prisoners, unsatisfactory living conditions and allegations of the indifferent and even inhuman behaviour by prison staff had repeatedly attracted the attention of critics over the years. Unfortunately, little has changed. There have been no worthwhile reforms affecting the basic issues of relevance to prison administration in India." Not only the National Police Commission and the Mulla Committee but also Justice Krishna Iyer's Committee and the National Human Rights Commission have made numerous valuable recommendations to bring about improvements and reform in the jail administration and in the entire criminal justice system.

⁴³ Id. 203

⁴⁴ Ibid

In December, 1994 the Common Wealth Human Rights initiative organised a workshop on "BEHIND PRISON WALLS - POLICE, PRISON AND HUMAN RIGHTS" at Delhi. Delegates from Sri Lanka, Pakistan and Bangladesh also participated in the workshop. Subsequently a report on the workshop was published. It throws considerable light on the conditions prevailing in prisons in our neighbourhood. I am quoting a few lines about each country from the said Report to show that prisoners' rights are in jeopardy in all countries of the region.

PAKISTAN

"Third-degree methods are used for obtaining confessions. Torture in police custody has become the norm rather than an exception. Sometimes relatives of suspects are detained in police custody to force them to disclose the whereabouts of suspects or accused."

"Seventy five to eighty percent of women in jails were in for Hudood offences. (The Hudood ordinance promulgated during the regime of Zia-Ul-Haque lays down that if a victim of rape fails to prove her innocence, she is guilty of adultery). In some of the cases that went before the courts, the judge had to rule that the Hudood charge had been wrongfully made."

"Violence against women continued to worsen. A woman was raped every three hours, every other woman raped was a minor, and every fourth victim was gang-raped. In an increasing number of cases influential persons were involved in such crimes."

"Police excesses against women in custody were a routine. The Hudood ordinance came handy for taking women into custody and the requirement that a close examination of women should only be made by women and that arrested women should be transferred to judicial custody was customarily ignored."

BANGLADESH

"There are cases in which persons are arrested at random without warrants in contravention of Section 54 of the Criminal Procedure Code. This section, although innocent in appearance, has given the police power to detain whom they will."

"There are reports that the police, in its endeavour to complete a case successfully, often exerts pressure on the detainee with the result that the accused either suffers serious injury or expires due to 'heart failure'. Autopsies when carried out, if the state of the body so permits, often tell a different story. At a time when several human rights activists all over the world are striving to uphold human dignity at home, at work, in prison and elsewhere, prisoners of all categories continue to suffer horribly, particularly in the Third World. Bangladesh is no exception. Little is known about prison conditions and the

treatment of prisoners in Bangladesh and little has been done to ameliorate the conditions which, thanks to the efforts of a few non-governmental organisations, have been brought to light."

"While our socio-cultural system is distinctly unfriendly towards women, the male-dominated police force is affected by a gender bias in its attitude towards women undertrials and prisoners. The hostility is more pronounced where the female victim is poor, helpless and illiterate. Most police stations do not have female constables or officers, so that women usually find themselves at the mercy of male officers and constables. The power of the police is often beyond control by law or authority and becomes even more unaccountable since the state itself depends on these police powers and condones their misuse."

SRI LANKA

"Three factors have contributed to the incidence of custodial violence, the first is the possibility of keeping detainees incommunicado under national security laws. Secondly, there is no accountability for what is done while in custody. Thirdly, confession obtained while in custody are admissible in trials under these laws. When an alleged voluntary confession is marked as evidence, it is per se admissible. Without further proof, and on the basis of his or her confession alone, an accused can be sentenced. Further, the burden of proof that the confession may not have been voluntary is cast on the accused."

In the course of his inaugural address, Justice V.R. Krishna Iyer observed as follows: "The Indian Supreme Court has held that arresting and handcuffing a person offends his inherent dignity and is violative of his human rights. Notwithstanding the decision of the courts, the police have been manfully carrying on with their practice and, shall I say, the judges have been looking on nonchalantly as prisoners or arrestees are brought handcuffed, before them. The lawyers are often times indifferent to or insensitive to this unfortunate breach of human rights except when lawyers are handcuffed. We must seek activation of the benches and the bar. We need conscientisation of policemen and policewomen. We have to start a new era. How can that be achieved?.... Now I come to prisons. Look, behind the dark cells and tall bricks of law, because every edifice is made of bricks of law. What is happening there? Nobody knows. The outside world does not know. It is a cosmos by itself and sex or shall I say sex tourism is commonly flourishing inside prisons. Young persons are brought in and they circulate like currency notes. Sex and harassment occur inside prisons. Sex-strawed adult prisoners, sex terrorists are party to it.... What is a prison for? Is it to brutalise a person, to embitter him, to make him hostile or more hostile to society? or is it to redeem the inner being that is there in every person? We talk of dignity. Dignity is a materialist manifestation of

divinity. There is divinity in every person and a dignity in him or her. How are we going to protect this dignity and divinity in every person?"

The National Law School of India University, Bangalore has started Human Rights Orientation Course for Police Officers in the State of Karnataka. The Delhi University may consider starting similar Orientation Course for the benefit of prison officials including jail doctors, not only those manning Tihar Jail, but also others who are manning jails in different parts of the country. They should be made to feel that every prisoner is a human being and is entitled to live with dignity inside the jail also and it is the duty of jail staff to protect his basic human rights. In the ultimate analysis the people of India should be increasingly vigilant and zealously preserve and protect their basic rights. Eternal vigilance is the price of liberty!

NEED FOR A CONSTITUTIONAL REQUIREMENT OF EQUAL OPPORTUNITY IN EMPLOYMENT IN PRIVATE CORPORATIONS : AN INDIAN PERSPECTIVE

Carlos A. Austin*

INTRODUCTION

A number of socialist experiments have failed in the later part of the century. As a result, from Asia to Africa to Latin America one message has rung with a special resonance and meaning: governments do not manage economies very well. Countries the world over, are abandoning state-managed economies and embracing capitalist system. In India, the situation is no different. There is too much poverty and illiteracy and malnutrition. And there are not enough roads, ports, electricity and clean water, nor the financial capital to do anything about them. The government figured it had little choice but to submit to capitalism or see the country literally fall apart. But where the memory of colonial exploitation is only 50 years short, concerns abound regarding the "recolonization" of the nation by "unscrupulous capitalists". Few Indians have forgotten, India was in fact originally colonized by the English in the form of a multinational company, the East India Company. The ensuing economic anxiety has penetrated the Indian mindset and has in fact gone to the heart of the social and political fabric of the nation, its Constitution.

The Indian Constitution in several places provides for economic justice and equality of opportunity. The founders of the post-colonial state crafted a Constitution that envisioned a Government that would wield the majority of the economic power. They also provided mechanisms to help ensure that all the castes and classes in the country would have an opportunity to participate in the economy. Now that this economic power will be transferred to the private sector, is there any justification - whether based on constitutional grounds or public policy concerns - to insist that the private corporations also provide opportunities to all castes and classes of India? This paper responds to the question as to whether by way of constitutional or public policy arguments a case can be made for the application of some sort of equality of opportunity requirement for the impending Indian capitalist revolution.

Law Faculty, Columbia University, New York, U.S.A.

NEED FOR A CONSTITUTIONAL REQUIREMENT

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I : SOLUTIONS IMPOSED BY THE JUDICIARY

We must address one pervasive issue, before we begin direct analysis: the threshold issue of judicial review. To what extent and in what circumstances can an Indian court impose a judicial solution on a socio-economic problem? The concepts of judicial restraint and activism have been widely debated in each of the major common law jurisdictions. And the Supreme Court of India is no stranger to an activist stance in order to support the poor. It is understood that legislation is the preferred option to provide relief to the country's social and economic ills, but the judiciary also has a role to play. Justice Krishna Iyer expresses the Court's view:

"The best solution [is legislation], but when law-makers take far too long for social patience to suffer, courts have to make do with interpretation and carve on wood and sculpt on stone without waiting for the distant marble."¹

Article 37 of the Constitution asserts that it is the duty of the State to apply the Directive Principles in making laws. This is of course primarily understood to be applied to legislators. But the judiciary has also been incorporated as part of the State under Article 37 and hence has applied the Directive Principles when issuing judgements.² This view of judicial activism has been expounded by the Supreme Court in *State of Kerala v. T.P. Roshna*.³ The Court found a government plan of admission to medical school unconstitutional. It, however, provided suggestions for proper implementation, observing that merely striking down the statute would not have achieved justice, but rather would have aggravated the injustice. The Court states:

"The root of the grievance and the fruit of the writ are not individual but collective and while the 'adversary system' makes the judge a mere umpire, traditionally speaking, the community orientation of the judicial function, so desirable in the Third World Remedial jurisprudence, transforms the Court's power into affirmative structuring of redress so as to make it personally meaningful and

¹ *Sunil Barva v. Delhi Administration*, AIR 1978 SC 1548

² *Kesavananda Bharati v. State of Kerala* AIR 1973 SC 1461 at 1952 (Per Mathew, J.)

³ See also *State of Kerala v. N.M. Thomas*, AIR 1976 SC 490; *K.C. Vasanthia Kumar v. State of Karnataka*, AIR 1985 SC 1495 at 1502

⁴ AIR 1979 SC 765

socially relevant. Frustration of invalidity is part of the judicial duty; fulfillment of legality is complementary.⁴

The Court has found that in India's special circumstances judicial restraint will not always achieve justice, asserting, in fact, that if interests of the poor are at stake, jurisprudence should be proactive.⁵

It is with this backdrop of justice that we turn to the question posed in Section II.

II: CAN A PRIVATE CORPORATION BE CONSIDERED PART OF THE STATE?

In order to make the constitutional argument, there are two questions to address. The threshold issue would be whether private companies can be included in the definition of the State as per Article 12, in order that the relevant fundamental rights of Part III of the Constitution can be applied to them. Then, if certain fundamental rights can be applied, the question is whether or not equality of opportunity is significant enough, among those rights, to be applied to industrialists.

Article 12 of the Constitution defines the State as follows:

"Definition. In this Part, unless the context otherwise required, 'the State' includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India." [emphasis added].

The argument for a possible expansion of the traditional concept of the State lies in the words "other authorities." Can private corporate entities be included within this concept? Before analyzing whether expansion of the traditional concepts is reasonable, however, it is important first to review the case law regarding how the courts have viewed the scope given to the definition of the State.

The first case to address this matter was *University of Madras v. Shanitha Bai*.⁶ A woman was denied entry into a college at Udupi, which was affiliated

⁴ Id. at 776; [emphasis added]. See also *Pradeep Jain v. Union of India* AIR 1984 SC 1420; *Dinesh Kumar v. Moti Lal Nehru Medical College*, AIR 1985 SC 1059 and AIR 1986 SC 1877; *K.C. Vasantha Kumar v. State of Karnataka*, AIR 1985 SC 1495.

⁵ In *Peoples Union for Democratic Rights v. Union of India* AIR 1984 SC at 1478, Justice (later Chief Justice) Bhagwati wrote that "the time has now come when the courts must be the courts of the poor and struggling masses of the country. They must shed their character as upholders of the status quo."

⁶ AIR 1954 Mad 67

with the University of Madras. The University had instructed all institutions affiliated with it not to allow female students without its permission so that it could ensure that proper facilities were available for them. The lower court found that the order had violated Article 15(1)⁷ of the Constitution. The High Court, however, reversed on the grounds that Article 15(1) is only applicable to the "State". The Court understood that "other authorities" should be interpreted consistently with the principle of "*ejusdem-generis*." Therefore, since each of the entities quoted before "other authorities" in Article 12 are authorities exercising governmental functions, other authorities should also share that quality. As a university does not, it cannot be considered as included within the definition of the State.

The Supreme Court subsequently overruled the *University of Madras* case in *Rajasthan State Electricity Board v. Mohanlal*.⁸ Here, the petitioner respondent claimed that his right to equality under Articles 14 and 16 was violated because a worker with less seniority had been promoted before him. The court first had to address the question as to whether the Electricity Board was the State according to Article 12. The appellant, relying on the logic of the *University of Madras* decision, claimed that the Electricity Board did not exercise any governmental function or sovereign power, but was engaged in commerce. The Court thought the rule of "*ejusdem-generis*" inapplicable, as there was no common genus running through each of the entities cited in Article 12. The Court instead relied on the dictionary meaning of authority, "a public administrative agency or corporation having quasi-governmental powers and authorized to administer a revenue producing public enterprise."⁹ The court went on to suggest that "all bodies created by a statute on which powers are conferred to carry out governmental or quasi governmental functions"¹⁰ can be considered "other authorities" under Article 12.

The Court did not expressly limit the application to such bodies, but the Court did impose such a requirement in *Sukhdev Singh v. Bhagaram*.¹¹ Employees of the Industrial Finance Corporation, the Life Insurance Corporation and the Oil and Natural Gas Commission claimed that their fundamental rights under Articles 14 and 16 were violated, because their discharge was against the company's regulations. In considering the question, the Court held that other authorities must satisfy a sovereign power requirement

⁷ Article 15(1) states "The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them."

⁸ AIR 1967 SC 1857

⁹ Id. 1862

¹⁰ *Ibid.*

¹¹ (1975) 1 SCC 421

to be considered as State, claiming that each of the corporations were incorporated by statute empowering them to make regulations. This statute, it was argued, gave their regulations the force of law. In a separate opinion, Justice Mathew argued for an expansion of the concept of the State to bodies wielding power due to the changing nature of the economy. He explained that the Constitution provided that individuals' fundamental freedom should be protected against the intrusion of the Government because the State was seen to wield great power. The state was not only expected to wield great judicial, executive and legislative power, but also the founders foresaw a State that would be heavily involved in commerce as permitted in Article 298.¹² Justice Mathew went on to argue that since the economy had evolved into one where the State did not directly wield the economic power, the constitutional limitations must be applied to those that did—the government companies. He then suggested that any company that was an instrumentality of the State should not be permitted to infringe upon fundamental freedoms. In this 1975 case, Justice Mathew did however, deny the application of Article 12 to private corporations. The agency and instrumentality test as originally asserted by Justice Mathew was first applied to a government corporation in *Som Prakash Rekhi v. Union of India*.¹³ In this case the Court adopted the five criteria test for designating an organisation as an instrumentality of the State derived from *R.D. Sherry v. International Airport Authority*.¹⁴ In the *Som Prakash* case the Court derived the following five guidelines:

- i. One thing is clear, that if the entire share capital of the corporation is held by the Government, that would go a long way towards indicating that the corporation is an instrumentality of Government.
- ii. Existence of 'deep and pervasive State Control may afford an indication that the Corporation is a state agency or instrumentality.'
- iii. 'It may also be relevant factor... whether the corporation enjoys monopoly status which is State conferred or state protected.'
- iv. 'If the functions of the corporation are of public importance and closely related to governmental functions, it would be a

¹² Article 298 states "The executive power of the Union and of each State shall extend to the carrying on of any trade or business and to the acquisition, holding and disposal of property and the making of contracts for any purpose"

¹³ *Som Prakash Rekhi v. Union of India* (1981) 1 SCC 449.
¹⁴ (1979) 3 SCC 489

relevant factor in classifying the Corporation as an instrumentality or agency of Government.'

- v. 'Specifically, if a department of Government is transferred to a corporation it would be a strong factor supportive of this inference of the corporation being an instrumentality or agency of government.'¹⁵

The Court went on to explain that no one factor was conclusive, but it was the cumulative effect of all the factors taken together.

