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I declare that the particulars given above are true to the best of my knowledge and belief.

— Professor Tahir Mahmood
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VOL. XV DELHI LAW REVIEW 1993

Contents

FROM THE DEAN'S DESK

TRIBUTES TO A RETIRING COLLEAGUE

Professor Sivaramaya's Perception of Constitutional Equality
PARMANAND SINGH

1

On the Retirement of Professor B. Sivaramaya
Mahendra P. SINGH

5

ARTICLES

Formalism Syndrome in Decisions of Industrial Tribunals
DEBI S. SAINI

16

Contempt of Court in Nigeria : A Critical Appraisal
EMMANUEL J. UKO

26

Litigating with Fundamental Rights : Rights Litigation and Social Action
Litigation in India
Y. SHEHNAZ MEER

38

The Management's Prerogative of Discipline in India
HARISH CHANDER

58

Tax Administration in Singapore
NOMITA AGGARWAL

84

Hostile Takeovers : Causes, Consequences and Control
SUMAN GUPTA

95

The Changing Nature of Contract of Sale — An Indian Perspective
QOBAL HUSSAIN

109

Search and Seizure under the Income Tax Act
GHANSHYAM SINGH

116

STUDENTS' SECTION

Performers' Rights : A Critical Review VIJENDRA KUMAR AHUJA	123
Indias' Education Scenario CHITTARANJAN HATI	133
Environmental Pollution : A Legal Overview SEEMA MONGA	142
Tortious Liability in Sport-An Analysis of Intimedatory Fast Bowling in Crickel ARUN BALASUBRAMANIAN	149
Case Comments MANIKA JAIN	155
BOOK REVIEWS	
Mayne's Hindu Law, 13th Edn. (Bharat Law House) B SIVARAMMAYA	161
Public Law in India and Britain William Wade (N.M. Tripathi (P) Ltd) PARMANAND SINGH	163
An Introduction to Legislative Drafting - P M Bakshi (N. M. Tripathi (P) Ltd) S. K. VERMA	165
Amending Powers under the Constitution - Raman (Eastern Law House (P) Ltd) M. P. SINGH	168
Learning the Law. Glanville Williams (Universal Book Traders) MANISH ARORA	171

From the Dean's Desk

The Faculty presents with pleasure the 1993 Volume of the *Delhi Law Review*. Since the release of the last volume (1992) important changes have taken place in the Faculty composition.

Professor P.S. Sangal completed his three-year tenure as Dean on 19 June 1992. Through his distinguished services to the Faculty he has left deep imprints on its working. The major achievements of the Faculty during his tenure have been (i) establishment of the Department of Special Assistance, (ii) introduction of an entrance-test for admission to L.L.B. course and, of course, (iii) revival of the *Delhi Law Review* which had stopped publication in 1983. The Faculty places on record its deep appreciation of his services.

The mantle of Deanship was taken on by me on 20 June 1992. On assumption of office I had announced my decision to follow the policies of (i) widest possible autonomy for the three Centres of the Faculty; (ii) democratization of administrative work at the Faculty level and (iii) simplification of official processes and procedures to the best advantage of the entire Faculty fraternity — teachers, karmcharis and students. Meticulously following these policies, I have been serving the Faculty to the best of my humble capabilities.

During the academic year 1992-93 two distinguished Professors of the Faculty — K.B. Rehatgi and N.R. Madhava Menon — took voluntary retirement. The former is now in Malaysia as a University Professor, while the latter is Director of the National Law School of India in Bangalore. A third colleague parted company with us on 18 February this year. This was Professor B. Sivaramayya, who retired after a long distinguished career as a teacher, researcher, research-guide, author, orator and academic administrator. Among others who left the Faculty during 1992-93 are Sri O.P. Popli and Sri Solil Paul. We extend our gratitude to all these colleagues for the splendid work done by them for the Faculty and our best wishes for long and active lives. Tributes to Professor B. Sivaramayya by some senior colleagues appear in this volume.

This issue of the *Delhi Law Review* opens with a scholarly contribution by a distinguished former student of the Faculty, Debi S. Saini. This is followed by articles penned by two foreign scholars — Emmanuel J. UKO of Nigeria and Y. Shehnaaz Meer of South Africa. Colleagues in the Faculty who have written for this volume are Dr. Harish Chander, Dr. Nomia Aggarwal, Dr. Suman Gupta and Sri Ghanshyam Singh. In their company are a number of Faculty students and a couple of Indian contributors from outside the Faculty. To all these authors, as also to those who have favoured the volume with book-reviews, I personally extend my heartiest thanks.

I must express my deep gratitude to Dr. Nomia Aggarwal — Editor of the Volume — and members of her team : Dr. Suman Gupta, Dr. Kiran Gupta and Sri D.S. Bedi. What is in the readers' hand is indeed the product of their editorial and

managerial skill — especially of Nomia who has well established herself as an academic lawyer and legal-aid activist.

While reviewing the *Review* in 1990 Dean P. S. Sangal had given its readers an assurance that it would "never stop appearing in future". During my tenure as Dean I will honour his commitment.

Faculty of Law
Delhi University
15 April 1993

[PROFESSOR] TAHIR MAHMOOD
Dean

Professor Sivaramayya's Perception of Constitutional Equality

PARMANAND SINGH*

Professor B. Sivaramayya, a unique combination of simplicity, humility and learning, has always been acknowledged as an acute legal thinker and a marvellous person. Besides, his life-time study, research and teaching on various aspects of family and succession law, his abiding critiques on the limits of legal effectiveness in bringing about social transformation¹ in the Indian society provide endless insights into the intricate interplay of law and life. His celebrated work *Inequalities and the Law*², provides a power critique of the role of law in eliminating various kinds of inequalities permeating the social life. The inequalities based on sex, caste, religion and holding of property have existed in our society ever since pre-colonial days which were supported by the legal system itself. He tells us that even during the post-constitution period our efforts to use the instrumentalities of law and its visible institutions (courts, executive, police, judges, lawyers,) have been thwarted by multiple autonomous social forces which lie beyond the knowledge and control of positive law and official apparatus.

What professor Sivaramayya has been telling us is that we need not be beguiled by the sovereignty and autonomy of positive law and we should stop exaggerating the power of law to maintain order in the society. One might regard law as an instrument of political power and as an agent of policy formulations, but the right path to the understanding of law in relation to society lies in the understanding of ontological status of law by examining how law and policies to reduce inequalities are heavily predicated upon such prior factors as tradition, morality, religions and most importantly the prevailing political culture and dominant ideologies.

Sivaramayya concurs with Gunnar Myrdal³ that social inequalities stand as the root cause of economic inequalities. He regrets that various economic policies pursued by the government have benefited only the intermediate sections are groups and have failed to reduce the deprivations suffered by the 'poorest of the poor', namely, the unouchables, beggars, bonded labourers, destitutes, rural women and so on. Distributive justice has meant the economic betterment of small farmers rather than the beggars, the destitutes and the aged and there has been very little effort to utilise land revenues for the weaker sections of the society. Job reservations are snatched by the advanced sections from the 'backward castes' leaving nothing for the 'poorest of the poor'. 'Socialism' underlined under the preamble "can only recognise classes based on income but not castes."⁴

* Professor of Law, Delhi University.