This case set the foundation for the interpretation of the words "other authorities" of Article 12. Since the *Som Prakash* case, the Supreme Court has had several cases that have required it to determine whether a government company is the State within the scope of Article 12 and has not hesitated to act under the proper conditions as it did then.¹⁶

The underlying rationale for the expansion of the concept of the State into the agent or instrumentality of the state doctrine was rooted in the changing nature of the economy. Justice Mathew wrote his opinion in the *Sukhdev Singh* case in 1975. Therefore, a review of two sets of changes in the economy is in order: first, a review of the changes in the economy to which Justice Mathew referred and second, the changes since his opinion. If the logic of Justice Mathew's opinion is applied, the changes since the 1975 opinion will indicate that a fundamental shift in the doctrine may be in order to preserve the purpose of Part III of the Constitution—the protection of individual rights.

III: A REVIEW OF THE ECONOMY

The economic policies of India were developed by its first Prime Minister, Pandit Jawaharlal Nehru. His view of India would be predominantly a socialist one. "The key to the solution of the world's problems and of India's problem lies in Socialism, and when I use this word I do so not in a vague humanitarian way but in the scientific economic sense.... I see no way of ending the poverty, the vast unemployment, the degradation and subjection of Indian people except

¹⁵ See supra n. 13 at 471

¹⁶ In *A.L. Kalia v. Project and Equipment Corporation* (1984) 3 SCC 316, on the basis of the respondent's own concession and the court's finding of instrumentality, the Supreme Court found the government company to be the State. The corporation was a subsidiary of State Trading Corporation, which was government of India undertaking, separated and itself became a government of India undertaking. Hence, this government company was determined to be the State.

through socialism."¹⁷ Nehru sought to achieve these goals by creating a mixed economy, with the State playing the dominant role in industries important to the national interest, while the private sector existed only in non-critical areas. "I have no shadow of doubt that if we say 'lop off the private sector', we cannot replace it adequately... Where there is such a vast field to cover, it is foolish to take charge of the whole field, when you are totally incapable of using that huge area yourself. Therefore you must not only permit the private sector but I say encourage it in its own field."¹⁸

In attempting to avoid the concentration of economic power in a few hands, Nehru, and the other founders of the post-colonial state, thought that government involvement in certain key industries would reconcile economic development with distributive justice.

Gradually, the principles of a mixed economy came to be practiced in a form of state capitalism. The government would set up statutory companies and government companies in order to manage and produce the goods and services of strategic importance to the nation more efficiently. This policy would enable the Government to harness a group of professional managers and talent while maintaining operational autonomy from the State. The State could ensure that the public's interest in strategic industries was maintained because the government was to still keep ultimate control and responsibility of the entities. The change then was not to be seen as structural. The public sector was primarily in infrastructure-basic and capital goods industries e.g. steel, heavy machinery, fertilizers- instead of consumer goods. Due to the long gestation periods, low returns on investment and large initial investments, the government found that it was, at a minimum, important to involve itself in these critical industries. The forgoing changes are those to which Justice Mathew referred.

After the *Sukhdev* case, very minor economic reforms were begun by Indira Gandhi when she returned to power in 1980. Her son, Rajiv Gandhi, expanded these reforms in the latter half of the 1980's under the New economic policy. He

¹⁷ In *central Inland Water Transport Corporation v. Brojo Nath Ganguly* (1986) 3 SCC 156, the government owned all shares, and managed the company. The company performed an important public function of river navigation and hence found to be the State.

¹⁸ In *Star Enterprises v. CIDC of Maharashtra Ltd.* (1990) 3 SCC 280 the government company again determined to be the State.

¹⁹ In *Lamba Industries v. Union of India* (1991) 2 SCC 407 the Court found that whether a government company can be an authority within the meaning of Article 12 is no longer a relevant question. It is a settled fact of law.

²⁰ Bhuleshkar, Ashok V, *Indian Economic Structure and Policy*, (1982), p. 5. Id. at p. 22.

altered the pattern of industrial production, thereby stimulating a short-lived economic boom.

The most drastic structural shifts to the economy occurred in 1991. At the time, there were several factors operating to encourage such changes. The foreign exchange reserves were particularly low, standing at approximately \$1 billion, which was insufficient to meet the import bill for more than 2 weeks. Imports for the nation were on the rise, as were import costs due mostly to increases in the cost of oil following the Gulf War. The War also precipitated a sharp fall in remittances from abroad. Moreover, non-resident Indians began significant withdrawal of foreign exchange deposited in the country. India's borrowing from private parties had reached a level at which the nation's ability to make repayments was uncertain. Hence, the country's creditworthiness was in question by international credit rating agencies, making private foreign creditors reluctant to lend more funds.

Then Prime Minister Narasimha Rao and his economic advisers believed that balance of payments problem was due to the Indian currency and other prices being fixed by the State. Therefore, they determined that the State should withdraw from all economic activity, except where absolutely necessary. This withdrawal marked the origins of the dismantling of the public sector enterprises. The Government decided that the economy must be left primarily to private sector companies. It ended the government monopoly in many areas of the economy previously considered fundamental to the national interest. The Government liberalized foreign investment rules, allowing investment on power, roads, ports, telecommunications, etc. In short the Government had realized it must employ economic policies that made the most efficient use of resources. As a result, it must rely on the market, and not itself, to allocate resources. Foreign investors would also help the Government to come to this realization because the Government would not be able to lure these investors without a capitalist economy.

It is also important to note that this structural change is not an aberration engineered by one political leader. It has become the consensus of the political leaders of India across all of the political parties with widespread support. The Economist reports.

"At the state and national level, all parties are now united around ...basic propositions:

-Liberalization: We must attract more private and foreign investment, because the state is bust and the public sector can therefore no longer control the economy"¹⁹

¹⁹ The Economist, April 27, 1996, p. 22.

through socialism."¹⁷ Nehru sought to achieve these goals by creating a mixed economy, with the State playing the dominant role in industries important to the national interest, while the private sector existed only in non-critical areas. "I have no shadow of doubt that if we say 'lop off the private sector', we cannot replace it adequately... Where there is such a vast field to cover, it is foolish to take charge of the whole field, when you are totally incapable of using that huge area yourself. Therefore you must not only permit the private sector but I say encourage it in its own field."¹⁸

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After the *Sukhdev* case, very minor economic reforms were begun by Indira Gandhi when she returned to power in 1980. Her son, Rajiv Gandhi, expanded these reforms in the latter half of the 1980's under the New economic policy. He

In *central Inland Water Transport Corporation v. Brojo Nath Ganguly* (1986) 3 SCC 156, the government owned all shares, and managed the company. The company performed an important public function of river navigation and hence found to be the State.

In *Star Enterprises v. CIDC of Maharashtra Ltd.* (1990) 3 SCC 280 the government company again determined to be the State.

In *Lamba Industries v. Union of India* (1991) 2 SCC 407 the Court found that whether a government company can be an authority within the meaning of Article 12 is no longer a relevant question. It is a settled fact of law.

¹⁷ Bhuleshkar, Ashok V., *Indian Economic Structure and Policy*, (1982), p. 5.

¹⁸ Id. at p. 22.

altered the pattern of industrial production, thereby stimulating a short-lived economic boom.

The most drastic structural shifts to the economy occurred in 1991. At the time, there were several factors operating to encourage such changes. The foreign exchange reserves were particularly low, standing at approximately \$1 billion, which was insufficient to meet the import bill for more than 2 weeks. Imports for the nation were on the rise, as were import costs due mostly to increases in the cost of oil following the Gulf War. The War also precipitated a sharp fall in remittances from abroad. Moreover, non-resident Indians began significant withdrawal of foreign exchange deposited in the country. India's borrowing from private parties had reached a level at which the nation's ability to make repayments was uncertain. Hence, the country's creditworthiness was in question by international credit rating agencies, making private foreign creditors reluctant to lend more funds.

Then Prime Minister Narasimha Rao and his economic advisers believed that balance of payments problem was due to the Indian currency and other prices being fixed by the State. Therefore, they determined that the State should withdraw from all economic activity, except where absolutely necessary. This withdrawal marked the origins of the dismantling of the public sector enterprises. The Government decided that the economy must be left primarily to private sector companies. It ended the government monopoly in many areas of the economy previously considered fundamental to the national interest. The Government liberalized foreign investment rules, allowing investment on power, roads, ports, telecommunications, etc. In short the Government had realized it must employ economic policies that made the most efficient use of resources. As a result, it must rely on the market, and not itself, to allocate resources. Foreign investors would also help the Government to come to this realization because the Government would not be able to lure these investors without a capitalist economy.

It is also important to note that this structural change is not an aberration engineered by one political leader. It has become the consensus of the political leaders of India across all of the political parties with widespread support. The Economist reports:

"At the state and national level, all parties are now united around ...basic propositions:

-**Liberalization:** We must attract more private and foreign investment, because the state is bust and the public sector can therefore no longer control the economy"¹⁹

¹⁹ The Economist, April 27, 1996, p. 22.

The march 8th, 1997 edition of The Economist again hails that

...[t]he latest Indian Budget, announced on February 28th, seems to mark a final break with India's traditional insistence on creating its own form of socialism. Instead, the country is moving towards the more pro-business policies associated with the booming economies of the Association of South-East Asian Nations (ASEAN).²⁰

The changes in the economy to which Justice Mathew referred altered the form in which the Government did business. The changes since then have shown a fundamental restructuring of the economy in India. The economy will no longer be centrally planned. The Indian socialist experiment has ended. The massive changes that have occurred in the economy since the rationale behind the case law on the doctrine of the agent and instrumentality of state was developed, indicate that a fundamental shift in the doctrine is required to continue to protect individual rights. As India continues to dismantle the governmental apparatus in the name of efficiency and to reduce the budget deficit, it will at the same time rid itself of the economic power that the founders envisioned it would maintain. The five criteria test stated explicitly in the *Som Prakash* case is based on the concept of a strong government player dominating the economy by varying means- either by the statutory company or by the Government company. Now that the government is shedding its previous policy of guiding the economy from central planning to the invisible hand of the market, are the constitutional goals of economic fundamental rights to be only applied to the shell of the government of India? Without the application of economic rights in some form to the private sector, the constitutional promise of equality of opportunity will soon become hollow. The review of the changes in the economy discussed in this section has allowed us to set the stage to now more fully amplify the arguments begun in the previous section.

It is possible to provide a structure for the government to reach at least some of the goals of the founders in connection with the economy. Guidelines should be developed in order to ascertain the nature and benefits of a private player's dominance of the economy. If a private corporation or industry is found to be sufficiently powerful, it could then be considered as part of the State under Article 12. Any such guidelines should consider matters such as number of employees, the company's gross sales as a percentage of industry sales, industry sales as a percentage of GDP, and other criteria that indicate ability to amass great power over the economy and the economic rights of Indians. At this stage, the Court can determine which of the rights are most fundamental and, hence, which rights must not be violated by the private corporation.

²⁰ The Economist, March 8, 1997, p.29.

The Court has had few opportunities to consider this question. In fact the question as to whether private companies can be considered as part of the State under Article 12 has been considered at length in only one case, *M.C. Mehta v. Union of India*.²¹ Shriram Foods and Fertiliser Industries was seeking to restart its power plant and manufacture caustic soda, chlorine and its by-products. It was claimed by the community that the private company's operations were hazardous to the health and welfare of the residents. The company's action was questioned in Supreme Court under Article 21.²² Therefore, the Court was called upon to ascertain whether a private corporation could be considered as State as a threshold question to whether Article 21 could apply. Ultimately, it left the question unanswered, but the Court did provide some helpful analysis.

The Court reviewed the State's concept of the national economy. The industrial policy Resolution, 1948 laid the foundation of the State's position and provided that the State should play a progressively greater role in the economy. However, with the passing of a few years and key events (such as the nationalization of the Life Insurance Companies, which created uncertainty in markets) a clarification in State policy was required.²³ This was done in the Industrial Policy Resolution enacted by the Government in 1956. This Resolution divided the industrial economy into three categories: Industries in category one were to be exclusively the responsibility of the State; industries in category two were to be progressively owned by the State until such time as the private corporation could supplement the State's efforts; industries in category three would include the remaining industries, which were to be left to the private sector initiative. The objective of this resolution was to be impelled by way of the Industries (Development and Regulation) Act of 1951. The first schedule of the Act identifies the industries which the State would control due to the public interest at stake.

In analyzing the Resolution and the Act of 1951, the Court noted that the production of fertilizers and chemicals, the primary activity of the defendant, Shriram Foods and Fertiliser Industries, was of national interest. The State was to perform these activities, except during an interim period, when private companies under State regulation would be allowed to participate. It was clear to the Court that the activities performed by the defendants were indeed in the national interest and hence the Court considered the ramifications of the United States doctrine of "State action".

²¹ AIR 1987 SC 1086.

²² Article 21 states "No person shall be deprived of his life or personal liberty except according to procedure established by law."

²³ See Pattanshetri, C.C., *The Dimensions of India's Industrial Economy*, (1967), p. 12

In general, the individual rights guaranteed under the United States Constitution are protected against violation by the State and not private parties. Therefore, there must be a "State action" for a person to invoke the protection of the Constitution for violation of individual rights. However, a private party's act can be considered a "State action" if it meets certain requirements, defined by the "public function" and "State involvement" doctrines. Under the public function doctrine, if a private person is engaged in an activity seen as governmental in nature, the private person can be deemed to be an organ of the State. As an agent of the State, the private party can then be held to violate individual rights held under the Constitution. Under the State involvement doctrine, if a State is found to be sufficiently involved in the private party's activities, then the private party can be deemed to be a State. Involvement can include the State encouraging, benefiting from, or highly regulating the private actor's activities.

*Concurring with both the R.D. Shetye case*²⁴ and Justice Mathew in *Sukhdev v. Bhagatram*,²⁵ the Supreme Court in *M.C. Mehta v. Union of India*,²⁶ argued that a body performing a public function or business in the public interest is acting in a governmental capacity. The court observed:²⁷

"[I]nstitutions engaged in matters of high public interest or public functions are by virtue of the nature of the function performed government agencies. Activities which are too fundamental to society are by definition too important not to be considered government functions."

However, the Court did not decide on whether or not the United States State Doctrine is applicable within India. The counsel for the plaintiff and the Court both pointed out obvious difference: while the United States doctrine grew out of the inability to address racial discrimination by private persons, the Indian Constitution contains Article 15(2)²⁸, and hence the United States

²⁴ See supra n.14

²⁵ See supra n.11

²⁶ See supra n.21

²⁷ *Id.* at 1094.

²⁸ Article 15(2) provides that "no citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subjected to any disability, liability, restriction or condition with regard to :

- a) access to shops, public restaurants, hotels and places of public entertainment; or
b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of general public.

historical context from which the doctrine arose is unhelpful in the Indian analysis. But the doctrine's principle is relevant—"State aid, control and regulation [can] so impregnate a private activity as to give it the colour of State action."²⁹

Chief Justice Bhagwati raised a significant issue during his analysis. His Lordship observed:³⁰

"Prima facie it is arguable that when the State's power as economic agent, economic entrepreneur and allocator of economic benefits is subjected to limitation of fundamental rights, why should a private corporation under the functional control of the state engaged in an activity which is hazardous to the health and safety of the community and is imbued with public interest and which the State ultimately proposed to exclusively run under its industrial policy, not be subject to the State limitations.

We can see the question of whether a private corporation engaged in business in the public interest should be allowed to violate the citizenry's fundamental rights can be analyzed from two perspectives. The State action doctrine articulates one perspective. Why should a private corporation engaged in business in the public interest be exempted from constitutional limitations? The other perspective considers the difference between the government corporation and the private corporation. Are they always clearly distinguishable? An analysis of the Companies Act and associated case law will make it clear that the two—government corporation and private corporation—are treated substantially the same. Moreover, such an analysis will show that the line between a government and non government company is not always very clear. The major difference involves what is obvious—the major shareholders are different but the tasks performed are quite similar and the manner in which they are held accountable is substantially the same.

IV: GOVERNMENT COMPANIES AND NON-GOVERNMENT COMPANIES: UNDERSTANDING THE SIMILARITIES

According to the Companies Act, 1956 a company is created when "formed and registered under" the Companies Act.³¹ The certificate of incorporation brings the company into existence and is "conclusive evidence that all the

²⁹ See *Supra* n. 21 at 1097.

³⁰ *Ibid.*

³¹ Section 3(1)

requirements of the Act have been complied with."³² The major kinds of companies are private, public, foreign and government companies.

Section 3(1)(iii) of the Companies Act, 1956 defines a private company. It provides that certain restrictions on the transferability of shares, on membership, and on the prohibition of the issuance of a prospectus must be included in the articles of association³³ for a company to be private. The creation of a private company only requires a minimum of two subscribers to the memorandum of association.³⁴ Since a private company is prohibited from issuing a public prospectus, the public is not allowed to invest in a private company. A public company by contrast and by definition is not a private company. Hence, it is not limited in these ways.

A foreign company is a company that is incorporated outside India, with a place of business in India.³⁵ A place of business has been given judicial interpretation,³⁶ but such a place is required in order to have a place for service of process. Within thirty days of arrival, the foreign company must file certain documents describing relevant details³⁷ with the Registrar of the State where the principal place of business is located and with the Registrar in Delhi.

A government company is defined as follows:

"any company in which not less than fifty-one per cent of the paid-up share capital is held by the Central Government, or by any State Government or Governments or partly by the Central Government and partly by one or more State Governments and includes a company which is the subsidiary of a company thus defined."³⁸

In addition to the kinds of companies mentioned above, there is now a recognised hazy third category between the private and the public company. A

³² Section 35

³³ The articles of association set forth the rules and conditions upon which the corporation is founded.

³⁴ The memorandum of association contains the specific objects for which a corporation is established, outside of which it is illegal to operate.

³⁵ Section 591

³⁶ *A/s Dampskib 'Hercules' v. Grand Trunk Pacific Rly Co.*, [1912] 1 Kb 222; *South India Shipping Corp Ltd. v. Export Import Bank of Korea*, [1985] 2 All ER 219 Ch. D; *P.J. Johnson v. Astrofial Armadorn*, [1989] 3 Comp LJ5, 10 Ker.

³⁷ Section 592 provides that the foreign company must provide a certified copy of the company charter, statutes or memorandum and articles; the full address of the registered or principal office; a list of the directors and the secretary; representatives resident in India; and the address of the principal place of business in India.

³⁸ Section 617

private company can be treated as a *deemed public company*. A private company can be converted into a deemed public company by choice, by default, and by operation of law. A private company becomes a deemed public company by choice, when it passes a special resolution removing from its articles of association the Section 3(1)(iii) requirements.³⁹ A private company becomes deemed public company by default, when it does not comply with requirements of Section 3(1)(iii) summarized above. To quote the Act: "[w]hen a default is made in complying with any of those provisions, the company shall cease to be entitled to the privileges and exemption conferred by or under the Act."⁴⁰ The entire Companies Act would then apply to the converted private company as if it were not private. A private company can be converted by operation of law under four conditions. This conversion can occur, first, when 25% or more of the capital of the private company is owned by public companies; secondly, when the annual turnover of the company exceeds Rs. 10 crores;⁴¹ thirdly, when the private company owns at least 25% of the paid up capital of a public company; or fourthly, when the private company advertises and then accepts or renews a deposit from the public.⁴²

The legal recognition of a third category of company between public and private is recent.⁴³ The Supreme Court asserted that it is fairly wrong to conclude that as a public company is defined as one that is not private, they must be considered mutually exclusive categories.⁴⁴ Chief Justice Chandrachud then searched the Act and described companies that retained characteristics of both private and public companies⁴⁵ as deemed public companies.

It should also be evident that the category of government company is not mutually exclusive either. The Act's definition of a government company is "any company" which has 51% of its capital from government sources entails that they could be government companies that are public or even foreign. In the

³⁹ Section 44(1)

⁴⁰ Section 43

⁴¹ Or, approximately US\$ 2.86 million

⁴² Section 43-A

⁴³ *Needle Industries (India) Ltd. v. Needle Industries (India) Holding Ltd.*, [1981] 3 SCC 333 at pp. 416-417; (1981) 51 Comp Cas 743.

⁴⁴ The precedent relied on by the advocate for the inappropriate assertion was *Paré v. Royalites Syndicate Ltd.* [1912] 1 KB 330; 81 LJ KB 313; 106 LT 184. The Court there suggested that there was no intermediate position between a private and public company.

⁴⁵ For instance a private company deemed public may maintain certain characteristics of a private company from which a public company is prohibited. And again, the membership of a private company deemed public may retain less than seven members whereas a public company may not.

case of a public company, the other 49% of the capital would simply be held by the public. Perhaps, the company would have been solely public. Then a government entity could choose to purchase 51% of the capital outstanding, keeping the remainder in public hands. In the case of a foreign company, the Government of India could choose to invest in a company incorporated outside India with a place of business inside the country.

The court was required to determine the status of a government company which also had characteristics of a foreign company in *River Steam Navigation Co. Ltd. Re*.⁴⁶ Incorporated in England, the River Steam Navigation Co. Ltd. had a river transport business between Calcutta and Assam. Business had declined as a result of the Indo-Pak conflict. Since the Government of India considered the business as of strategic importance, it invested in the company. But despite government investment, a creditor applied for a winding up order. The Court had to address the threshold issue of whether the company was a foreign or government one. The Court conceded that the company did fit both descriptions. It stated that "it is possible to conceive a company which satisfied the test in both and therefore be at once both a government company and foreign company". The Court decided that as a result of procedural problems in applying certain conflicting provisions of the Act, the company should be deemed a government one. In addition, the Court found even more convincing the fact that the Act claims that "any company" fitting the relevant description is a government one.

But, it is critically important to note that the line between government and non government companies is not always clear. It can even be argued that they are hazy areas between not only the public and the private company, but also between the government and the public or the government and the foreign companies. Due to the Government's ability to incorporate companies under different provisions, several hybrids are possible. S. Krishnamurthi explains that "there are government companies which are private companies, deemed public companies, non profit companies, public companies, subsidiary and holding companies."⁴⁷

The entire companies act applies to the government company as to any other, except for certain selective invoked exemption that the Government can invoke under Section 620(1) of the Act. The rationale for allowing certain exemption is that the government company already has certain controls over its affairs. Therefore the Government achieves accountability over some of its

⁴⁶ (1967) 2 Comp LJ 106 Cal.

⁴⁷ Krishnamurthi, S., Law and practice Relating to Government Companies, (1982) 47

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affairs in a procedurally different manner, while achieving the same substantive goal. S. Krishnamurthi again asserts:

"The obligations cast on the public limited companies in the private sector, that is, to safeguard public interest, and the interest of the shareholders is already more than served by the various forms of control on the affairs of the government companies. Further the dichotomy between the corporate personality and the individual personalities of the shareholders which is markedly present in the case of private sector companies does call for a greater degree of vigilance on the part of shareholders and the government over the affairs of these companies. In the case of private sector companies proposals for the reduction of capital and amalgamation of two or more companies are subject to the examination of the courts. But in the case of government companies such decisions are taken by the administrative ministry, they are examined by the Central Government in the Department of Company Affairs instead of the court with a view to simplifying the procedures."⁴⁸

As shown in the foregoing analysis, the law treats the two entities, the government company and the private corporation, largely the same. And the lines between the two are not always crystal clear. In fact several hybrids exist. Now we can consider Chief Justice Bhagwati's question about why the two should be treated differently when violating fundamental freedoms. A corporation that has 51% paid up capital is a government corporation, but suppose this ownership was totally in the form of preferred non-voting shares. Such a corporation for all intents and purposes is in the hand of private stockholders and private management, since the government cannot vote on any matter at any point, suppose further that this government corporation is a public utility with exclusive rights to a region. Despite the need for a shift from the agent and instrumentality test to a more expansive concept to include powerful private corporations, if the test is employed, this government company could arguably be considered as State. A public utility would have heavy government regulations evidencing a "deep and pervasive State control." The corporation would have monopoly status. Moreover, it would be operating in a sphere "of public importance and closely related to government functions." Three out of the five criterion would thus be met. Such examples indicate the obscurity of the line that exists between the government and private corporation.

This obscurity is reminiscent of the issue at stake when the difference between the statutory and government companies were being considered by the

⁴⁸ Id. at 48.

Court in application of the concept of State for purpose of Article 12. In the *International Airport*⁴⁹ decision the Court propounded:

"Where constitutional fundamentals, vital to the survival of human rights, are at stake, functional realism, not facial cosmetics, must be the diagnostic tool. Law, constitutional law, seeks the substance, not merely the form."

And again in *Managing Director, U.P. Warehousing Corporation v. Vijay Narain Bajpayee*⁵⁰ the Court's attempt "to confine the applicability of the equality clauses of the Constitution, in relation to matters of employment, strictly to direct employment under the government, is perhaps to mock at the Constitution and at the people."

The *M.C. Mehta* decision, makes clear that the court is struggling with the propriety of looking through the reality underlying the private corporate entity. We need to remember that the State has structurally changed the economy and its own position within it. But, initially, the State involved itself in these industries because of the high level of public interest at stake and the distrust of the private profit motive. Now across the political spectrum this distrust has to an extent subsided but the country's need to protect the public interest in certain industries has not. The State action doctrine will not fully protect individual rights due to the shift in the methods by which a State manages the economy. The application of the American doctrine is limited and hence permits the State to ensure that only some of the large players in the economy protect individual rights.

The Supreme Court in *M.C. Mehta* case appeared to agree with the view expressed in *R.D. Shetty* case in determining whether a corporation is engaged in a business activity in the public interest. The Court acknowledged that this determination should be based on current perception, rather than past. As mentioned in the Industries (Development and Regulations) Act of 1951, the Government had derived a comprehensive list of industries in which the State should progressively engage to protect the public interest. In the past, the State determined who would be the economic power brokers in the nation by planning which industries would develop and at what pace; by controlling the amount that industries would be able to sell on the market and hence how much they would contribute to GDP, and as a derivative effect, by controlling how many employees an industry could employ. Now the market forces will take over the management of the economy. In 1951, the State assessed which industries were in the country's interest. The focus now should be on which industries the market sees as critical to the nation's development for the future.

⁴⁹ See supra n.14

⁵⁰ (1980) 3 SCC 459

Very few would argue against the notion that the building of the country's infrastructure like roads, ports and electricity are still very much in the country's interest.⁵¹ But those firms that will own the infrastructure will only be part of the list of private corporations that will grow large and powerful. The industries that should be added to this list are those that have demonstrated its comparative advantage in the Indian and international marketplace. Those industries and companies that are most competitive and efficient. These will turn out to be the industries and companies that will be the most powerful, influential and profitable.

If the Court does find the argument that to preserve certain fundamental rights of Indians, private corporations should be considered part of the State acceptable then following the Court's logic, it must determine which industries today are in the public interest and make them subject to these constitutional limitations. To return to the language of Justice Mathew in the *Sukhdev* case, it is important to understand who now wields the economic power that the founders intended the State to maintain. Therefore, in its economic regime of privatization, to convert the 1951 specified list of industries into a present day equivalent with adaptability to the future, some sort of criterion test—such as number of employees, company's gross sales as a percentage of industry sales, industry sales as a percentage of GDP—should be employed.

V. RIGHT TO LEVELHOOD AND OPPORTUNITY OF EMPLOYMENT

Once the Court is willing to consider certain powerful private corporations as the State under Article 12, it is still necessary for it to deem that the fundamental right of equality of opportunity be specifically applied. In *M.C. Mehta* case the Apex Court does not seem to suggest that even if a private corporation is deemed to be State, all fundamental rights of Part III of the Constitution should be applied to it. The Court asserts :

⁵¹ In a speech presented by the former Prime Minister Mr. Deve Gowda at the Opening Plenary of the Asia Society's 8th Annual Corporate Conference- "Moving to the Market: Sustaining Reforms in India and Asia" on March 6, 1997 p. 9, he states:

"Another major challenge of sustaining [economic] reforms lies in the area of infrastructure: the pace of economic growth depends crucially on the augmentation of infrastructural facilities—such as roads, ports, telecommunication and power in line with the needs of a growing economy. Obviously, these are non tradable. The infrastructure of India... is proving to be grossly inadequate for a rapidly transforming economy. Reform of the infrastructure sector is, thus, high on the agenda."

"that it is not correct to say that in India once a corporation is deemed to be 'authority,' it would be subject to constitutional limitation of fundamental rights in the performance of all its functions and that the appellation of 'authority' would stick to such corporation, irrespective of the functional context."⁵²

While it is immediately logical that one would consider the fundamental rights asserting opportunity for ordinary citizens in the economy to be dominant player of the economy, the Courts have already established the necessary connections. First, one should note that what was at stake in the *M.C. Mehta* case was the most critical of the fundamental rights, namely, the right to life. The Article in question was Article 21, which states that "No person shall be deprived of his life or personal liberty except according to procedure established by law." But the Supreme Court has found that the right to life and the right to livelihood are inextricably tied. And in the technologically advanced and service oriented global economy of the twenty-first century, which India plans to join, the right to livelihood will not be found in the government employment. Therefore, it will be necessary for the seeds of opportunity for all citizens to be grounded in the important industrial sectors of the future.

In a significant case, *Oiga Tellis v. Bombay Municipal Corporation*,⁵³ the Supreme Court established that the right to life must include the right to livelihood. The Court claimed that if it did not, one could not sustain oneself and the loss of life would soon be followed by the loss of livelihood. More recently, the Supreme Court in *Narendra Kumar Chandra v. State of Haryana and others*⁵⁴ decided this matter. An employee of the State Electricity Board, being paid on the pay scale between Rs. 1400-2300, had an operation whereby his right arm was removed. The court found that "Article 21 protects the right to livelihood as an integral facet of right to life."⁵⁵

Article 21 is not, however, an absolute bar to removal of livelihood. Livelihood and hence life can be removed if done by "procedure established by law." The *Oiga Tellis* case establishes the meaning of the phrase "procedure established by law" as follows: "[I]t is far too settled to admit of any argument that the procedure prescribed by law for the deprivation of the right conferred by Art. 21 must be fair, just and reasonable."⁵⁶

⁵² See supra n.21, at 1097.

⁵³ (1985) 3 SCC 545; AIR 1986 SC 180.

⁵⁴ AIR 1995 SC 519.

⁵⁵ Id. at 520.

⁵⁶ See supra no. 53 at 196. In support of the proposition see *E.P. Royappa v. State of Tamil Nadu*, (1974) 2 SCR 348; (AIR 1974 SC 555); *Maneka Gandhi v. Union of India*, (1978) 2 SCR 621; (AIR 1978 SC 597); *M.H. Hoskote v. State of*

VI: CONSIDERATION OF PUBLIC POLICY

The phrase "procedure established by law" with the importance placed on fairness, justice, and reasonableness is quite closely related to notions of public policy. Therefore, the paper will address the limitation to a fair and just removal of livelihood and hence life as embedded in the public policy argument rooted in contract. Before addressing the public policy argument directly, we need to first trace clear the relationship between "procedure established by law" and public policy. To trace this relationship it can be shown that "procedure established by law" noted in Article 21 has been interpreted as akin to the 5th and 14th amendments Due Process Clause in the United States Constitution. The American Due Process Clause in turn has its origins in the public policy doctrine.

The new relations between the Indian phrase and its American counterpart was established in the landmark case of *Sunil Batra v. Delhi Administration*,⁵⁷ in which Justice Krishna Iyer asserted:

"True ... our constitution has no due process clause ... but, in this branch of law, after *Cooper* ... *Maneka Gandhi* ... the consequence is the same".