Pending careful evaluation of other aspects of inequalities explored by Professor Sivaramayya. I seek here to understand his views on constitutional equality and its compatibility with the idea of reservations. Such an endeavour would be both belating and timely, in honour of this distinguished colleague, in the wake of the most criticised judgment of a nine-judge bench of the Supreme Court in *Indira Sawhney v Union of India*, (hereafter as the *Mandal case*).⁵

Professor Sivaramayya has maintained despite *Thomas*⁶ that the guarantee of "equality of opportunity" in matters of public employment under Article 16(1), being related to "equality of opportunity and status" in the preamble, is an individual right, embodying the concept of meritarian equality. Article 16(1) provides equality of opportunity to all citizens to compete for available jobs and therefore it would be impermissible to interpret this clause as permitting compensatory discrimination in favour of backward classes short of job reservations. Reservations and other concessions to these classes can be provided only under Article 16(4) which adopts the principle of proportional equality. To think of equality of opportunity as a component of the general right to equality guaranteed by Articles 14 and 15 would be over simplification if not erroneous, because such a view would ignore the critical distinction between equality of status and equality of opportunity. The concept of equality differs from equality of opportunity in the following ways: (a) it is open to a subject to accept or reject the opportunity, (b) effort is needed to grasp it, and (c) it is episodal in its character. In this sense equality of opportunity is a type of liberty or freedom. Proportional equality, on the other hand is concerned with group rights and does not share the episodal characteristics. Since reservation clause does not create any justiciable right in favour of any member of backward classes and depends largely upon the policies adopted by the state, it is only an exception to equality of opportunity guaranteed as individual fundamental right. Since Article 16(1) right is 'episodal', 'transient' and a form of 'freedom', no preference can be given to any disadvantaged group under this clause even by resorting to the doctrine of reasonable classifications.

Surprisingly all the nine⁹ Judges in the *Mandal* case have deprived from the *Thomas* principle permitting compensatory discrimination for backward classes under Article 16(1) itself, and have held that Article 16(4) is exhaustive of all reservations, concessions, test exemptions, and other employment preferences for the Scheduled Castes, Scheduled Tribes and backward classes. No preference of any kind in the area of employment can be given to the historic groups under Article 16(1).

The *Mandal Case*, however, does not accept the position taken by Professor Sivaramayya that Article 16(1) adopts the concept of meritarian equality and therefore Article 16(4) embodying the principle of proportional equality, is an exception to Article 16(1). Seven out of nine Judges permit reservations and other concessions in jobs for non-backward categories such as physically handicapped, political sufferers, ex-servicemen, disaster victims etc. Only Justices R. M. Sahai and Kuldip Singh maintain that no reservation or preference can be given to any group under Article 16(1) which guarantees individual right to all citizens to compete for jobs and opportunities.

Interestingly enough the Judges in the *Mandal* case endorse the view taken by Justice Beg in his dissenting opinion in *Thomas* that "the guarantee contained in Article 16(1) is not by itself aimed at removal of social backwardness due to socio-economic and educational disparities produced by past history of social oppression, exploitation or degradation of class of persons". Instead "it was in fact intended to protect claims of merit and efficiency...".¹⁰ In adopting Justice Beg's dissent in *Thomas*, the Supreme Court, thus unanimously reject *Thomas*'s majority that Article 16(1) itself mandates 'equality of result'.

If radical reconceptualisation of 'equality of opportunity' in *Thomas* has been thought to be irrelevant and erroneous by the *Mandal* Court, it seem unclear what purpose would be served in permitting reservation for 'otherwise handicapped' groups under Article 16(1). From a theoretical point of view this approach intellectually vacuus because on earlier occasions preference for other disparate categories had been tested under Article 14¹¹ and not under Article 16(1). That it would make no difference to the power of the State to create favoured groups whether it is under Article 14 or under Article 16(1) is besides the point. To say, as has been done in *Mandal* that Article 16(4) exhausts all employment preferences for backward classes and then to say that Article 16(4) is not an exception to Article 16(1) is nothing but a piece of intellectual confusion. If Article 16(4) exhausts all reservations and other preference including the kind of preference involved in *Thomas*, then Article 16(1) is surely an exception to Article 16(1) in relation to backward groups and this proposition will come very close to the position taken by Sivaramayya.

The basic flaw in the *Mandal* judgment, in my respectful submission is that the Judges have failed to clarify the relationship between reservations for the backward classes under Article 16(4) and reservation for other categories under Article 16(1), in view of fifty percent general limit placed by the court on job reservations. What will be the quantitative limit of job reservations in such a doctrinal setting where departure from merit principle is permissible not only for overcoming historic disparities but also for overcoming all kinds of inequalities caused by personal misfortunes, incompetence or disaster. What are legitimate social goals in the pursuance of which meritarian concept of equality can be constructed. It has always to be remembered that broader the class of beneficiaries and more expansive the benefits, there will be greater danger that the essentially temporary arrangements will ossify into permanent caste, communal and group allotments. The inevitable consequence of the expansion of compensatory principle might be to diffuse the special quality of the commitment to the lowest social categories who have been the victims of historic wrongs. The Judges in the *Mandal* case have not attempted to provide a conceptual framework so reconcile the antagonistic principles of equality.

END NOTES.

1. B. Sivaramayya, *Inequalities and The Law* (1984) Eastern Book Co. Lucknow.

2. Gunmar Myrdal, *The Challenge of World Poverty* Ch. III (1970) cited in B. Sivaramayya *supra* n. 1. at 162

3. *Supra* n. 1 at 165.
4. *Id* at 46.
5. JT 1992 (6) S.C. 273.
6. *State of Kerala V.N. M. Thomas* AIR, 1976 S.C. 490.
7. *Supra* n. j at 36.
8. *Id* at 37.
9. M. H. Kania CJ, M. N. Venkataswamy, R. Pandian, A. M. Ahmadi, P. B. Sawani, B. P. Jeevan Reddy, Thommen, Kuldip Singh and R. M. Sahai JJ.
10. *Supra* n. 6. at 522.
11. *Chanchala V State of Mysore* AIR 1971 S.C. 1762, P. Rajendra V. *State of Madras* AIR, 1968 SC1012, *Subhasini V State of Mysore* AIR, 1966, My 40, *Jacob Mathew V State of Kerala* AIR, 1964 Ker. 39, *Chitra Ghosh V Union of India* AIR, 1970, SC. 33.

On the Retirement of Professor B. Sivaramayya

MAHENDRA P. SINGH*

After an illustrious and inspiring career of successful teaching spanning nearly four decades, Professor B. Sivaramayya bids farewell to active service at the University of Delhi on 18 February 1993. During this period he has produced a large number of bright and promising law graduates in India as well as abroad. Many of them and some others have also pursued higher studies and research with him at the postgraduate, doctoral or postdoctoral level. Definitely all of them must be carrying a vivid imprint of Professor Sivaramayya's scholarly, personality, rigorous teaching, persistent research, all combined with his simplicity, modesty and rightness. Those who had such a teacher were indeed very fortunate students.

I could have very well shared this fortune, had I pursued my studies at the University of Delhi. But that was not to be and, therefore, much later in his distinguished career, I joined him as a very junior colleague. I have, however, been fortunate to be with him in that capacity for nearly 23 years. During these years I had the opportunity of interacting with him in a number of ways. To begin with from 1970 onwards I had the opportunity of teaching family law with him for several years. Apart from his thoroughness in the subject, I marked his amazing concern and passion for maximum class teaching even by holding additional classes over and above the assigned ones. I even remember having once disagreed with him on the desirability of supplementing the initially agreed course content by an additional topic towards the end of the semester and teaching it by holding additional classes. But that was basically due to my own obsession for no-deviation from the already announced course and not because of any impropriety in Professor Sivaramayya's suggestion. From then onwards there were many occasions to participate with Professor Sivaramayya either in cooperative teaching of postgraduate classes, or in research and writing projects, seminars and discussions, departmental committees, preparation of course contents and reading materials, etc. At each one of these occasions and opportunities Professor Sivaramayya has impressed me in no uncertain terms about his sincerity of purpose, thorough preparation, punctuality and regularity, and determination to pursue things and to take them to their logical end without compromising any of his superb qualities mentioned above.

* Professor of Law, University of Delhi.

Beside the professional interactions, occasionally I also had personal interaction with him. Although apparently he gives the impression of being reserved and to some extent also aloof, he is full of warmth and humour. He enjoys telling professional and other anecdotes. But at the same time he is very sensitive towards the feelings of others and would never say anything that hurts a person either in his presence or even at his back. For that reason we never found him either indulging in backbiting or even encouraging

Ours is said to be a land of oral traditions where knowledge progresses and is transmitted from generation to generation through words of mouth and not of pen. This tradition can be prominently marked among the legal academics who, committed to their counter-parts in the West, write very little. Although Professor Sivaramayya is also a product and part of that tradition, he falls within the category of those few who are an exception to that tradition. As is evident from the appendices of his writings, from the very beginning of his career he has been consistently publishing. Not only that, the range of his writings extends from family law to institutional law to issues of women and children, poverty and bonded labour; usually and affirmatively action, uniform civil code, property and specific relief and so on. Although serious research needs to be done in each of these areas to assess the contribution of Professor Sivaramayya even on a cursory reading one gets impressed by the simplicity and lucidity of his style, depth of learning and concern for the most important and timely issues. While some of his writings have influenced legislative policies others have been authoritatively cited even by the apex court of the land.

In his writings as much as in his oral presentations Professor Sivaramayya resists his point of view with conviction and determination. Unlike many of us he straight forward and plain speaking. He will express plainly and in no uncertain terms his agreement or disagreement on any issue in which he participates. If he is convinced of his point of view he would hold his ground inspite of opposition or disagreement of others. But at the same time he ideally represents Learned Hand's spirit of 'Liberty' which is never too sure to be right. He is always receptive to views of others and open to change even his deep seated and well formulated views in the face of superior and more convincing views of others. Not many people in our law schools, where ignorance coupled with arrogance dominates, will do that. Let us hope that Professor Sivaramayya's spirit turns more and more of us towards the natural course of *Vidya Vinaya Sampannay* (learning with humility).

We all know of the late origin and limited role of the academic discipline in the common law system which we have received from the United Kingdom. Unlike the civil law system where the academic discipline in law is entrenched in long established tradition and plays the dominant role in the shaping and guiding of the legal system, in the common law that role is played by the practical lawyer or the

judge while the academic lawyer remains at the periphery and plays a very marginal role. In some common law countries like the United States academic lawyers have vigorously worked to establish the importance of the role of the academic discipline in the legal system, but in general the practical lawyer continues to dominate the scene. This is much more the case in India where academic discipline in law has never been taken very seriously. Therefore, most of the talented and ambitious lawyers are attracted by practice. A few who either by compulsion or by choice enter the academic discipline do not get adequate intellectual nourishment in the academic circles and encouragement from the legal profession and the legal system. Consequently, even the marvellous efforts of the dedicated ones end up in making a few ripples in the vast ocean of the legal system without in any way influencing the tide. Vast income disparities in the academic and practical profession and lack of adequate or suitable working conditions in the former are other disincentives for the entry and progress in academic legal career. Therefore, a substantial number of academic lawyers is attracted by or compelled to look for other avenues of income. Some of them also give up half way and enter practice while others move to foreign universities where apart from anything else they have at least better working conditions. The ones, like Professor Sivaramayya, who enter academic life by choice and pursue it with exclusive devotion without caring for additional avenues of income or facilities, are indeed the rare species in our law schools. Hardly any one in the country, however, realises that this species alone is protecting the legal system from total collapse. The legal profession has miserably failed in performing its role of training the practical lawyer and exclusively depends upon the law schools. If law schools also fail, and they are bound to but for persons like Professor Sivaramayya, what would happen to our legal system on which the practical lawyer makes such a big claims and survives? Thus those few amongst us who are following the footprints of Professor Sivaramayya are doing an immense service to our legal system and in turn to our society. And whether anybody recognises their debt or not they must continue to pursue their work with total dedication and devotion. In that alone lies some hope, if any, and Professor Sivaramayya is harbinger of that hope. Our present and future generations must take inspiration from him in the shaping and improving of our legal system and society.

In today's materialistic world serious difficulties are pointed out in pursuing the path which Professor Sivaramayya has so graciously treaded. But why? We always boast of our traditions of learning being the greatest *dharma* and the greatest wealth, of learned being superior even to the king because the king is respected only in his kingdom while the learned is respected everywhere as well as of the perpetual rivalry between the learning and worldly acquisitions. If there is any truth in these traditional claims, and I believe there is at least to the extent that they attract men towards learning, then today, when many of us are fanatically looking for our cultural roots, there is a much greater need than ever before to translate these claims into practice. Then and then alone we can dream of rising to the position to which

our society is said to have reached in the world when these traditions took their roots and flourished and of realising the wonderful vision of the Gunrddeva for this country.

Professor Sivaramayya also personifies *The Gita's* famous exhortations of *Karmanyevadhikaraste* and of sticking to one's *dharma* notwithstanding the superiority of any one else's *dharma*. Very often we ignore or do not take seriously our own duty or role in life and either get attracted by the roles of others or indulge in finding fault with them for our ills. Of course in a free and dynamic society no roles are and should be fixed and people must also have the right to freely comment on the social roles of others. But at the same time we must also remember that everyone cannot, rather no one can, get everything he longs for. Nor can that be an excuse for not performing one's own role faithfully. In our law schools, however, we find that very few of us are performing our roles faithfully. The rest are either getting allured by other roles and trying to simultaneously indulge in them or are becoming totally indifferent, inert and inactive. Neither of them is, however, consistent with our fundamental exhortations and the foundational principles on which they are based.