B. Errabi describes this relationship as follows:

"[I]n most significantly, the court inducted the doctrine of "due process" of the American model into the content of Article 21 with all its far-reaching consequences to the validity of laws both in their procedural and substantive aspects."⁵⁹

Maharashtra, (1979) 1 SCR 192; (AIR 1978 SC 1548); *Sunil Batra v. Delhi Administration* (1979) 1 SCR 392; (AIR 1978 SC 1675); *Sita Ram v. State of U.P.*, (1979) 2 SCR 1085; (AIR 1979 SC 745); *Hussainara Khatoon I v. Home Secretary, State of Bihar, Patna*, (1979) 3 SCR 532, 537; (AIR 1979 SC 1369 at pp. 1372-73); *Hussainara Khatoon II v. Home Secretary, State of Bihar, Patna*, (1980) 1 SCC 81; (AIR 1979 SC 1360); *Sunil Batra II v. Delhi Administration* (1980) 2 SCR 557; (AIR 1980 SC 1579); *Jolly George Verghese v. Bank of Cochin*, (1980) 2 SCR 913, 921-922; (AIR 1980 SC 470 at p. 475); *Kasturi Lal Lakshmi Reddy v. State of Jammu & Kashmir*, (1980) 3 SCR 1338, 1356; (AIR 1980 SC 1992 at p. 2000); and *Francis Corralie Mullin v. Administrator, Union Territory of Delhi* (1981) 2 SCR 516, 523-524 (AIR 1981 SC 746 at p. 750)

⁵⁷ AIR 1978 SC 1675

⁵⁸ Id. at 1689

⁵⁹ B. Errabi, *The Right to Personal Liberty in India: Gopalan Revisited with a Difference*, in M.P. Singh (ed.) *Comparative Constitutional Law*, 293 at pp. 294, see also *Mithu v. State of Punjab*, (1983) 2 SCC 277; AIR 1983 SC 473 and note that S. 303 of the Indian Penal Code dictated compulsory imposition of death penalty. The Court found it unconstitutional due to its unreasonable and arbitrary nature.

The due process clause is traced as having its meaning and base in the notion of public policy which refers to "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."⁶⁰

It is these same principles of justice to which Article 21 refers. Therefore, the question is whether it is against public policy for the dominant companies or industries controlling most of the economy and hence the jobs and the livelihood of the population to be able to enter into contracts and engage in business which excludes at a minimum, one half of the Indian population.

In the context of the appalling present economic conditions in the country the relevant question is: how many Indian citizens will have the requisite skills and ability to be employed after these privatization and liberalization efforts and in the futuristic service oriented and technological 21st-century global economy? Surely, not those below the poverty line.⁶¹ That cuts out about 310 million people or more than the entire population of the United States. The literacy rate of the nation is 52%.⁶² Capitalists seek to have the most efficient workforce. Generally speaking, that will not include the illiterate. As a result it is necessary to deduct another 13% or 115 million. So far 425 million people will likely have little hope for about two generations in participating in this economic liberalization. Now to assess how many people can actually participate in a liberalized economy would be difficult. But if 425 million have no opportunity, logic would dictate that the number of those who probably will, is a very small porportion of the populace. But for the purposes of the argument, excluding 425 million people from the economy is sufficient.

Considering the condition of the people, an Indian judge would look to a different source in search of public policy guidance in uncharted territory to

⁶⁰ Winfield, Percy H., *Public Policy in the English Common Law*, 42 Harvard Law Review 76 at 101. (emphasis added)

⁶¹ According to the Expert Group to the Planning Commission 35% of the Indian population was below poverty line in 1993-94.

⁶² Matthew, K.M., *Manorama Yearbook* 1997. (1997) p. 458. The 1991 census polled only those above 6 years old for literacy. Therefore the illiteracy rate of 48% should only be applied to the population above 6 years of age. That would lower the 425 million excluded from participating in the economy. But also note that approximately 40% of the nation's population is under 15 years of age (approximately 355 million). Therefore some of these children while not in poverty are far from sufficiently educated to participate in technology and service driven economy. These children would be added to the 425 million excluded from the economy. As a result, both amounts have been excluded. The penetrating point is, however, not lost.

arrive at a just conclusion—the Indian Constitution. In the *Central Inland case*⁶³ the Supreme Court shares the following insight:

"Above all, in deciding any case which may not be covered by authority, Courts have before them the beacon light of the preamble to the Constitution. Lacking precedent, the Court can always be guided by that light and the principles underlying the Fundamental Rights and the Directive Principles enshrined in the Constitution."⁶⁴

A quick brisk walk through the Preamble to the Constitution, Fundamental Rights and the Directive Principles is all that is necessary to bring the point home. The Preamble provides that

"The People of India having solemnly resolved... to secure to all its citizens:

JUSTICE, social, economic and political....

EQUALITY of status and of opportunity."

Several of the Articles in Part III (Fundamental Rights) and Part IV (Directive Principles) reinforce these ideas giving them life substance. Worthy of particular mention in this regard would be Article 15 clause (4), Article 16 clauses (1), (4) and (4a), Article 21, Article 38 clauses (1) and (2), Article 39 clauses (a), (b) and (c), Article 41, Article 43-A, Article 46 and Article 47. They all speak in some way towards providing equality of opportunity or economic betterment of the entire populace.⁶⁵

One reflexive counter-argument that must be discussed is that of freedom of contract. Freedom of contract in the United States context was for some time held in high regard. Article 1 section 10 of the United States Constitution prohibits states from making any law that impairs "the Obligation of Contracts." The view that reigned in the United States for quite some time is adequately represented by cases such as *Lochner v. New York*.⁶⁶ The *Lochner* holding was overruled only 12 years later in *Bunting v. Oregon*.⁶⁷ But the freedom of contract philosophy developed in the *Lochner* case lasted in the United States until the 1930's. It was then when the travail of the Great Depression, President Roosevelt's New Deal programs and Court Packing schemes together produced sufficient upheaval to lessen the importance-of-the

⁶³ *Central Inland Water Transport Corporation v. Brojo Nath Ganguly*, AIR 1986 SC 1571

⁶⁴ *Id.* at 1574

⁶⁵ For the text of these provisions, see Constitution of India.

⁶⁶ (1904) 198 United State 45

⁶⁷ (1917) 243 United State 426

Lochner view of freedom of contract. Viewed from this socio-economic perspective, it is understandable why freedom of contract never gained the foothold in India that it enjoyed in the United States. The poverty referred to earlier in this analysis was actually worse at Indian independence. Therefore, as during the Great Depression in the United States, conventional wisdom dictated that the Government ought to come to the aid of the weaker sections of the nation. Early in Indian legal history the Court system established that freedom of contract was to enjoy no special status in the nation. In 1953, the Madras High Court propounded:

"The freedom of contract is not guaranteed by the Constitution. And in the absence of a guarantee, we do not think it unreasonable to presume that the freedom of contract can, to a certain extent, be curtailed if such curtailment is reasonable and in the general interest of the public."⁶⁸

Therefore, despite western traditional freedom of contract concerns, an Indian judge would have appropriate grounds to find problematic, under public policy concerns, a liberalization effort that excluded at least half the population.

So far, it has been shown that there are sufficient grounds to find certain conditions present: firstly, that dominant private corporations can be deemed to be the State within the meaning of Article 12. Secondly, that once the most critical of fundamental rights is applied to a private corporation, namely, the right to life, that the right to livelihood is an integral facet thereof and thus cannot be denied within the constraints of fairness and justice. Lastly, on contract and public policy grounds, contracts and business transactions that exclude most of the population from any opportunity of participation in them are unfair and unjust and hence problematic.

VII: EQUALITY OF OPPORTUNITY: A SUGGESTION

How then should the Court affirmatively structure an equality of opportunity requirement in India under the conditions of poverty that exist and in view of its new capitalist leanings? The founders faced with the problem under a socialist type of economy turned to a Reservation system which would be more efficient and more reasonable to apply with modifications if necessary, than to create a system anew.

The Reservation system was developed due to the gross injustice heaped upon the former "untouchables" in the nation. They were primarily deemed so because of the unclean occupations in which they engaged. As a result, they

have been politically, socially, educationally, and economically ostracized for many generations. The Constitution sought to address the matter by two primary methods. First, in Article 17 the practice of untouchability was to be abolished. This riddance of untouchability is widely acknowledged as applicable to private as well as public persons.⁶⁹ And secondly, the Reservation system was established for the newly termed Schedule Tribes (ST's) and Schedule Castes (SC's). In order to address the lack of political power, the system provided that certain seats in the Lok Sabha (the Lower House) and the State legislatures should be reserved for those persons who are members of the ST's and/or SC's.⁷⁰ The Constitution provides for the social and educational needs of the ST's and SC's in several Articles, including Articles 15 and 46.⁷¹ Economic redress was primarily addressed in Articles 16, 46 and 335.⁷² In the or reserved for members of the SC's and ST's.

In determining what form of special treatment a class of the citizenry should receive, first, a word must be said about who should receive the benefit. In a nation where there are many degrees of misery, that proposition is no easy task. It has been the cause of much controversy. Despite the fact that an attempt must be made to go as low as possible on the scale to uplift the lowest among citizenry, the understandable problem is that many are suffering and hence clamouring for relief. Firstly, it has been argued that preferential treatment should be expanded beyond ST's and SC's members to all educationally and socially backward and the weaker sections of the nation. Secondly, although historically all members of the SC's and ST's experienced discrimination, there has been a top layer of these members who are in fact quite educated and affluent. They perhaps may still experience some level of social ostracism, but physically and economically they have done as well as and better than many in the forward castes.

Regarding the expansion of constitutional help to citizens in an undesirable state, Articles 15 and 46 have produced some controversy in this regard. Article 15 speaks about the advancement of all educationally and socially backward classes while Article 46 refers to aiding the weaker sections of the nation. The problem, of course, in a nation as poor as India, is that almost all of the

⁶⁹ Unfortunately the abandoning of such an entrenched social custom has proven to be more difficult than initially estimated

⁷⁰ See Articles 330 and 332, respectively

⁷¹ For the text of these provisions see Constitution of India.

⁷² Article 335 states "The claims of the members of the Schedule Castes and Schedule Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a state."

population would fit into the category of backward or weak. The term "Other Backward Classes" (OBC'S) has come to encapsulate this large group. Unfortunately, much more powerful than the SC's and ST's the OBC's tend to usurp the privileges intended to go to the poorest of the poor. In *Balaji v. State of Mysore*⁷³ the State had reserved 68% of the seats in engineering and medical colleges for the OBC's, ST's and SC's. The lion's share of 50% of the seats was to go to the OBC's. The uncertainty regarding what constitutional rights belong to this group has led to significant litigation, political power struggles and violence.⁷⁴ The Supreme Court has found a sole economic criterion problematic. In *Janki Prasad v. State of J&K*,⁷⁵ the Court found that an exclusive poverty test would include too large a proportion of the population making the situation untenable.⁷⁶ The Court had similar findings in *State of U.P. v. Pradeep Tandon*.⁷⁷

In reference to those members of the ST's and SC's that are at the top of their caste financially, but who perhaps experience some residual form of social discrimination due to their caste, additional economic advancement in the form of job preferences will not be likely to assist them. They are already middle or upper classes economically. Therefore additional reserved posts would be of little use. The Supreme Court discussed this matter in *Chiralekha v. State of Mysore*⁷⁸ and asserted:

"To illustrate, take a caste in a State which is numerically the largest therein. It may be that though a majority of the people in that caste are socially and educationally backward, an effective minority may be far more advanced than another small sub-caste the total number of which is far less than the said minority. If we interpret the expression "classes" as "castes," the object of the Constitution will be frustrated

⁷³ AIR 1963 SC 649

⁷⁴ See Singh P. "Reservation, Reality and the Constitution-Crisis in India" in P. Leelakrishnan, ed., *New Horizons of Law*, 62-69 (Cochin 1987) In this context see the report of Backward Classes Commission (popularly known as Mandal Commission).

⁷⁵ AIR 1973 SC 930

⁷⁶ While it is true that an exclusive poverty test would also include the forward castes in the persons to be favoured, even excluding the forward castes and only favoring all OBC's below poverty line, the situation would remain untenable

⁷⁷ AIR 1975 SC 563. See the latest judgment of the Supreme Court in *Indra Sawhney v. Union of India*, AIR 1993 SC 477 which is the latest decision in the field.

⁷⁸ AIR 1964 SC 1823

and the people who do not deserve any adventurous aid may get it to the exclusion of those who really deserve."⁷⁹

Again in *State of Andhra Pradesh v. P. Sagar*⁸⁰ the court found basing reservation solely on caste problematic. It observed:

[I]n determining whether a particular section forms a class, caste cannot be excluded altogether. But in determination of a class, a test solely based upon the caste or community cannot also be accepted... The criterion for determining the backwardness must not be based solely on religion, race, caste, sex or place of birth; and the backwardness being social and educational, must be similar to the backwardness from which the Scheduled Castes and Schedule Tribes suffer."⁸¹

Who is due for preferential treatment under the Reservation system has been analysed using three approaches. The first approach is considering income only, which largely relates to the first proposition above. The second approach involves considering caste only, which is the second assertion shown above. The more appropriate model is a mixture of caste *cum* income. The poorer of the SC's and ST's should benefit from the reserved posts in the private sphere. In the Indian context where incomes are often artificially suppressed, a more holistic quantification would be required to determine constructive income, considering such factors as education, housing etc.

Conceptually, in applying the Reservation system to private corporations the system would work largely the same, but with some notable differences. A certain percentage of the positions would be held for SC's and ST's that meet certain constructive income requirements. The entry level positions would be reserved based on minimum objective criteria. This minimum objective criteria would be similar to Article 335⁸² requirement to maintain minimum efficiency in administration, despite reserving places. However, this minimum would not be relaxed even for a period to allow SC's and ST's to adjust as has been done with the State. Promotions would be earned in an open competitive field, therefore no positions beyond entry level posts would be reserved. This is again in contrast to application of the system to the State.⁸³

⁷⁹ Id. at 1834

⁸⁰ AIR 1968 SC 1379

⁸¹ Id. at 1382, 1383. This view is no longer valid in view of the Supreme Court's decision in *Indra Sawhney* case (See supra n. 77)

⁸² See supra n. 72.

⁸³ However, for the latest position see *Indra Sawhney* case (See supra n. 77)

Chief among the goals of private companies is to operate as efficiently and hence profitably as possible. Therefore, even the type of restraints imposed must be those that will allow them to maintain some level of efficiency and profitability. Companies must then be able to select the most efficient of the poorest SC's and ST's. But still this choice will be out of a largely uneducated lot. As a result, there should be some provision to allow corporations to not fulfill their quota, but with a financial penalty. The non compliance penalty would grow more onerous over the years to encourage compliance. Some may consider the situation of the destitute hopeless. However, with properly motivated capitalist and willing students, and equilibrium is possible.⁸⁴

The proceeds from the financial penalty would go to the establishment of a fund to train and educate the SC's and ST's that meet the constructive income requirements. The training and education would have to be at a level where at the end thereof the participants would be employable. As the corporations would have a strong interest in seeking competent graduates, they should have a strong hand over those selected to participate and the curriculum employed. Under this kind of structure, the private sector would logically select those persons requiring the least amount of training. By contrast, the government will have an interest in seeing those requiring the most help also advance. One way to reconcile this divergence of interest is to ensure that community service, in the form of aiding their less fortunate brethren to advance, is a part of the training of the selected participants. The community service should also continue after graduation. On a periodic basis, a representative of the court would report on the progress of those who are in the training program and those not selected to participate.

In short, the dominant private corporations would have to employ now or pay to prepare the SC's and ST's for later employment.