This aspect of Professor Sivaramayya's life also reminds me of a living example from the West. Towards the end of his long and glorious career as Betts Professor of Law at the Columbia Law School, Professor Walter Gellhorn told one of his last classes, in which I was also fortunate to be present, that on the completion of his clerkship with Justice Brandeis he had the choice of either taking up a teaching position at the Columbia Law School or joining a law firm at the famous Wall Street of New York. When Justice Brandeis asked for his preference, young Gellhorn expressed his desire to join the law firm because of much higher earnings in the law firm with which he could lead an independent life. The great judge told him that if independent life was his goal then he must know that independence does not come from the amount one earns; it comes from how one spends whatever one earns or, in other words, from the kind of life one leads. It changed Gellhorn's preference and he joined the law school. With great contentment and sense of pride he told his class that never in life he had ever regretted his decision. Everybody in the field of law in the United States and abroad knows the name, fame and respect which Professor Gellhorn has earned as professor of law and the immense contributions he has made to the law and the legal education. Apart from numerous other distinctions and awards conferred on him, perhaps he was the first law professor in the long history of the Columbia University to be made University Professor Emeritus in 1974 and perhaps the only professor anywhere in the world in whose name a chair has been instituted from funds raised by his alumni at the Columbia University while he is still actively serving that university, law and legal education.

In narrating this example I am funy, conscious of the difference in conditions in the United States and India and also of the Delhi University Ordinance XII-B

which expressly denies "any special facilities like a personal office or an independent laboratory" to a Professor Emeritus and refuses to make any "financial commitment" or to take any "responsibility for providing residential accommodation" for him. The Delhi University has also not conferred even that honorary status on any professor of law so far notwithstanding the fact that some of them have made seminal contribution to the legal education and the law. Yet, in my view, if there is any hope at all it lies only in the kind of example which Professor Sivaramayya has set. Any deviations or distractions from that will neither help the law teachers, nor the legal system, nor our society at large. Therefore, we must make his life our ideal and dedicate ourselves to that ideal. We must also get satisfaction in the fact that in our own setting though a law professor may not be having everything needed for an ideal living, he is not placed too badly either. Professor Sivaramayya and those who have lived with his ideals are well placed in our social system and are capable and expected of living a reasonably good life after their retirement from the university. Let us hope and wish that Professor Sivaramayya continues to inspire us in his retirement in the same measure as he did during his active service at the University.

Appendix

A Glimpse of the Life and Works of Professor Sivaramayya

Professor B. Sivaramayya was born on 19 February 1928 at Behrampur in the state of Orissa. He did his graduation in science (B. Sc.) from the Benaras Hindu University, Visakhapatnam, Varanasi and the becheior's and master's degrees in law (B. L. and M. L.) from the Andhra University. Later he also did his LL. M. from the Yale University, U. S. A. and D. C. L. from Mc Gill, Canada. After completing his legal education in India he had for a while joined the Andhra Pradesh High Court Bar. But soon he changed his profession and took up teaching at the Faculty of Law, University of Delhi on 1 October 1956. Ever since until his retirement on 18 February 1993, he has served the University of Delhi with unflinching devotion. In between there have been brief periods of absence either for study or research or for teaching abroad

including his deputation from the Government of India at the Ahmadu Bello University Zaria, Nigeria but without any break in his service at the University of Delhi.

Along with his normal teaching and research, he has also been associated with several important projects, programmes and organisations. He has been a member of the task force on social legislation of the Planning Commission, on law of the Committee on the Status of Women, on the Law of Security Interests; in Personal Property of the Banking Laws Committee, and on child legislation of the Indian Council of Child Welfare. He has also been a member of the Curriculum Development Committee in Law constituted by the University Grants Commission. Currently he is a member of the Committee of Experts constituted by the National Commission for Women to examine provisions in the existing laws affecting women.

Professor Sivaramayya has also organised and participated in many national and international conferences, seminars and colloquiums. Some of them in which he has been programme participant are:

1. World Congress on Equality and Freedom held at St. Louis U. S. A. in 1976;
 2. The Indo-US Seminar on Ethnicity held in New York in 1979; and
 3. The International Conference on Affirmative Action held at Bellagio, Italy in 1982.
- Professor Sivaramayya has widely published. His publications include:

Books

1. WOMEN'S RIGHTS OF INHERITANCE IN INDIA (1973, Madras Law Journal, Madras).
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3. INEQUALITIES AND THE LAW (1984, Eastern Book Company, Lucknow)
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Professor Sivaramayya owns a house in Delhi in which he plans to stay with his wife during his retirement. From there he will also continue to pursue his scholarly interests and plans. Persons with similar shall always be getting inspiration and guidance from him.

Formalism Syndrome in Decisions of Industrial Tribunals

DEBI S. SAINI*

Introduction

While choosing to retain¹ the law of compulsory adjudication on the Indian statute book, the framers of the Industrial Disputes Act, 1947 (hereinafter referred to as the IDA) were aware of the risk of formalism entering in the issues of industrial-equity negotiations. This was how compulsory adjudication (or compulsory arbitration as it is known in some systems) was looked upon world over, so far as is concerned its potential of legalisation of important socio-economic issues involved in industrial relations. Nevertheless, the supporters of this model succeeded in projecting that this system would ensure expedient, cheap, simple and informal administration of industrial justice, and "give impetus to trade union movement".² Also, industrial Tribunals and Labour Courts were expected to provide greater accessibility to disputant parties as compared to civil courts, with less legalistic procedures. Further, they were to be special-purpose bodies, and in this regard were to combine expertise in industrial relations with principles of justice administration.³

How have the above-mentioned objectives of industrial adjudication been achieved, and what kind of industrial relations culture has compulsory adjudication promoted? Not much empirical work has been undertaken in India in this regard. Most labour law researchers in the country have been confined to doctrinal investigations. Even scholars of labour studies and social sciences in India have confined themselves mostly to aggregate-data analysis at the all-India or state levels. However, since around late seventies, labour scholars have begun to undertake micro-level labour studies,⁴ but sociology of labour law has been virtually a barren field.⁵

This paper attempts to make a socio-legal analysis of the presence of informality in industrial-justice dispensation through Industrial Tribunals in India. It may be noted that in India, broadly, Labour Courts have the jurisdiction to decide rights disputes like those relating to dismissal, discharge, interpretation of standing orders etc.; Industrial Tribunals, however, have been given powers to decide rights as well as interest disputes,⁶ like those relating to wages, bonus, fringe benefits etc. Interest disputes are usually of collective nature; but rights disputes could be

individual or collective. The paper is based on field work conducted at Faridabad Industrial Complex in respect of the processing of collective labour disputes⁷ in private sector industries.

Data Sources and Research Methodology⁸

The principal source of data collection for this paper is interviews of two sets of respondents: 76 general-category (also called second category) professionals in Faridabad, including outsider union leaders (32), practising labour lawyers (27), and management consultants (17); and disputant parties' (management and workmen's representatives) in 33 collective labour disputes. In the latter category were a sample of 29 disputes that were adjudicated by Industrial Tribunal, Faridabad, and in respect of which it delivered awards, and 4 disputes are those the conciliation proceedings of which were observed live. Three of the conciliation cases were settled at conciliation level, and one was referred for adjudication by the Industrial Tribunal. The Tribunal proceedings too were observed. The data from respondents in the general category as well as in the disputant category were obtained by administering an interview schedule, which involved, *inter alia*, questions on Tribunal working relating to formal atmosphere, difficulty in understanding proceedings, use of legal jargon, and approach in treatment of industrial-relations problems. The interview schedule also contained open-ended questions, giving scope to elaboration by the respondents.