Indeed, a non conventional approach is not one without a precedent. In *M.C. Mehta v. State of Tamil Nadu*,⁸⁵ the Supreme Court analysed the problem of child labor in India. A very intractable problem much like the one discussed at length in this paper. There is a litany of constitutional provisions and statutes against the practice. The Court examines each and tells how the practice continues and by some accounts expands. The Court traces the sordid history of the practice and suggests reasons why perhaps everything tried to date has failed. At the end of the judgment the Court orders several matters, but two of which are worthy of mention. First, that those businesses employing children illegally are to stop and employ the parents of the children formerly employed.

⁸⁴ To further motivate capitalists, the Government should consider a reduction in other taxes due to the Government when certain quantifiable goals are reached.

⁸⁵ (1996) 6 SCC 756

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And, secondly, as there will be more adults to employ than children formerly employed, for every child's parent not employed, the business who has employed child labour illegally must pay Rs. 20,000 per child. And the government must add an additional Rs. 5,000 per child. The payments are to be contributed to a Child labour Rehabilitation-cum-Welfare Fund. The returns from the Fund are to educate and provide for the health and welfare of the children. The Court, in effect, provides a very similar remedy to the one proposed in this paper.

CONCLUSION

In conclusion, as India looks westward to capitalism it must also look at its strengths as well as its weaknesses. When the United States was in the throws of the Great Depression, one weakness was squarely in the mind of President Franklin D. Roosevelt. He reminded the American people that:

"Concentration of economic power in all-embracing corporations... [makes] private enterprise become a kind of private Government which is a power unto itself—a regimentation of other people's money and other people's lives."⁸⁶

India has for a very long time found its economy in a state of depression. The former Prime Minister Deve Gowda too had planned on providing economic growth with justice. He asserted that to achieve the economic targets of the country's Ninth Plan (1997-2002), the nation's theme would be "growth with equity".⁸⁷ Achieving equity for the poorest of the citizenry which the founders intended and recent administrations have asserted as their goal must include some reasonable possibility of participation by most of the population in the nation's economy of the 21st century. This kind of global economy will be dominated not by the Government or statutory company, as in the past, but the private corporation would virtually become private Government. The current approach will not permit this inclusion. Imposing some form of equality of

⁸⁶ Franklin D. Roosevelt, Acceptance Speech, Democratic National Convention, June 27, 1936

⁸⁷ Speech of former Prime Minister Deve Gowda at the Opening Plenary of the Asia Society's 8th Annual Corporate Conference- Moving to the Market: Sustaining Returns in India and Asia" on March 6, 1997 p. 7. He went on to say:

"We recognize that increased competition brings in greater efficiency, lower cost of production and provides more and better goods and services to consumers. However, the Government also appreciates that more market-oriented and less regulated regime does not imply an abdication by the State of its responsibility towards the poor and the disadvantaged. Our policies and programmes in the coming years will adequately reflect both these crucial concerns."

opportunity requirement by expanding the notion of State within Article 12 combined with overall public policy concerns will contribute to this noble aspiration.

CONSTITUTIONAL PERSONIFICATION OF LEGISLATIVE SUPREMACY IN INDIA AND MALAYSIA: SOME REFLECTIONS

*B. Errabbi*¹

I. INTRODUCTION

It is a matter of common knowledge for the scholars of comparative political and constitutional history that while the American War of Independence of 1776 inspired the liberation movements all the world over, the American Constitutionalism culminating in the adoption of the American Constitution in 1787 has left its indelible imprint on the constitutional developments in most of the Countries of Africa and Asia. The doctrines of Constitutional Supremacy and of Judicial Review, which are the prime pillars of the edifice of American Constitutionalism, have been its most valued and cherished gifts to the Asian constitutionalism. The constitutional developments both in India and in Malaysia have not escaped from the over-reaching impact of the American constitutionalism. It may be appreciated, in this context, that the influence of the American constitutionalism on the constitutional developments in India has been more direct, visible and pronounced than those in Malaysia.

The Constitutions of India and Malaysia, which are written, unlike the unwritten Constitution of England which personifies the concept of Parliamentary Sovereignty, have professed their commitment to the values of constitutional supremacy, guaranteed bill of rights and judicial review by providing for the embodiment of several constitutional provisions in this regard.¹ However, the main question in the context of the working of these Constitutions since their inauguration is: how strong and effective has this constitutional commitment been in these countries? Are there effective and meaningful constitutional strategies envisaged and designed for the enforcement of the doctrine of Constitutional Supremacy in these countries? To put it differently, is the concept of Constitutional Supremacy proclaimed so eloquently by the fundamental laws of these two countries a living and

¹ Professor of Law, Faculty of Law, Delhi University, Delhi-110007

² See Articles 4 to 13, 121 and 128 of the Malaysian Federal Constitution and Articles 13 to 32 and 245 of the Indian Constitution. Some of these provisions will be discussed in detail later.

dynamic core aspect of the Indian and Malaysian constitutional jurisprudence or is it a mere constitutional myth and a ceremonial constitutional slogan not taken seriously both by the founding-fathers of these Constitutions and the apex courts in these countries? It is humbly submitted that while in India the doctrine of constitutional supremacy has become a living and dynamic core aspect of the Indian constitutional jurisprudence, in Malaysia it has unfortunately been relegated to the position of a mere ceremonial constitutional slogan.

In this paper an attempt is made to substantiate this submission with the help of the constitutional experiences of these two countries in the context of certain specific areas of constitutional concern such as the right to personal liberty, the right to freedom of movement and the right to freedom of speech, association and assembly.

II. THE DOCTRINE OF CONSTITUTIONAL SUPREMACY: DIFFERING PERCEPTIONS

(a) *Malaysian Constitutional Perception*

At this stage it is necessary and appropriate to state that the Malaysia's professed commitment to the value of constitutional supremacy has been consciously intended and designed to be more of a constitutional myth than a vibrant constitutional reality. This constitutional intent and design, as will be seen presently, is amply reflected in, and pervades throughout the schematic setup of the fundamental liberties guaranteed by the Malaysian Federal Constitution. The Malaysian Constitution contains several provisions which have been designed to augment and strengthen the powers of the Federal Parliament to such an extent as to compel the conclusion that the Parliament's constitutionally sanctified legislative supremacy in certain areas of constitutional governance is no inferior to that of the British Parliament. Thus, in the areas of the right to personal liberty,² the right to freedom of speech and expression,³ the

² Article 5(1) of the Malaysian Federal Constitution declares:

"No person shall be deprived of his life or personal liberty save in accordance with law"

³ Article 10(1) of the Federal Constitution states:

- (a) every citizen has the right to freedom of speech and expression;
- (b) all citizens have the right to assemble peaceably and without arms;
- (c) all citizens have the right to form association."

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right to association and assembly,⁴ the right to property,⁵ and the special and emergency legislative powers of Parliament,⁶ there is a well pronounced constitutional personification of legislative supremacy giving the Federal Parliament the ultimate say in the enactment and validity of laws.⁷ The Malaysian constitutional scheme of fundamental rights is bereft of an adequate judicial strategy for an effective enforcement of the fundamental liberties. This is evident not only from the absence, in its scheme, of constitutional principle of reasonableness,⁸ which makes the legislative transgression of fundamental rights justifiable but also from the presence of

⁴ The restrictive clauses 2, 3 and 4 enable the Federal Parliament to impose restrictions on the enjoyment of these rights on several grounds mentioned therein. For the text of clause (2) of Article 10, See *infra* n. 8

⁵ See *supra* note 3.

⁶ Article 13(1) of the Malaysian Federal Constitution reads:

"No person shall be deprived of property save in accordance with law."

⁷ See Articles 149 and 150 of the Malaysian Federal Constitution. While Article 149 enables Federal Parliament to enact laws against subversion and actions prejudicial to the public order which are exempt from the reach of the operation of the rights to life and personal liberty, freedom of movement, freedom of speech and expression, association and assembly and the right to property, Article 150 empowers the King (Yang di-Pertuan Agong) to issue a Proclamation of Emergency to combat a grave emergency threatening the security or the economic life or public order in the Federation or any part thereof.

⁸ The laws are made immune from judicial challenge on the ground that they are unjust, unreasonable and oppressive.

Clause 2 of article 10 States:

"Parliament may by law impose,

- (a) on the rights conferred by paragraph (a) of clause (1), *such restrictions as it deems necessary or expedient in the interests of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement or any offence;*
- (b) on the right conferred by paragraph (b) of clause (1), *such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof or public order;*
- (c) on the right conferred by paragraph (c) of clause (1), *such restrictions as it deems necessary or expedient in the interest of the security of federation or any part thereof, public order or morality.*

Emphasis added.

from the presence of constitutionally ordained ouster clauses⁹ in the fundamental law. Consequently the Malaysian judiciary, as guardian of the Malaysian Federal Constitution, has been content to adopt a positivistic, conservative, literal and logical interpretation of constitutional provisions, thereby evincing its expected judicial empathy with, and deference to, this constitutional intentment of the founding-fathers of the Malaysian constitution.

(b) *Indian Constitutional Perception*

In contrast, the India's commitment to the notion of constitutional supremacy is more akin to that of United States of America. Although the Indian constitution, like its American counter-part, does not expressly proclaim its commitment to the value of constitutional supremacy, it embodies quite a few provisions which implicitly endorse and confirm this commitment. The Indian constitutional scheme of fundamental rights envisages, unlike its Malaysian counter-part, the imposition of effective constitutional limitations on the legislative powers of the Indian legislatures¹¹ with an adequate judicial power conferred upon the higher courts for their enforcement.¹² Except in the area of

⁹ See Article 4(2) of the Malaysian Federal Constitution. For its text see page 12 of this paper.

¹⁰ Article 245(1) of the Indian Constitution states:

Subject to the provision of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State."

Article 372(1) declares

Notwithstanding the repeal by this Constitution of the enactments referred to in Article 395 but subject to the other provisions of this Constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein, until altered or amended by a competent legislature or other competent authority."

Article 13, a provision in Part III of the Constitution entitled as "Fundamental Rights", declares:

"(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void..."

¹¹ See the restrictive clauses of Article 19 of the Indian Constitution which embody the criterion of reasonableness.

¹² See Articles 32 and 226 of the Indian Constitution.

the right to life and personal liberty,¹³ the founding fathers of the Indian Constitution took care to provide an adequate constitutional framework to ensure an effective enforcement of the concept of constitutional supremacy. It may be appreciated that the Indian legislatures, unlike their Malaysian counterparts, are not constitutionally intended to enjoy an unlimited and uncontrolled measure of legislative supremacy. In the Indian scheme of constitutionalism there is no scope for the constitutional personification of legislative supremacy of the Malaysian model. The Indian Constitution not only does respect and embody the principle of reasonableness¹⁴ but also omits the "ouster clauses" of the Malaysian variety from its scheme of fundamental rights. The result is that the Indian apex court is constitutionally enjoined to adjudge the constitutionality of the legislative incursions on fundamental rights.¹⁵ The Indian Supreme Court, inspired by the preamble goals of liberty, justice, equality and fraternity enshrined in the India's basic law,¹⁶ opted, unlike its Malaysian counter-part, to play a more active and creative role to ensure an effective enforcement of fundamental rights.¹⁷

III. THE CONSTITUTIONAL SPECTRUM OF LEGISLATIVE SUPREMACY: CONSTITUTIONAL INTENT

(a) *Malaysian Position*

The preparatory materials (*travaux preparatoires*) of Article 10¹⁸ of the Malaysian Constitution throw enough light on the constitutional intent of its founding-fathers regarding their conception of judicial review.

¹³ Article 21, which guarantees the right to personal liberty states:

"No person shall be deprived of his life or personal liberty except according to procedure established by law."

¹⁴ See supra note 11. See also M.P. Singh, "The Constitutional Principle of Reasonableness", (1987) 3 SCC(1)31.

¹⁵ Article 32 of the Indian Constitution declares:

"(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this part is guaranteed."

¹⁶ See the Preamble to the Constitution of India.

¹⁷ See infra ns. 73 and 74

¹⁸ See the Reid Commission's Report. An independent Commission headed by Lord Reid (known as Reid Commission) was appointed to devise a Constitution for the Federation of Malaya which later became Malaysia. This Commission, which consisted of constitutional experts from United Kingdom, Australia, India and Pakistan, duly submitted its report on 21 Feb. 1957. A Working Party was

The original Reid Commission's draft Constitution contemplated a constitutional scheme which, among other things, envisaged the inclusion of a guaranteed bill of fundamental liberties. This was premised on the constitutional fundamentals of "supremacy of the constitution" and "judicial power" of the courts to enforce these rights.¹⁹ This scheme contained an effective constitutional framework of which the principle of reasonableness was an integral part.²⁰ The inclusion of the principle of reasonableness in the draft Article 10²¹ was intended to confer on the Malaysian highest judicial organ the ultimate power to examine and decide on the reasonableness, expediency and necessity of legislative restrictions that could be imposed on the exercise and enjoyment of the fundamental right to freedom of speech and expression guaranteed by the provision. Unfortunately, this constitutional scheme was not destined to become the main constitutional fundamental of the Malaysia's "document of destiny".²²

The revised draft proposals, as prepared by the "Working Group"²³ dropped the principle of reasonableness from the fabric of the constitutional scheme for the enforcement of fundamental rights. The deletion of the principle of reasonableness was intended to ensure legislative supremacy in matters of social control.²⁴ It is these revised proposals that were approved and adopted by the Federal Legislative Council which evidently wanted to confer "a restrictive power of judicial review" on the courts in Malaysia. It may be of interest to note that one of the reasons advanced in this regard was that the courts were not suitable to decide on the wisdom of the imposition of legislative restrictions on fundamental liberties and that it was better to repose trust and confidence in the

¹⁹ appointed to examine the Reid Commission's Report in detail and to make its own recommendations. On the basis of the recommendations of the Working Party a new Federal Constitution of the Malaya (Later on Malaysia) was promulgated on 31 August 1957 which is known as Merdeka (Independence) day.

²⁰ Ibid. para 161

²¹ Ibid.

²² Mr Justice Abdul Hamid of Pakistan who was a member of the Reid Commission disagreed with the majority view and appended a note of dissent. He argued for the deletion of the principle of reasonableness from the scheme. In his opinion reasonableness of legislative restrictions should be left to the legislature. See Reid Commission Report at pp. 95-105. His dissenting view came to be accepted later on.

²³ The Working Party was appointed to revise the draft proposals and to make counter-recommendations.

²⁴ See Legislative Council Debates (1957) speech of the Attorney-General at cols. 3162 to 3163.

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legislature in this respect.²⁵ The supporters of the principle of legislative supremacy believed that "the true guardian of fundamental rights and liberties must remain with the people themselves and entrusted to the keeping of their representatives in the Parliament."²⁶ Commenting on the revised draft proposals which became part of the Malaysian Constitution, Lord Reid observed²⁷ that "a greater part of the changes have been in the direction of giving more freedom to the ... Parliament of Malaysia and correspondingly less extensive guarantees of fundamental rights than we have recommended."

As regards the scope of the constitutional protection of the rights to personal liberty, it is not possible to discern any constitutional intent either from the Report of the Constitution Commission or from the debates of the Federal Legislative Council as the draft provisions were adopted without any debate. Therefore, it will be impossible to know the mind of the constitution-makers regarding the import of the expression "save in accordance with law" which finds mention in clause (1) of the Article 5²⁸ of the Malaysian Federal Constitution.

(b) Indian Position

While the preparatory materials of the Malaysian Federal Constitution do not throw any light on the constitutional intent as to the scope of the constitutional protection of the right to personal liberty, the *travaux préparatoires* of the Indian Constitution provides valuable evidence of the intention of its architects as to the scope of the constitutional protection of the right. As will be seen presently, in the area of the fundamental right to personal liberty²⁹ the founding-fathers of the Indian Constitution intended to ensure legislative supremacy of the Indian Legislatures. They wanted to avoid the use of the "due process" clause of the American model because they thought that it would lend itself to judicial vagaries in respect of its import.

The draft Article 15, which later became Article 21 of the Constitution, in its original form, stated that "no person shall be deprived of his life or liberty without due process of law". But in its revised version the Drafting Committee³⁰ supplanted the expression "without due process of law" by the

²⁵ Id. at 3168

²⁶ Ibid

²⁷ Quoted at col. 3139 of Legislative Council Debates.

²⁸ See supra n. 2

²⁹ See supra n. 13

³⁰ Drafting Committee was entrusted with the task of drafting the Indian Constitution.

expression "except according to procedure established by law".³¹ When the revised draft provision came up for discussion and adoption on the floor of the Constituent Assembly several members opposed it and argued for the restoration of the "due process" clause.³² It was thought that the expression "except according to procedure established by law" would negate the jurisdiction of the courts to determine whether or not an impugned law was capricious, unjust, or unreasonable and that the expression would enable the courts only to see whether or not the procedure laid down by the law has been complied with and that when once "the procedure is complied with there will be an end to everything and the judges would be only spectators".³³

Therefore, it was feared that the expression as embodied in the provision would augment the power of the legislature barring judicial review of detention laws. The supporters of the "due process" clause were, however, in a minority and all the amendments they moved were rejected. The result was that the draft provision as settled and recommended by the Drafting Committee was adopted by the Constituent Assembly without any change.

As regards the constitutional intent of the scope of the fundamental right to freedom of speech, association and assembly the founding-fathers of the Indian Constitution wanted to ensure judicial supremacy. The principle of reasonableness, which did not find any place in the original draft Article 13 (which corresponds to Article 19³⁴ of the Constitution) at the time of its introduction in the Constituent Assembly,³⁵ was inserted into the provision by way of an amendment³⁶ in the House. The induction of this principle in the Indian constitutional jurisprudence was intended to empower the courts to examine whether or not a particular legislative restriction was reasonable, proper and necessary in the circumstances of the case.

³¹ See B. Shiva Rao, *The Framing of India's Constitution*, Vol. 3 at 328. The reason given for the change was that the new expression was more specific.

³² 7 Constituent Assembly Debates, pp. 843-44

³³ *Ibid.*

³⁴ Article 19 guarantees several freedoms, such as freedom of speech, association, assembly and movement etc. The restrictive clause 2 of this provision which enables the Indian legislatures to impose restrictions did not, in its origin form, contain the principle of reasonableness. This was changed by the Constitution (first Amendment) Act, 1951.

³⁵ 7 Constituent Assembly Debates, pp. 711-789

³⁶ *Id.* at 739

IV. CONSTITUTIONAL SUPREMACY AND THE SCHEME OF FUNDAMENTAL RIGHTS: DIFFERING PERSPECTIVES

(a) *Malaysian Constitutional Perspective*

The Malaysian Federal Constitution which proclaims itself to be the Supreme Law of the land declares that any post Merdeka (Constitution) law which is inconsistent with any provision of the Constitution shall, to the extent of the inconsistency be void.³⁷ An important implication of this declaration is that all the constitutional functionaries in the country including the Federal Parliament are constitutionally enjoined to function within the framework of the Constitution. This would necessarily mean that the doctrine of Parliamentary Sovereignty which is an essential concomitant of the British constitutional jurisprudence is alien to the Malaysian constitutional culture. This aspect was emphasised by Lord President Sufian in *Ah Thian v. Government of Malaysia*,³⁸ when he observed:³⁹

"The doctrine of the Supremacy of Parliament does not apply in Malaysia. Here we have a written Constitution. The power of Parliament and the State Legislatures in Malaysia is limited by the Constitution and they cannot make any law they please."

As the Supreme Law of the land, the Malaysian Federal Constitution incorporates and guarantees several fundamental liberties in Part II of the Constitution which are sought to be enforced by the imposition of various limitations and restrictions upon the legislatures. Since there can be no absolutely guaranteed rights in an orderly society, the Constitution attempts to strike a balance between individual liberty on the one hand and social control on the other. Towards this end, the Constitution confers power of judicial review on the courts to keep the legislatures within the limits of their powers.⁴⁰ While this

³⁷ Article 4(1) of the Malaysian Federal Constitution declares:

"This Constitution is the Supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void."

³⁸ (1976) 2 MLJ 112

³⁹ *Id.* at 113.

⁴⁰ See Articles 121 and 128 of the Malaysian Federal Constitution. Article 121, which deals with the judicial power of the Malaysian Federation, does not confer original jurisdiction on Malaysia Supreme Court for the enforcement of fundamental rights. Malaysian Supreme Court, unlike its Indian counter-part, does have only appellate jurisdiction with respect to the enforcement of fundamental rights. In Malaysian Constitution, there is no provision similar to Article 32 of the Indian constitution.

is the normal constitutional scheme for the enforcement of constitutional supremacy, the Constitution permits major departures from this scheme in certain crucial areas of constitutional rights such as the right to personal liberty,⁴¹ the right to freedom of movement,⁴² the right to freedom of speech, association and assembly.⁴³ In these areas, the Constitution confers wide and extensive powers on the Federal Parliament enabling it to impose even unreasonable, oppressive and arbitrary legislative restrictions on the enjoyment of these fundamental rights.⁴⁴

(i) The Right to Personal Liberty: The Scheme of Constitutional Protection

A look at the scope of the right to personal liberty as guaranteed in the Malaysian Federal Constitution makes one feel that the right is not at all effective against the Federal Parliament. Article 5(1)⁴⁵ which guarantees the right to personal liberty declares that "no person shall be deprived of his life or personal liberty save in accordance with law." It may be appreciated that the right is guaranteed in negative form. If one converts it into positive form it would mean that a person can be deprived of his life or personal liberty in accordance with law. The question is: does this right envisage any limitation on the legislative power of the Federal Parliament? Answer to this question would depend upon the import of the expression "*save in accordance with law*". A plain reading of this expression would convey the meaning that there should be a law before a person is deprived of his life or personal liberty. Articles 5(1) only insists on the enactment of a law before a person is deprived of his life or personal liberty. Obviously, this provision with this meaning is not intended to be a restriction on the legislative powers of the Federal Parliament. It is

Article 128 confers on the Malaysian apex court exclusive original jurisdiction to decide disputes between the State and the Federation and to decide issues relating to the legislative competency of either Federal Parliament or State Legislatures.

See supra n. 2

See Article 9 of the Malaysian Federal Constitution. Article 9(2), which is relevant for our purpose states:

"Subject to clause (3) and to any law relating to the security of the Federation or any part thereof, public order, public health, or the punishment of offenders, every citizen has the right to move freely throughout the Federation and to reside in any part thereof."

See supra n. 3.

The restrictive clauses of Article 10 do not require the legislative restrictions to be reasonable.

Clauses 3 and 4 of Article 5 provides certain procedural safeguards.

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submitted that this provision is intended to embody the Diceyan concept of "rule of law"⁴⁶ in the area of personal liberty.

The available scholastic opinion on the import of this expression is divided. While Professor Sheridan takes the view that the expression only means "save lawfully",⁴⁷ Prof. Jayakumar argues for a liberal interpretation of the expression so that its import would embrace the "procedural due process" of the American model.⁴⁸ It is humbly submitted that the view taken by Professor Sheridan is more logical and persuasive as it is in consonance with the constitutionally intended theme of ensuring legislative supremacy in matters of social control.

(ii) The Freedom of Movement, Speech, Association and Assembly: Scheme of Constitutional Protection

Again a closer look at the scope of the constitutional protection accorded to the right to freedom of movement, the right to freedom of speech and expression, the right to association and the right to assembly would give a clear impression that these rights are mere playthings in the hands of the Federal Parliament. Articles 9⁴⁹ and 10⁵⁰ of the Federal Constitution which guarantee all the fundamental liberties mentioned above appear to personify the constitutionally sanctified legislative supremacy of the Federal Parliament. These provisions, read with Article 4(2) of the same Constitution which expressly excludes any judicial review of all legislative restrictions that may be imposed on the rights to freedom of movement and of speech and expression, not only empower the Federal Parliament to impose a wide range of legislative restrictions on the exercise and enjoyment of these rights but also, in a way, immunise these restrictions from judicial scrutiny. Since the requirement of the criterion of reasonableness is alien to the scheme of fundamental liberties in Malaysia,⁵¹ the legislative restrictions which the Federal Parliament is authorised to impose cannot be questioned on the ground that they are unreasonable, oppressive and arbitrary.

It may be of interest to note that Article 9(2) of the Malaysian Federal Constitution, which declares that all citizens shall have the right to move freely throughout the Federation and to reside in any part thereof, subjects the same

⁴⁶ Diceyan rule of law only requires legality.

⁴⁷ L.A. Sheridan and H.F. Groves, *The Constitution of Malaysia*, 44 (1987).

⁴⁸ S. Jayakumar, *Constitutional Limitations on Legislative power in Malaysia*, 9, MLR 96.

⁴⁹ See supra n. 42

⁵⁰ See supra ns. 3 and 8

⁵¹ See supra n. 8

right to any law relating to the security of the Federation or any part thereof, public order and public health etc. In a similar vein, the rights to the freedom of speech, and expression, freedom of association and freedom of assembly guaranteed to all Malaysian citizens in Article 10(1) are subject to the imposition of a wide range of legislative restrictions which are deemed necessary and expedient by the Federal Parliament in the interest of several specified grounds mentioned, in Article 10(2) of the Malaysian Federal Constitution.⁵² In this context it will be of crucial significance to note that the word "restriction" in the provision has not been qualified by the expression "reasonable". Again, the "ouster clause" of Article 4(2) shuts out any scope for judicial review. This provision declares:

"The validity of any law shall not be questioned on the ground that -

- (a) it imposes restrictions on the right mentioned in Article 9(2) but does not relate to the matters mentioned therein; or
- (b) it imposes such restrictions as are mentioned in Article 10(2) but those restriction were not deemed necessary or expedient by Parliament for the purposes mentioned in that Article."

This provision read in conjunction with Articles 9(2) and 10(2) would give a clear indication of the intendment of the founding-fathers of the Malaysian Federal Constitution. The clear intendment, it is submitted, is to ensure constitutionally sanctified legislative supremacy in matters of social control. This intendment was sought to be realised by reducing the scope of judicial review power of the courts to the minimum.

(b) *The Indian Constitutional Perspective*

The Indian Constitution, as a grand norm of the Indian legal system, incorporates and guarantees several fundamental rights in Part III of the Constitution. These rights have been modelled on the American Bill of Rights. The same fundamental law provides for their effective enforcement by the conferment of adequate power of judicial review on the higher courts of the land. The Apex Court of the country is constitutionally enjoined to play the role of a sentinel of the fundamental rights.⁵³ The architects of the Indian Constitution, guided by the experience of the working of the American Constitution, took care to harmonise the compelling claims of freedom and liberty on the one hand and those of the social control on the other. This is amply reflected in the scheme of fundamental rights, which permits regulatory

control over the exercise and enjoyment of these rights in the interest of social control.

(i) The Right to Personal Liberty: Constitutional Scheme of Protection

In India the right to personal liberty as guaranteed in Article 21⁵⁴ of the Indian Constitution, like its Malaysian counterpart, was not intended to be an effective limitation on the legislative powers of the Indian legislatures. Look at Article 21 which states that "no person shall be deprived of his life or personal liberty except according to procedure established by law." As its text indicates, the provision only requires the enactment of a law and the laying down of a certain procedure before the State may deprive any person of his life or personal liberty. The quality and content of either the law or the procedure embodied in the law was not intended to be amenable to judicial scrutiny under this provision. This provision was intended to ensure legislative supremacy of Indian legislatures.

It may be of great interest to note that this view of the expression received judicial approval not only in the famous *Gopalan*⁵⁵ case in 1950 but also in the land-mark *Hebeas Corpus*⁵⁶ case in 1976 although it was rejected in the epoch-making *Maneka Gandhi*⁵⁷ case in 1978. This view has now been relegated to the domain of constitutional history in India.

Bhagwati, J., the main architect of the Indian judicial activism, in *Hebeas Corpus* case observed:⁵⁸

"The only safeguard enacted by Article 21, therefore is that a person cannot be deprived of his personal liberty except according to procedure prescribed by 'State made' law. If a law is made by the State prescribing the procedure for depriving a person of his personal liberty and the deprivation is effected strictly in accordance with such procedure, the terms of Article 21 would be satisfied and there would be no infringement of the right guaranteed under that Article.

(ii) Freedom of Speech, Association, Assembly and Movement: Scheme of Constitutional Protection

While the right to personal liberty was not intended to be an effective constitutional limitation on the legislative powers of the Indian legislatures, Article 19 freedoms are meant to impose real and effective limitations on them.

⁵⁴ See supra n. 13

⁵⁵ See infra n. 71

⁵⁶ *A.D.M. Jabalpur v. Shiva Kant Shukla*, AIR 1976 SC 1207.

⁵⁷ *Maneka Gandhi v. Union of India*, AIR 1978 SC 597

⁵⁸ See supra n. 56 at 1361.

⁵² *Ibid.*

⁵³ See supra note 15. See also *State of Madras v. V.G. Rao*, AIR 1952 SC-196.

In the Indian constitutional scheme these rights are considered to be preferred rights calling forth a stricter judicial scrutiny of State encroachments of the rights.

While clause (1) of Article 19⁵⁹ guarantees the main freedoms, clauses 2 to 6⁶⁰ of the same provision enable the State to impose reasonable legislative restrictions on the exercise and enjoyment of these rights. The requirement of reasonableness of legislative restrictions brings in the element of "due process" of the American model subjecting them to judicial review.⁶¹ Under the restrictive clauses of Article 19 the legislative restrictions which the State is authorised to impose will have to satisfy the three-fold criteria before they can validly restrict the enjoyment of Article 19 freedoms. First, the restrictions should have the statutory sanction which means that the executive cannot, without the backing of a law, impose any limitation on the right. Secondly, the restrictions will have to have a clear nexus to one of the purposes, enumerated in the restrictive clauses. Thirdly, the restriction imposed should pass the test of reasonableness.

V. CONSTITUTIONALLY SANCTIONED LEGISLATIVE SUPREMACY AND JUDICIAL ENFORCEMENT: CONTRASTING APPROACHES

The concept of legislative supremacy is based upon the philosophy of legal positivism which is postulated on the fundamental premise that the positive or enacted law is the basis of any given legal system. It does not countenance any moral element in the definition of law. It does not therefore concern itself with the justice, morality and reasonableness of law. It forbids judges from examining and questioning the reasonableness, fairness and justice of the law. It promotes and encourages a literal, grammatical and conservative interpretation of laws. The idea of creative, purposive and innovative interpretation is alien to its scheme of thought. It is a moot question as to what extent the philosophy of legal positivism should be allowed to flourish in countries which have written Constitutions which proclaim to be the supreme laws of the land. This question becomes most relevant in the context of the differing Malaysian and Indian constitutional experiences.

(a) Malaysian Judicial Approach

It may be appreciated that while the theory of legal positivism has not only been inseparably engrained in the scheme of Malaysian constitutional

⁵⁹ See Article 19 of the Indian Constitution

⁶⁰ *Ibid*

⁶¹ The concept of reasonableness was explained by the Supreme Court in *State of Madras v. V.G. Rao*, AIR 1952 SC 196.

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jurisprudence but also continues to have overwhelming influence on Malaysian judges, the Malaysian judges have shown remarkable degree of judicial deference to the constitutionally sanctioned legislative judgement in matters of social control. There is a catena of cases⁶² in the area of the right to personal liberty to illustrate this point. In several cases⁶³ the Malaysian judges have interpreted the word "law" in the expression "save in accordance with law" used in Articles 5(1) and 13(1) of the Malaysian Federal Constitution in its literal, and plain grammatical sense. These judges have steadfastly stuck to the view that the word "law" would refer to "lex", i.e. any enacted law and not to "jus", i.e. justice or right.