Informality by Tribunals and IDA

Simply speaking, informality in industrial adjudication means that the disputant parties *feel comfortable while participating* in the dispute settlement process, and are able to *present their own case with expectation of a reasonable degree of success*. Though it is true of both labour and management, it should be more so in case of the former, who, due to their comparatively poorer educational background, are likely to perceive greater unease while participating in Tribunal proceedings. The adoption of an informal approach would undoubtedly require minimization of formalities by the Tribunals.

Since the disputant parties do not see Tribunal hearings as every-day events, some formality is bound to be perceived by them in all Tribunal proceedings. We have to, therefore, accept that level of formality as inevitable. If Tribunals adopt too technical an approach in exploring solutions to industrial relations problems and adhere to strict judicial procedures, that would prove counter-productive to the objectives of special-purpose bodies like Industrial Tribunals, which are provided to cater to the specific needs of disputants. It is important to ask, however, can Tribunals, with their present structural framework and expected role, eschew technicalities and become informal, and at the same time comply with a large corpus of ever-increasing complexities of industrial relations law?

If it is not possible to banish all technical requirements, it is important to ask what degree of informality is achievable. And, by way of a corollary, what

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situations can be described as formal? Atkinson argues that a situation may be perceived as formal when the more interactional details are different from conventional way of talking.⁹ According to this notion of formality, Tribunals will have to eschew much of their strict judicial procedures and also replace them by inquisitorial approach, while simultaneously complying with the standard requirements of quasi-judicial procedure.

Let us look into the objectives of adjudication under the IDA and the safeguards provided in this regard in this Act against the development of formalism. The Act provides in its preamble that it was being enacted to "make provisions for investigation and settlement of industrial disputes" through, *inter alia*, Labour Courts and Industrial Tribunals. The framers of the Act expected that these bodies would expeditiously resolve industrial conflict, and without involving legalistic court procedures. The framers were aware of the importance of informality in industrial-justice dispensation as the statement of aims and objects of the IDA accepted that "industrial peace will be most enduring where it is founded on voluntary settlements".

To safeguard against the danger of legalism, the Act provides: "No party to a dispute shall be entitled to be represented by a legal practitioner in any conciliation proceedings".¹⁰ The Act also discouraged the representation of parties by lawyers before the Labour Courts and Tribunals. It is provided that they could be allowed before them with the consent of the other parties to the proceedings, and with the leave of the authority concerned, the Presiding Officers (POs) in case of Labour Courts and Industrial Tribunals.¹¹ To dilute the incidence of legalism and to invoke greater degree of industrial-relations expertise, appropriate Government was authorised to appoint two persons as assessors to advise a Tribunal.¹² Also, the authorities were given the power to "enter the premises occupied by any establishment to which the dispute relates"¹³ so as to, perhaps, grasp the finer aspects of the concerned disputes. Most importantly, from the viewpoint of informality, Industrial Tribunals and other adjudicatory bodies were given freedom from following any rigid procedure. They can "follow such procedure as the... authority... may think fit".¹⁴ Even the Supreme Court of India, accepted "collective bargaining" as one of the objectives of the IDA.¹⁵

A reading of these provisions of the IDA shows that the Tribunals were expected to dilute legalism so as not to administer industrial justice in, among others, a formal manner. Legalism promotes either-or dichotomization of issues, and is negative in character, and "frequently discourages further inquiry",¹⁶ thus contradicting the notion of informality. Thus, the court-like procedures and the use of legal jargon were expected to be minimised, or even eschewed. But, these Tribunals were to be manned by Judicial Officers as is clear from their qualifications prescribed in the IDA.¹⁷ Therefore, it will be Utopian to completely banish formality from Tribunal proceedings. And, to know the incidence of formality, we decided to know the perceptions of those who participated in these proceedings, and also of the professionals who represent parties before them on a regular basis. These perceptions have been analysed in the following sections.

The Tribunal Atmosphere

A very important corollary of the absence of formalism is that the Tribunal working must, in the first instance, contribute to relaxed hearings, whereby the disputant parties perceive it to be so. Formal and tense hearings will surely dilute the norm-creating potential of the disputant parties—more likely the workmen—participating in it. Table I depicts the responses of disputant parties relating to the perceived atmosphere at the Tribunal hearings.

The table shows that both the workmen's as well as managements' representatives, by and large, did perceive the Tribunal proceedings as formal. While eliciting the responses, the respondents were asked whether they felt at ease or tense, and as if they would have felt at the negotiation table. More than 3/4 of the respondents belonging to both parties perceived Tribunal proceedings as tense.

Table I: Views of Tribunal Proceedings: Disputant Parties*

Were Tribunal Hearings Formal?	Union/Workmen's Representatives		Management Representatives	
	No.	(%)	No.	(%)
Yes	21	(77.8)	18	(75.0)
Neutral	5	(18.5)	4	(16.7)
No	1	(3.7)	2	(8.3)
Total	27	(100)	24	(100)

Note: This question related to the actual experience of the disputant parties. Since Tribunal hearing did not take place in some of the cases at all, therefore, the question was not applicable to some of the respondents. Also, the question was not put to disputant parties in conciliation cases. And, the number of respondents representing managements is less than those of workmen because some management representatives refused to share their experiences. This is also true of Tables 3, 5 and 6.

* Figures in parentheses denote percentages
Source: Disputant-Parties' Interviews

The professionals in the general category too were asked about their impression which the Tribunal projects in terms of creating a formal atmosphere. The responses have been presented in Table 2.

Table 2: Views on Tribunal Proceedings: General-Category Interviews*

Are Tribunal Proceedings Formal?	Practising Lawyers		Union Leaders		Management Consultants	
	No.	(%)	No.	(%)	No.	(%)
Yes	11	(40.8)	16	(50.0)	9	(32.9)
Neutral	8	(29.6)	10	(31.2)	6	(35.3)
No	8	(29.6)	6	(18.8)	2	(11.8)
Total	27	(100)	32	(100)	17	(100)

* Figures in parentheses denote percentages
Source: General-Category Interviews

The three categories of professionals had mixed feelings of the presence of formal atmosphere in Tribunal proceedings. Union leaders (50 per cent) and management consultants (52.9 per cent) were more inclined to labelling the atmosphere as formal than practising labour lawyers (40.8 per cent). Respondents in all three cases in the general category perceived less formality in proceedings at the Tribunal as compared to disputant parties. Interestingly, a sizeable number of respondents in this category — 29.6 per cent practising lawyers, 31.2 per cent union leaders, and 35.3 per cent management consultants — were neutral on the question of labelling the Tribunal atmosphere as formal. This would mean that these respondents do not regard Tribunals as too formal or too informal.