According to this view, the word, "law", as used in Articles 5(1) and 13(1), only embodies the legislative will and the function of the judges is only to give effect to that will no matter how harsh, unjust or oppressive the law may be.⁶⁴

In *Loh koi Choon v. Government of Malaysia*⁶⁵ Raja Azlan Shah F.J. remarked:⁶⁶

"The question whether the impugned act is 'harsh and unjust' is a question of policy to be debated and decided by Parliament and therefore not meant for judicial determination. Our courts ought not to enter this political thicket, even in such worthwhile cause as the fundamental rights guaranteed by the Constitution."

In a similar vein, in *Andrew Sio Thomboosamy v. Supr. of Pudu Prisons*,⁶⁷ Suffian L.P. observed:⁶⁸

"If the Government exercises a power conferred on it by Parliament and keeps within the law, the duty of the court is quite clear; the court should simply apply the law, no matter how harsh its effect may be on

⁶² *Karam Singh v. Menteri Hal Ehwal Dalam Negeri*, (1969) 2 MLJ 129; *Andrew Sio Thomboosamy v. Superintendent of Pudu Prison, Kuala Lumpur*, (1976) 2 MLJ 156; *Loh Kooi Choon v. Government of Malaysia*, (1977) 2 MLJ 18; *P.P. v. Yee Kim Seng*, (1983) 1 MLJ 252; *A.G. of Malaysia v. Chon Than Guan*, (1983) 1 MLJ 51; and *Che Ani Bin Iam v. P.P.* (1984) 1 MLJ 113.

⁶³ See supra n. 62. See also *Annugam Pillai v. Government of Malaysia*, (1975) 2 MLJ 29 and *Kritaisingam v. Commissioner of Lands, Federal Territory* (1982) 1 MLJ 204.

⁶⁴ In *Ong Chuan v. P.P.* (1981) 1 MLJ 64. The Privy Council gave a slightly liberal interpretation of the word "law" used in these provisions.

⁶⁵ (1977) 2 MLJ 187

⁶⁶ *Id* at 188-189

⁶⁷ (1976) 2 MLJ 156

⁶⁸ *Id* at 158. *Emphasis added.*

the individual effected. His remedy is then not judicial but political and administrative."

Therefore, not surprisingly, the Malaysian judiciary has refused to induct the American "due process" into "law" as envisaged in Articles 5(1)⁶⁹ and 13(1)⁷⁰ of the Malaysian Federal Constitution.

Although it is debatable whether this type of positivistic judicial interpretation is consistent with the doctrine of supremacy of the Constitution, one thing is very clear, and that is that the Malaysian higher judiciary has not only respected the constitutional intent of the founding fathers of the Malaysian Constitution as to its role in the enforcement of the fundamental postulate of the supremacy of the Constitution but also taken it seriously. It will be interesting to note that the *Gopalan*⁷¹ ratio which was rejected in India in 1978 still holds its sway over Malaysian judges.

(b) *The Indian Judicial Approach*

In India until the advent of the *Maneka Gandhi* case⁷² on the Indian constitutional scene, the philosophy of legal positivism with its hand maiden of narrow, literal and conservative judicial interpretation dominated the field of the right to personal liberty. In 1978 there was a judicial revolution in the country, ushering in a new era of judicial approach to the values of constitutional supremacy, guaranteed fundamental rights and judicial review. The decision in the *Maneka Gandhi* case transformed the whole constitutional scene in the country. It rejected the *Gopalan* ratio which held sway over the Indian constitutional jurisprudence for a period of 28 years. Rejecting the *Gopalan*'s narrow, restrictive, literal and common law approach to the constitutional interpretation, the Indian Supreme Court preferred a creative, purposive and innovative approach to the interpretation of the right to personal liberty as guaranteed in Article 21 of the Indian Constitution.⁷³ In the process, the Court transformed the right to personal liberty into a new fundamental of all fundamental rights and elevated it to the position of "brooding omnipresence" in the scheme of

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fundamental rights. One of the seminal aspects of the *Maneka Gandhi* ratio is the rejection of the *Gopalan*'s positivistic interpretation of the word "law" in Article 21 of the Indian Constitution and induction of the American "due process" into the provision.⁷⁴ Justice Bhagwati (as he then was) who delivered the leading judgement of the case observed:⁷⁵

"The principle of reasonableness which legally as well as philosophically is an essential element of equality or non-arbitrariness pervades Article 14 (right to equality) like a brooding omnipresence and the procedure contemplated by Article 21 must answer to the test of reasonableness in order to be in conformity with Article 14. It must be "right, just and fair" and not arbitrary, fanciful or oppressive, otherwise it would be no procedure at all and the requirement of Article 21 would not be satisfied."

Justice Bhagwati also rejected the doctrines of "exclusiveness" and "object of state action" which were the main stay of the *Gopalan* ratio and which reigned the relationship of Articles 21,⁷⁶ 22⁷⁷ and 19⁷⁸ for a long time. His Lordship held that no fundamental right was a separate and exclusive constitutional island and that an impugned law satisfying the requirements of one right would not be immune from challenge and judicial scrutiny under another right which was alleged to have been violated. It may be appreciated that the rejection of the *Gopalan* ratio meant that all preventive detention laws which were held to be immune from examination on the touchstone of reasonableness under Articles 19 and 21 would no longer be so immune from such examination. This was made crystal clear by Justice Bhagwati (as he then was) in *Francis Caroline Mullin v. Delhi Administrator*⁷⁹ where he observed:⁸⁰

⁷⁴ In *Sunil Barua v. Delhi Administration*, AIR 1978 SC 1675 at 1689, Justice Krishna Iyer observed:

"True, ... our Constitution has no due process clause ... but, in this branch of law, after

Cooper ... *Maneka Gandhi* ... the consequence is the same."

⁷⁵ See supra n. 57 at 624

⁷⁶ See supra n. 13

⁷⁷ Article 22 of the Indian Constitution provides certain safeguards to persons who are arrested and to persons who are detained under preventive detention laws.

⁷⁸ Clause (1) of Article 19 guarantees several democratic freedoms such as freedom of speech, freedom of association, freedom of assembly and freedom of movement, etc. Chapters 2 to 6 of the same provision enable the State to impose reasonable legislative restrictions on the enjoyment of these rights.

⁷⁹ AIR 1981 SC 746. In *A.K. Roy v. Union of India*, AIR 1983 SC 710, the Indian Supreme Court clarified its judicial approach towards the validity of preventive

⁶⁹ See supra n. 65

⁷⁰ *Arumugam Pillai v. Government of Malaysia*, 1975 2 MLJ 29 (F. C.)

⁷¹ *A.K. Gopalan v. State of Madras*, AIR 1950 SC 27.

⁷² See supra n. 57

⁷³ In *Maneka Gandhi v. Union of India*, AIR 1978 SC 597 at 622 Justice Bhagwati (as he then was) declared the Supreme Court's professed new judicial policy towards the interpretation of fundamental rights. He said:-

"The attempt of the Court should be to expand the reach and ambit of the fundamental rights rather than attenuate their meaning and content by a process of contraction."

"The law of preventive detention has therefore now (after *Maneka Gandhi* case) to pass the test not only of Article 22 but also of 21 and if the constitutional validity of any such law is challenged, the court would have to decide whether the procedure laid down by such law for depriving a person of his personal liberty is reasonable, fair and just."

In India the principle of reasonableness has become an all pervasive constitutional principle to safeguard the Supremacy of the Constitution. This is evident from Justice Bhagwati's observation in *Bachan Singh v. State of Punjab*⁸⁰. He declared⁸²

"The concept of reasonableness... runs through the entire fabric of the constitution ... the procedure for depriving a person of his personal liberty must be reasonable, fair and just. It is for the courts to determine whether in a particular case the procedure is reasonable, fair and just..."

In conclusion, it may be mentioned that in India the constitutional principle of reasonableness, fairness and justness has come to stay as an ever shining star on the Indian constitutional horizon beaconding the Indian Apex

detention laws by holding the view that these laws, to the extent of their protection under article 22(4) to (7), are valid and that the same cannot be declared invalid under Article 21 on the ground that these laws are inherently unreasonable, unjust and unfair. This is evident from the Chief Justice Chandrachud's observation:

"The power to judge the fairness and justness of procedure establishs by a law for the purpose of Article 21 is one thing and... [the power to decide upon the justness of the law itself is quite another thing: that power springs from due process" provision such as to be found in the 5th and 14th Amendments of the American Constitution by which no person can be deprived of life, liberty or property "without due process of law"... In so far as our Constitution is concerned an amendment was moved... substituting the words "without due process of law" for words "except according to procedure established by law" (which was negatived)... in view of this background and in view of the fact that the Constitution as originally conceived and enacted recognises preventive detention as a permissible means of abridging the liberties of the people, though subject to the limitations imposed by Part III, we must reject the contention that preventive detention is basically impermissible under the Indian constitution." (see pp. 726 and 727)

It will be interesting to note that Justice Bhagwati, whose opinion in *Francis Coriole Mullin* case was being considered in this case was content to concur with the judgement given by Chief Justice Chandrachud.

Id. at 750

AIR 1982 SC 1325.

Id at 1340

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Court to be a jealous guardian of the Supremacy of the Constitution in the country. This is the most invaluable consequence of the enactment of the *Cogstitution* (Forty-Forth Amendment) Act, 1978⁸³ which, *inter-alia*, enjoins the President of India not to suspend the enforcement of Article 21 of the Indian Constitution even during the operation of national emergency proclaimed under Article 352⁸⁴ of the Indian Constitution.

VI. CONCLUSIONS

From the foregoing discussion, the following conclusions may be deduced.

- (1) While the impact of the American constitutionalism on the Indian constitutional developments is more direct and pronounced, its impact on the Malaysian constitutional developments is more indirect and less pronounced.
- (2) The concept of constitutional supremacy so eloquently proclaimed by the Malaysian Federal Constitution is constitutionally intended to be more in the nature of a constitutional myth than a constitutional reality. It is intended to be a mere ceremonial constitutional slogan.
- (3) In contract, the concept of constitutional supremacy as envisaged in India is intended to be a living and dynamic core concept of the Indian constitutional jurisprudence. It has become a vibrant constitutional reality in India.
- (4) Both the preparatory materials (*Tranvax Preparatoires*) of the Malaysian Federal Constitution and of the Indian Constitution throw enough light on the constitutional intentment of the founding-fathers of the respective constitutions.
- (5) In consonance with the constitutional intent of its founding-fathers, the Malaysian Constitution embodies several provisions in the areas of the right to personal liberty and the right to freedom of speech, etc. which personify a kind of constitutionally sanctified Parliamentary Sovereignty. This is evident not only from the absence of the principle of reasonableness from the Malaysian constitutional scheme but also from the presence of constitutionally ordained "ouster clauses" in its scheme.

⁸³ The amendment effected a change in Article 359 of the Indian Constitution, which authorises the President of India to suspend by order the enforcement of any of the fundamental rights named therein, to prohibit him from suspending the enforcement of Articles 20 and 21 of the Constitution.

⁸⁴ Article 352 of the Indian Constitution authorises the President of India to proclaim emergency on certain grounds mention therein. See the amended Article 359 of the Indian Constitution.

- (6) In contrast, except in the area of the right to personal liberty, the Indian Constitution does not countenance the idea of constitutional personification of legislative supremacy. This is ensured by a provision for the strong presence of the principle of reasonableness in the Indian constitutional scheme of fundamental rights.
- (7) The Malaysian judges have preferred to show a remarkable degree of judicial deference to the intentment of the Malaysian Constitution makers. They are also constitutionally obliged not to obstruct the growth of the philosophy of legal positivism in Malaysia. Their narrow, literal and conservative approach to their function of constitutional interpretation is in tune with the intended overall scheme of fundamental rights in the country.
- (8) The Indian judges have ignored the intentment of the Constitution makers in the area of the right to personal liberty. They have rejected the idea of legislative supremacy as it is, in their opinion; utterly incompatible with the notion of constitutional supremacy. They, therefore, preferred a more activist, creative and innovative constitutional interpretation to safeguard the supremacy of the Indian Constitution.

VIOLENCE AGAINST WOMEN : SUBVERSION OF WOMEN'S HUMAN RIGHTS

S.K. Verma *

On June 25, 1993, the World Conference on Human Rights at Vienna adopted the Vienna Declaration and Programme of Action (the Vienna Declaration)¹, which is a hallmark in the efforts to gain recognition of women's human rights in many ways. It, for the first time, recognised the violations of the women's human rights and integrated their rights in the mainstream of the United Nations human rights dialogue. The Declaration recognized human rights of women as "an inalienable, integral and indivisible part of universal human rights" and demanded that the "equal status of women and the human rights of women ... be integrated into the mainstream of the United Nations system-wide activity". It pressed for the "eradication of all forms of discrimination against women, both hidden and overt".² But the most important of all, the Vienna Conference, for the first time recognized the gender-based violence against women in public and private life as a human rights concern. The Declaration specifically condemned "gender-based violence and all forms of sexual harassment and exploitation"³ and called upon the General Assembly "to adopt the draft declaration on violence against women".⁴ It welcomed the decision of the Commission on Human Rights to consider the appointment of a special rapporteur on violence against women.⁵ This, indeed, is a big achievement. It has brought the issue of violence against women to the centre-stage of all the discussion of women's human rights, because violence negates all the human rights conferred upon women through various human rights instruments of the United Nations and legislated in many countries.

Violence against women is all-pervasive in every society. It is reported that in the United States, a woman is physically abused every eight seconds and one is raped every six minutes. In a survey in Papua-New Guinea, 67 percent of

* Professor of Law, University of Delhi.

¹ See the *Vienna Declaration and Programme of Action*, text in 32 I.L.M. 1661(1993).

² *Ibid.*, paras. 18.37.39.

³ *Ibid.*, para. 18.

⁴ *Ibid.*, para. 38.

⁵ *Ibid.*, para. 40.

women were found to be the victims of domestic violence.⁶ In Columbia, until 1980, a husband could legally kill his wife for committing adultery.⁷ In India, it is reported that a "woman is molested every 26 minutes, raped every 52 minutes and falls a victim to dowry death every 102 minutes".⁸ It is further reported that between January-June 1994, in India, there were 3504 cases of rape, 3700 cases of kidnapping and abduction, 1226 cases of dowry death, 4322 cases of cruelty, 7037 cases of molestation and 3992 cases of eve-teasing.⁹ These figures are mind-boggling. They point out to the fact that woman's identity is defined in terms of her sexuality or gender, who is systematically deprived of her human rights. Violence against women is a fact of life. It is also manifested in the form of trafficking in women, child prostitution, female foeticide and infanticide. These acts against women are committed over and above the discrimination and inequality they suffer in every walk of life. In a UN Report (1980), it is reported that:

"women constitute half the world's population, perform nearly two-thirds of its work hours, receive one-tenth of the world's income and less than one-hundredth of the world's property."

They comprise 66 percent of the world's illiterates and 70 percent of the world's poor. Violence against women, clubbed with these inequalities, is the total denial of their human rights.

VIOLENCE AS A FOCAL POINT TO WOMEN'S HUMAN RIGHTS

In order to advance women's rights, it is necessary to tackle the problem of violence perpetuated against them. So far, across cultures and throughout time, violence against women in the private sphere is viewed as something apart from, and less egregious than violence that occurs in the public sphere. The traditional notions of human rights abuses have evolved with the distinction that abuses in the private sphere occur most frequently against women and those in the public sphere occur most frequently against men. Examples of the private sphere abuses against women include intimate violence, murders, rape,

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etc. Examples of public sphere abuses committed frequently against men are torture, arbitrary detention, disappearances, and summary executions. Whereas the public sphere abuses get more attention, the private sphere abuses have not previously aroused public outcry or state protection to the same degree, and they have been kept hidden from public scrutiny. But, it is important to note that those experiencing the abuses, the issue presents as an indivisible whole because it affects the entirety of the life of the person experiencing the abuse, and thus cannot and should not be fragmented into neat compartments of "private" or "public" abuses or cannot be ignored. Women particularly suffer from the effects of these abuses because of the fewer resources, and recourse or redress available to them.

However, to deal with the problem of violence against women, and to determine whether to define this problem as a human right issue, it is imperative to examine the issue in its whole perspective. A focus on the acts themselves - the beatings, the rape etc., would neglect the material circumstances which give rise to the acts as well as the consequences, leading toward further subordination of the survivor of the violence. A contextualization of the acts of abuse (i.e., events that occurred before the act of violence that contributed to its commission, and events that happened after the act) is essential. Violence against women is systemic, and intersects with all other aspects of their lives. Mere emphasis on acts of physical violence against women as a priority in human rights protection concerns is not enough. It must also address human rights issues which warrant the full attention, resources, and commitment of the nation-states.

Women are subject to various forms of violence, which are manifested in their human rights violations. These violations include: acts invading women's bodily integrity manipulating their child-bearing decisions etc.; economic exploitation viz., selling them as children or child brides, forced prostitution, near total exclusion from development programs; assaults, penalizing women for engaging in political activity in defense of themselves; so-called "domestic violence", i.e., husband's beating/rape/torture of women in "his house", torture by his family members; forced compliance with restrictive gender roles, often accompanied by persecution for refusing to accept them "appropriate" or "required" behaviour; poverty; lack of educational opportunities; inability of women or not allowing women to live apart from men, or to master "men's work", or limiting their public appearance only with the presence of a male relative. All violations of this kind, including in particular murder, systematic rape, sexual slavery, forced pregnancy, etc., require a particularly effective response. This requires the exploration of the roots of such acts and their deeper consequences.

Violence against women is a part of general violence found within social structure, such as based on class, caste, religion, ethnicity, and state control, i.e.,

⁶ See the *UN Newsletter*, Vol. 50, no. 33, p. 2 (19 Aug. 1995).

⁷ Magdala V. Toro, "Columbia: Legal Gains for Women" in Margaret Schuler (ed.), *Empowerment and the Law: Strategies of Third World Women* (1986) p. 71, at 71-73.

⁸ It is reported that in India, five women are burnt in dowry-related disputes every day, see *op.cit.* 6; also, Ranbir Singh, "Gender Justice and Human Rights in India" in J.L. Kaul (ed.), *Human Rights: Issues and Perspectives* (1995), p. 111 at 116.

⁹ See A.K. Jha, "Women: Saga of struggle", *Civil Services Chronicle* (April 1993), p. 16 at 18. For 1995, there were 357 reported cases of rape, 481 of molestation and 2639 of eve-teasing, see *The Times of India*, Feb. 1996, p. 3.

structural violence. Violence against women is also a manifestation of forms of control and coercion exercised through hierarchical and patriarchal gender relationships in the family and society.¹⁰ Power is at the core of violence. It runs through all the human rights violations committed against women, through each of them at every stage and at every facet.¹¹

Power is differently manifested and alternatively displayed, obscured, and trumpeted on women's bodies and in women's lives. Examining acts of violence alone fails to locate and explore these power plays. This requires a multi-facet approach towards these systematic acts of violence in order to evaluate them within the human rights framework. It also requires the examination of socio-economic and political circumstances from which this display of power emerges. Margaret Schuler, in her study, states that "understanding the phenomenon of gender violence requires an analysis of the patterns of violence directed toward women and the underlying mechanisms that permit the emergence and perpetuation of these patterns."¹² For this matter, it is necessary to scrutinize the role of poverty,¹³ the militarization of the society,¹⁴ culture, race, ethnicity, and religion in fostering, encouraging, justifying, or allowing violence against women. It is also necessary to closely examine the ways in which society reinforces violence against women through law, custom, and politics. State, by its policy of non-intervention in domestic violence perpetuates violence against women. The law-enforcement agencies, such as courts, by their non-action or wrong actions or decisions also give a flip to this situation.¹⁵

¹⁰ See Govind Kelkar, "Stopping the Violence Against Women: Fifteen Years of Activism in India" in Margaret Schuler (ed.), *Freedom from Violence: Women's Strategies from Around the World*, (1992), p. 75 at 76.

¹¹ "Power" here means not only the ability to get someone to do what you want, but also to gain political power and to operate in a society that values one's existence on this basis.

¹² See Margaret Schuler, "Violence Against Women: An International Perspective" in *Freedom from Violence, op.cit.* 10, p. 1 at 10.

¹³ Studies show that violence against women increases during hard economic times, see J. Ann Tickner, *Gender in International Relations: Feminist Perspectives on Achieving Global Security* (1992), p. 56.

¹⁴ See Julie Merrius and Pamela Goldberg, "A Perspective on Women and International Human Rights After the Vienna Declaration: The Inside / Outside Construct", *Journal of L. & Politics*, vol. 26, p. 201 at 226.

¹⁵ See the Supreme Court judgment in the case of a minor girl, whose rapists were acquitted by the lower court and the High Court, the girl was labelled as of "loose morals". The Supreme Court was critical of these courts and awarded rapists 5 years' jail term and Rs. 5000 fine to each of them after over ten years when the incident occurred in June 1985, see *The Times of India*, Jan. 1, 1996, p. 5.

To have a full view of this problem, one must also look deeper into the aftermath of the acts to understand their impact on the individual woman victim of the violence, as well as on women as a group and on society as a whole. How did the woman respond? How has the violence affected her life? What social or community support was available to help her to overcome the trauma? The answers to these questions serve an important role in formulating the problem and its resolution. While examining this problem, it is also important to analyse the social conditions that produce men that violate women, and subjugate women to men. It is also necessary to examine how the state has responded to the act or attempted to prevent the act. This is a difficult task, but then difficult problems need radical solutions. It is now time to shun the approach by labelling these abuses as solely women's issues which almost exclusively affect women, such as intimate violence, rape, and other acts that are carried out by the family members or by strangers, who are not state actors, and sometimes committed by the state actors also, like custodial rapes or violence against their body. Violence, when contextualised in this manner, will encompass many of the social, cultural, and economic disparities to which women are subjected to as well as the political abuses they confront. In fact, the close examination will reveal that violence is at the core of multitude of issues that affect women's lives, such as poverty, illiteracy, and lack of freedom to take vital decisions affecting her life, and thus making violence against women the central issue in the human rights of women. On the other hand, it can also be argued that, in the context of human rights, women's human rights violations are also a form of violence. Violence works as a catalyst to aggravate the human rights violations. Sometime women experience these human rights abuses without any tangible physical violence, and those cases must be raised as human rights violations. Thus, the challenge is to allow violence to remain a central issue, and use it as a vehicle to improve and highlight the women's human rights.

INTEGRATED APPROACH TO VIOLENCE

The full range of women's realities, in fact, represents a saga of intertwined repressions which requires a well thought of approach. Though it is true that at times to tackle the problem squarely, gender must be singled out and women should be given a separate and favoured treatment. This is being done under Article 15(3) of the Constitution of India and the Government has adopted various laws favouring women and punishing the crimes committed against them. Yet, separating the gender aspect does not solve the problem, though such an approach may be politically advantageous. Thus, though the Government of India has passed different laws to deal with the problem of atrocities against women, such as the Dowry Prohibition Act, 1961 as amended, by the 1986 Amendment Act, the Criminal Law (Amendment) Act,

1983. The latter Act has amended the Indian Penal Code and has introduced certain reforms concerning the punishment of rape, the procedure and rules of evidence. New provisions are added in the Indian Penal Code for the dowry death (Sec. 304 B) and domestic violence committed against women by her husband and his relatives (Sec. 498A). But these laws have not improved the situation in any significant manner. Furthermore these laws do not take into account every conceivable situation of violence against them, like the rape committed against a minor child by a family member, where she may not be in a position to comprehend and respond to the act in a legal sense. There also does not exist any meaningful societal support system to look after these victims.

This necessitates an integrated approach whose goal should be for the full recognition of the broad range of human rights violations that women encounter, while honouring the differences in their social position. Underlying the integrated approach is an assumption that women reject power imbalances that render their lives subordinate and invisible, and make them second class citizens in the society. It presupposes that patriarchal social relations have systematic social consequences and that mapping such consequences is valuable for corrective as well as constructive purposes. Such an approach may be reconstructive as well, which will help in designing new, gendered frameworks for thinking about the links between oppressions and path toward solutions. In such an approach, it is important to note that by merely adding women to traditional categories is not enough because they will take male experience as the norm and the women's issues will again take a back seat. They will be looked into from the point of view of men and not from the women's angle. Adding women should mean empowering women and to give the decisions a typical femininity approach. The underlying premise of this approach is that women view the world in diverse ways, which may be distinct from that of men. It also makes clear that women and conventional framework often cannot coexist. Thus, the Government's decision to have 30 percent seats in Gram panchayats or reservation of jobs for women is hardly a meaningful step, though politically most feasible and administratively most convenient to do, but it is hardly a meaningful step to eradicate the instances of violence against women. On the contrary, the integrated approach seeks to challenge the current, traditional frameworks and attempts to create new, gendered framework, constructed to fit the way in which women in all their diversity view the world, rather than adding the women to existing epistemological frameworks.¹⁶ Such a structure will reject efforts by the existing formalised human rights structure to keep women isolated in a separate, segregated realm.

¹⁶ See *op. cit.* 14, at p. 231.

The Fourth World Conference on Women, held between 4-15 September, 1995 at Beijing in China, in its Platform for Action has also identified violence as one of the critical areas of concern for women. It has suggested a multi-pronged, integrated approach to deal with this problem. The actions proposed by the Platform of Action are addressed to Governments, employers, non-governmental organisations (NGOs) and others. The governments are required not to use any custom, tradition or religious considerations to avoid their obligations to the elimination of violence; adopt measures to modify the social and cultural patterns of men and women; provide well-funded shelters and relief support for victims of violence; and assist female victims of violence due to prostitution and trafficking. The actions suggested to be taken by the governments, employers, NGOs and others are: to develop programmes and procedures to eliminate sexual harassment and other forms of violence in all educational institutions, workplace and elsewhere; promote research on violence against women; encourage the media to examine the gender stereotypes and take measures to eliminate them. However, in order to evolve an integrated approach and to introduce measures outlined in the Platform for Action require a strong political will of the governments which is not easy to come-by in the male-dominated decision-making process.

However, to deal effectively with this problem, the United Nations should keep a check on the member nations. Efforts should be made to enable the Commission on Status of Women to comment on the many reports of the Special Rapporteurs and Working Groups of the Commission. Similarly, the High Commissioner for Human Rights should review the work done by States towards the implementation of the Human rights conventions. The General Assembly, in 1993, adopted the Declaration on the Elimination of Violence, describing violence against women as "one of the crucial mechanisms by which women are forced into a subordinate position compared with men". It also appointed a Special Rapporteur on Violence Against Women, asking her to collect the most comprehensive data, and to recommend measures at the "national, regional and international level" to eliminate violence against women and its causes. The UN Commission on Human Rights in its 51st session (1995) adopted resolutions on the elimination of violence against women (Res. 1995/85), and on the question of integrating the human rights of women into the human rights mechanisms of the United Nations (Res. 1995/86).¹⁷

India is a party to many UN conventions related to women and it has also ratified the 1979 Convention on the Elimination of All Forms of Discrimination Against Women. The Government of India has appointed a National Commission for Women and the National Human Rights Commission which are

¹⁷ See the International Commission of Jurists, *The Review*, June 1995, p. 65.

operative since 1992 and 1993 respectively. Their main function is to prepare situation reports, which are recommendatory in nature. But one of the important functions of the National Human Rights Commission is to see that all treaties to which India is a party, should be implemented. In the light of the 1979 Convention on Women, the Commission's task is gigantic. The Convention enjoins the states to eliminate all forms of discrimination against women *in effect*.

CONCLUSION

The 1948 Universal Declaration of Human Rights declared that everyone "has the right of life, liberty and security of person" (Art. 3) and "no one shall be subjected to torture or to cruel, inhuman or degrading treatment" (Art. 5). Violence against any individual is a denial of human rights of the individual. Violence against women is practised in every society systematically which is systemic. It does not get the required attention and treatment from the governments because of its falling in the private sphere of the society. The Vienna Conference has brought the issue of violence against women to the forefront, and to treat the issue of violence as human rights violation. The Declaration stresses acts of physical violence against women as a priority in human rights protection concerns. There are ever-widening array of stories of manifestations of these acts and formulating ad-hoc and piecemeal solutions to them. Rather, the attempt should be to evolve an integrated approach, by taking into account the whole gamut of social relations, political and cultural realities of the country. Nevertheless, the attempt should not stop at the issue of violence but it should be integrated with the concept of human rights. In fact, those working to expand the concept of human rights must integrate and include violence against women and continue to address issues beyond violence and treat it as a fundamental human right issue which warrants full attention, resources and commitment of a community.

In organising a strategy, it is to be kept in mind that purely gender-specific solutions would be short term with their negative results in the long-term. They would focus on creating a gendered framework for thinking about oppressions and may not get the required community support. The better approach would be to integrate the gender-specific framework to deal with the acts of violence in the human rights dialogue, drawing connections between oppressions and social conditions, and emphasising their inter-relationship. In such an approach, it should not be lost sight that any given issue should be examined in its whole complexity, contextuality and with a view towards both the issue itself and the circumstances that give rise to it or allow it to occur.

A NOTE ON THE LEGAL BASIS OF "SHOOT TO KILL ORDER"

*Parnanand Singh**

I. INTRODUCTION TO THE PROBLEM

'Shoot to kill order' is sometimes issued by Magistrates and senior departmental officers to policemen or para-military personnel dealing with violent mobs or for combating widespread lawlessness. Such order can be sustained under various provisions contained in Code of Criminal Procedure and the Indian Penal Code. However, the exact legal basis of 'shoot to kill' order has so far not been conclusively decided by the courts.

Section 129 (1) of the Code of Criminal Procedure authorizes the executive magistrates and the other police officers to use *civil* force to disperse an unlawful assembly. Clause (2) expressly authorizes the use of such force for such dispersal. Section 130 authorizes the executive to call armed forces to disperse an unlawful assembly. Under section 132 a soldier receives absolute exemption from criminal liability for any act done in the compliance of the order of the superior. Such exemption is also available under sections 129 to 131 to executive magistrates for any act done by them in good faith. Section 23 of (The) Police Act 1861 imposes a duty on every police officer "promptly to obey and execute all orders and warrants lawfully issued to him by any competent authority". Clause (3) of Section 46 of Cr. P.C. forbids police officer to cause death of a person if the person to be arrested is not accused of an offence punishable with death or life imprisonment. This means that a person accused of an offence punishable with death or life imprisonment can be killed by a police officer in police encounter. Section 46(2) authorizes a police officer to "use all means *necessary* to effect the arrest of an accused".

Besides the aforesaid provisions, Exception 3 to section 300 of the Indian Penal Code protects a public servant acting for the advancement of public justice who exceeds the power given to him by law and causes death. Sections 76 to 79 of I.P.C. also excuses a person who has done what by law is an offence, under a misconception of facts, leading him to believe in good faith that he was commanded by law to do it. Illustration (a) to Section 76 reads:

A Soldier fires on a mob by the order of his superior officer in conformity with the commands of law. A has committed no offence.

*Professor, Campus Law Centre, University of Delhi. This note is based on the legal opinion given by the author to the National Commission on Human Rights, New Delhi, in August, 1995 on the legal basis of shoot to kill order. The author gratefully acknowledges the help given by Professor B.B. Pande in the preparation of this note.