Various factors contribute to the creation of formal atmosphere. Even though, the Tribunal PO is not required to wear a judge's dress, the presence of a large number of lawyers in black coats in and around the Tribunal office contributes to a formal atmosphere. In spite of restrictions¹⁸ on their appearance before Tribunals and Labour Courts under the IDA, they appear before them freely; this is how Tribunal working has got structured. The lawyers and union leaders have committed for a peaceful co-existence in the Tribunal structure, both deciding not to raise propriety questions about each others' presence. Also, most labour lawyers in Faridabad, and presumably elsewhere also, keep shutting between the Tribunal and the Labour Court Offices and Civil Courts, keeping upon hearing fixations in their cases, where too, many of them practice in civil and criminal matters; they are likely to find it difficult to change their legalistic attitude. This has a demonstration effect on the management-consultants and even the professional union leaders who — in spite of their lack of higher and legal education — attempt to emulate the lawyers in their arguments. And, formality is conspicuous in all Court situations.

Understanding of Tribunal Proceedings

Simple and informal administration of justice also warrants that the disputant parties understand the proceedings. A legalistic approach followed by the Tribunal would be difficult for parties to understand what goes on at the Tribunal, and therefore would obstruct their fuller participation in the processing of disputes. Table 3 depicts disputant-parties' understanding of Tribunal proceedings.

Table 3: Whether Tribunal Proceedings were Difficult to Understand: Disputant Parties*

Was it Difficult to Understand Tribunal Proceedings?	Union/Workmen's Representatives	Management Representatives
Yes	20 (74.1)	15 (62.5)
Neutral	2 (7.4)	4 (16.7)
No	5 (18.5)	5 (20.8)
Total	27 (100)	24 (100)

*Figures in parentheses denote percentages

Source: Disputant-Parties' Interviews

The table shows, the majority of both parties find it difficult to comprehend what is going on at the Tribunal: the implications of the Tribunal proceedings. About 20 per cent respondents belonging to each party did not find any problem in understanding the Tribunal proceedings.

The majority of respondents in the general category, as shown by Table 4, also corroborated the disputant-parties' inability to understand the implications of Tribunal proceedings. The percentage of union leaders who feel so is 78.1.

Table 4: Whether Tribunal Proceedings are Difficult to Understand for Non-Professionals: General-Category Interviewees*

Is it Difficult for Non-Professionals to understand what goes on at Tribunal?	Practising Lawyers	Union Leaders	Management Consultants
Yes	18 (66.7)	25 (78.1)	9 (52.9)
Neutral	5 (18.5)	3 (9.4)	2 (11.8)
No	4 (14.8)	4 (12.5)	6 (35.3)
Total	27 (100)	32 (100)	17 (100)

*Figures in parentheses denote percentages

Source: General-Category Interviewees

As is well-known, industrial relations are continuing relations of conflict and accommodation, and are not one-time disruptions. One of the basic postulates of industrial relations is "participation" in resolving industrial-relations matters especially in collective-labour issues. Interestingly, global thinking has begun to emerge in the area of upgrading the status of individual disputes to those of collective ones¹⁹ for settlement purposes. It would be unthinkable, therefore, that industrial relations procedures are so structured that common people don't understand the implications of the proceedings. This is a manifestation of industrial relations issues having been legalised and formalised.

Jargon in Tribunal Proceedings

The usual method of dispute processing at Tribunal is adversarial and involves case citations on technical points. This further alienates the disputant parties and especially the workmen from the dispute settlement process. Use of legal jargon also makes it difficult for parties to understand the proceedings. While legal jargon may make a positive contribution in civil cases by conveying precise meanings, Industrial Tribunals have to deal with interest-relations of parties, which cannot be left to the mercy of legal jargon because they aim at adjusting to the socio-economic realities of the enterprise. The realities change fast and cannot be legalised without adverse consequences. The reactions of disputant parties to the use of jargon at Tribunal have been presented in Table 5.

Table 5 shows that three -four or even more respondents representing both the disputant parties perceive that legal jargon is used at Tribunals. Only an insignificant number of them feel that it is not so. Table 6 presents responses of

General-category respondents to the question, who too feel that legal jargon is used at the Tribunal. In fact, many of them questioned whether they could be avoided in quasi-judicial proceedings like that of Tribunals. But the use of jargon surely is against the original intention of the framers of the IDA, and is also antithetical to a proper processing of collective labour disputes especially interest issues.

Table 5: Use of Legal Jargon at Tribunal: Disputant Parties*

Is Legal Jargon used at Tribunal?	Union/Workmen's Representatives		Management's Representatives	
	No.	No.	No.	No.
Yes	21	(77.8)	18	(75.0)
Neutral	4	(14.8)	3	(12.5)
No	2	(7.4)	3	(12.5)
Total	27	(100)	24	(100)

*Figures in parentheses denote percentages
Source: Disputant-Parties' Interviews

Table 6: Use of Legal Jargon at Tribunal: General-Category Interviewees*

Is Legal Jargon used at Tribunal in Collective Disputes?	Practising Lawyers		Union Leaders		Management Consultants	
	No.	No.	No.	No.	No.	No.
Yes	17	(63.0)	30	(93.8)	12	(70.6)
Neutral	7	(25.9)	1	(3.1)	3	(17.6)
No	3	(11.1)	1	(3.1)	2	(11.8)
Total	27	(100)	32	(100)	17	(100)

*Figures in parentheses denote percentages
Source: General-Category Interviews

Industrial Relations as Legal Issues

Industrial relations often involve problems of human relations, especially in interest-disputes situations. Treatment of these issues legalistically dilutes the law-creating potentialities of the parties, and also ultimately leads to "juridification" of industrial relations. It would compel the parties to promote as well to become victims of legalism. The disputant-parties' perceptions of Tribunal's handling of industrial disputes are presented in Table 7.

An overwhelming majority of representatives of both managements as well as workmen involved in the sampled disputes perceive that Tribunals basically deal with legal issues, and see the concerned industrial relations issues as legal questions rather than those of industrial relations. This approach compels the parties' representatives to sharpen their legal skills; and in the process, the organisational activities of unions get overshadowed by the preparing for Tribunal proceedings.

Table 7: Whether Tribunal Perceives Disputes as Merely Legal Problems: Disputant Parties*

Does Tribunal Perceives Issues Merely as Legal in Collective Disputes?	Union/Workmen's Representatives		Management Representatives	
	No.	No.	No.	No.
Yes	24	(88.9)	19	(79.2)
No	1	(3.7)	4	(16.7)
Can't say	2	(7.4)	1	(4.1)
Total	27	(100)	24	(100)

*Figures in parentheses denote percentages
Source: Disputant-Parties' Interviews

Even most of the general-category respondents whose responses are presented in Table 8 feel that Tribunals treat disputes as legal issues. Many practising lawyers (29.6 per cent) and management consultants (17.6 per cent), however, felt that it is not necessarily so. Interestingly, 100 per cent union leaders subscribed to the view that Tribunal treats problems as legal issues; but most of them have no dispute on why it is so. In fact, they question whether such treatment could be avoided.

Table 8: Whether Tribunal Perceives Issues Merely as Legal Problems: General-Category Interviewees*

Does the Tribunal Perceives Issues Merely as Legal in Collective Disputes?	Practising Lawyers		Union Leaders		Management Consultants	
	No.	No.	No.	No.	No.	No.
Yes	19	(70.4)	32	(100)	14	(82.4)
No	8	(29.6)	-	(0)	3	(17.6)
Neutral	-	(0.0)	-	(0)	-	(0.0)
Total	27	(100)	32	(100)	17	(100)

*Figures in parentheses denote percentages
Source: General-Category Interviews

Concluding Remarks

Thus, we notice from Tables 1 to 8 that Tribunal working shows a technical treatment to industrial-relations issues in the perceptions of both category of respondents — the disputant parties as well as the professionals. This technical treatment characterises formal atmosphere, use of legal jargon, treating disputes as essentially involving legal and not industrial relations issues, problems in understanding the implications of Tribunal proceedings by the disputant parties etc. The responses put a question-mark on the capability of Tribunals to handle industrial conflict without the use of technicalities and without promoting legalism. Thus POS of Tribunals become passive listeners and interest-neutral. Such an approach becomes a major stumbling block in enquiring into industrial disputes. It was observed at the Tribunal that whenever workmen wanted the PO to play a more

affirmative role, he refused to deviate from the adversary procedure; rather ridiculed them for asking to do so.

Why haven't Tribunal POs innovated procedures of inquiring into disputes so as to investigate them as envisaged in the IDA? This is not a question of only their attitude but the entire Tribunal environment has been structured to produce this outcome. The IDA provides that the awards of Tribunals are final and not appealable to any higher Judicial Forum.²¹ But Articles 226 and 136 of the Constitution provide for writs and special leave to appeal respectively against decisions of bodies like Tribunals and Labour Courts. "Even though, these remedies are not supposed to be available as a matter of course, it is a known fact that they have been sought and granted mostly as a matter of routine", observed a Supreme-Court-level labour lawyer (who represents exclusively managements). When the technical correctness of an award is sought to be standardised, and tested at the touchstone of objectivity evolved at judicial fora, technicalities cannot, as a rule, be avoided. These remedies warrant that Tribunal rulings have to be consistent and reasoned. Not only the higher judiciary, but the Tribunals themselves look upon these standardisations as the more proper or even the only method of arriving at a just and fair solution.

It must be agreed that in a situation where an Industrial Tribunal has been appointed to settle all the collective and even some individual industrial disputes in the whole State — which is manned by a Civil Judge — he will, naturally, hear the cases in a routine juridical manner. Is it, otherwise, possible that a PO innovates methods of enquiring into and settling industrial disputes? Neither is informality possible due to legalistic training and background of judicial officers nor can it be practised on a grand scale where heaps of cases have to be processed by them. The legally-trained PO, labour lawyers, management strategies, union leaders' values and goals,²² and the requirements of appeal and writ provisions, all contribute to relegating informal approach to the background. It is, therefore, unjustified to blame either the Judges, management consultants or union leaders for formalising and legalising the industrial relations issues; it is the "creation, and the natural outcome, of the system of compulsory adjudication".²³ No safeguards of the types provided in the IDA can ensure informal approach. We need to relook at the compulsory adjudication system itself for its restructuring if we are serious in restoring the informal approach in settlement of industrial relations issues.

END NOTES

1. As is known, the Industrial Disputes Act, 1947 (IDA) has its genesis in Rule 81-A of the Defence of India Rules (DIR) adopted by the British Indian Government during the Second World War for containing industrial unrest. The IDA primarily formalised this Rule by retaining the method of compulsory adjudication of industrial disputes as its principal feature, and permitting collective bargaining in its shadows, which have been lengthening over the years.
2. *Proceedings of the Indian Labour Conference - 12th Session 6-7 (1952)*.
3. See Debi S. Saini, "A Socio-Legal Study of Compulsory Adjudication in Industrial Relations", unpublished Ph.D. dissertation, University of Delhi (Faculty of Law), Delhi 1991; also see Linda Dickens, Michael Jones, Brian Weeks and Moira Hart, *Dismissed - A Study of Unfair Dismissal and the Industrial Tribunal System* (1985).

4. See, among others, for example, E. A. Ramaswamy, *Power and Justice* (1984); Debashish Bhattacharjee, "Unions, State and Capital in Western India: Structural Determinants of the 1982 Bombay Textile Strike" in Roger Southall (ed.), *Labour and Unions in Asia and Africa - Contemporary Issues* (1982); K. Manikotam, *Trade Unionism: Myth and Reality* (1982).
5. Studies in this area have also just begun to emerge. See, for example, P. Gopal Krishnan, K.L. Bhatta, *Administration of Workers' Compensation Law* (1986); and Debi S. Saini, *supra* n.3.
6. See Sec. 7A(1), *The Industrial Disputes Act, 1947*.
7. Collective disputes here mean those espoused by a union or substantial number of persons, whether relating to individual-rights issues or collective-rights or interest issues.
8. The word methodology here refers to the technique employed for data collection and not the theory of methods.
9. Maxwell J. Atkinson, "Understanding formality: The Categorization and Production of Formal Interaction", 33 *British Journal of Sociology*, 86.
10. *Supra* n.6 Sec. 36(3).
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12. *Id.*, Sec. 7A(4).
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15. *Workmen of Dinakuchi Tea Estate v. Dinakuchi Tea Estate* (1958) 1 LJJ 500 (SC).
16. Richard Abel, *A Comparative Theory of Dispute Institutions in Society*, 14, *Law & Society Review*, 217 at 224 (1973).
17. *Supra* n.6 Sec. 7A(3).
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20. Debi S. Saini, "Compulsory Adjudication of Industrial Disputes: Juridification of Industrial Relations", 21 *Indian Journal of Industrial Relations*, 1; Clark and Wedderburn *supra* n.19, p.188; and Linda Dickens *et al.*, *supra* n.3, p.252.
21. *Supra* n.6 sec. 17.
22. Debi S. Saini, "Leaders or Pleaders: Dynamics of Brief/Case Trade Unionism", Paper sent for publication.
23. Debi S. Saini, "Collective Labour Law, Labour Disputes, and Labour Power in India: Legitimacy of a Colonial Model", Paper presented to Joint Meeting of the Law and Society Association (U.S.A.) and Research Committee on Sociology of Law (RC-12) of the International Sociological Association, Amsterdam, The Netherlands, June 26-29, 1991; also see Saini *supra* n.3.

Contempt of Court in Nigeria: A Critical Appraisal

EMMANUEL J. UKO*

Contempt of Court, the name that runs "feverish spasms through the spinal cords" of most legal practitioners, lacks clearly defined boundaries. Different judges and Courts determine what contempt means to them and where to "draw the cotton".

Over the course of time some legal developments involving contempt cases have tended to raise so much dust and to prove that the issue of contempt is clouded with much confusion, though in certain cases the facts of contempt are clear.

Section 1(a) of the Rules of Professional Conduct in the Legal Profession states thus: "It is the duty of the lawyer to maintain towards the Court respectful attitude not for the sake of the judicial office, but for the maintenance of its supreme importance. Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the Bar against unjust criticism and clamour. Whenever there is proper ground for serious complaint of a judicial officer, it is the right and duty of the lawyer to submit this grievance to the proper authorities. In such cases, but not otherwise, such charges should be encouraged and the person making them should be protected".

Section 3(a) of the Rules of Professional Conduct in the Legal Profession says "During the trial, the lawyer should always display a dignified and respectful attitude towards judge presiding, not for the sake of his person, but for the maintenance of respect for and confidence in the judicial office. It is both the right and duty of the lawyer fully and properly to present his clients' case and to insist on an opportunity to do so. He should vigorously present all proper arguments against any ruling he deems erroneous and should see to it that a complete and accurate case record is made. In this regard, he should not be deterred by any fear of judicial displeasure or even punishment...."²

As provided above, the two provisions of the Rules of Professional Conduct in the Legal Profession, while enjoining legal practitioners to give due respect to the "Bench" also encourage them to pursue their grievances and ensure that justice is done at all cost regardless of fear or threats of judicial displeasure or punishment. On careful appraisal, one sees some conflicts of roles for while expected to give unquestionable submission, obedience and respect, the lawyer is equally expected to revolt or guard against any kind of "injustice" perpetrated against him.

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It must be noted that injustice could be either real or imaginary, imminent or impending; obvious or hypothetical.

Encouraged by the above provisions of the rules of professional conduct and strengthened by the Fundamental Human Rights provision of the Nigerian Constitution³ guaranteeing freedom of speech, Nigerian Lawyers and others appearing before Nigerian Judges frequently seek to enforce their rights in this regard. More often than not, they meet with the surprise of their lives.

A Comparison with Western Philosophical approach to Contempt

It is often said that our State of development dictates to a great extent our approach to things and issues. Certain studies⁴ have shown that the process of development entails greater hardships which have serious psychological consequences, for the "heavy burdens" we carry may impair our sense of perception and tolerance.

E. Fuller Torrey, M.D., a white doctor, once made a comparison between the white man's and black man's perception of reality⁵. It is true that at times we blacks see harm where no harm was intended and we perceive insults where the aim was not to insult. Taken too far to apply to contempt cases against our lawyers in Nigeria, it is equally true that we may perceive dishonouring conduct to the judiciary where the intention of the lawyer was otherwise and probably to save himself from embarrassment.

Our state of mind in Africa as a whole shows up in our approaches and attitudes towards many issues. For example, in the Western Worlds, capital punishment is sparingly invoked but in Africa capital punishment is readily applied. At one time, the sanctions against drug traffickers in Nigeria was death by firing squad⁶. Our sanctions are harsher by any standards. There are no provisions for parole. Sanctions in the developed western nations are milder, meant to correct the individual offender for the growth of society, but not to destroy him.

A good comparison of the Western Philosophical approach to contempt as compared with our approach can best be summarised by the following cases and decisions.

Izuora Vs. The Queen⁷

This case typifies the white man's approach to contempt. The power to punish for contempt, though manifestly and unquestionably available to the Courts, is nevertheless sparingly invoked, and only as a last resort. Not every act of discourtesy to the Court by counsel amounts to contempt as was epithomised by Izuora V The Queen. The counsel who had filed an application before the Court was furious when the Court rejected her application. Frustrated and disappointed, she displayed her anger by getting hold of a book case and throwing it at the judges. When it missed the justices she took another book case and threw once more at the judges. Again, it missed its way. That act by counsel marked the height of anger, the height

of contempt. But was counsel punished for contempt? If any counsel in Nigerian courts acted with such a flagrant display of anger and show of disrespect to the courts would he have gone away free?

In *Izuora V The Queen*, the Court took no notice and said nothing of counsel's act of gross disrespect and show of disgraceful conduct. Counsel was even surprised that she was not cited for contempt to the extent that she commented thus "I congratulate your Lordships on your coolness under fire" and left.

Parashuraman Deteram Shandashani Vs. King Emperor⁸

This was an appeal from the High Court of Bombay. Their Lordships emphasized that the summary power of punishing for contempt should be used sparingly and only in serious cases. According to the judgement, it is a power which a court must of necessity possess; its usefulness depends on the wisdom and restraint with which it is exercised, and to use it to suppress methods of advocacy which are merely offensive is to use it for a purpose for which it was never intended.

Onitili Vs. Ojomo⁹

The plaintiff who was charged for a criminal offence was an accused person before the defendant who was the Magistrate. He applied for a transfer of the case from the defendant's Court. At the request of the defendant, the plaintiff read out the paragraph of his application for transfer whereupon he was informed by the defendant that he had committed a Contempt of Court.

The defendant formulated a charge against the plaintiff and informed him that he was to be kept in prison custody pending trial by another Magistrate. The plaintiff was then taken to prison.

In Onitili's case the presiding Magistrate "took refuge" in the Magistrate Court of Lagos Law,¹⁰ as amended. This was in addition to the general judicial immunity enjoyed.

Awosaya Vs. Board of Customs¹¹

Here, the appellant — the Senior Magistrate in Lagos was found guilty of criminal contempt by Honourable Justice Belgrave, sitting in the Federal Revenue Court. The accused was alleged to have disobeyed the order of the said Revenue Court to stay further proceedings in a case before the Magistrate Court in which two persons were charged with evading of customs duties on some imported goods. The two persons were prosecuted in the Magistrates Court and the Board of Customs and Excise later brought a fresh action against them in the newly established Federal Revenue Court which ordered that further proceedings in the Magistrate Court be stayed.

On the 6th of February, 1974, the date set for the hearing of the motion, neither the two accused persons nor the Senior Magistrate turned up. The Revenue Court

was informed that on the previous day — 5th of February, 1974 the Magistrate had struck out the case because he had been served with an order and a motion for certiorari.

The learned trial Judge ordered that a criminal summons be issued against the Senior Magistrate to appear before the Federal Revenue Court to show cause why he should not be committed for contempt.

The learned trial Judge instructed that a summary of the facts of the complaint should be attached to the criminal summons to be served. After reviewing the offence and the law the learned trial Judge concluded that the Magistrates' disobedience was willful and that he proceeded from improper motive and so found him guilty of contempt.

On appeal to the Supreme Court, Chief Rotimi Williams, learned Counsel for the appellant argued the case on three grounds:

1. That the action of the appellant did not constitute Contempt of Court.
2. That if it constitutes an offence at all it is one involving only a civil contempt by the Magistrate for disobeying the order of the Superior Court for a stay of proceedings.
3. Assuming that it is a case of criminal contempt the appellant has not had a fair trial on the grounds of procedural irregularities.

In acquitting and discharging the appellant of contempt, the Supreme Court held *inter alia*:

1. That an error of judgement on the Magistrate's part, whether as to jurisdiction or as to the precise order to make in the circumstances confronting him was not criminal.
2. That even if it was regarded as a criminal contempt, the trial Judge was wrong to have ordered a criminal summons to be issued against the Magistrate without following the procedure under the Criminal Procedure Act.
3. That the learned trial Judge should not himself have assumed the drafting of the charge as if he were exercising the power under the Penal Procedure Code of the Northern State of Nigeria since there is no such similar power granted under the CPA which is the applicable law.

Agbachom Vs. The State¹²

In this case the contempt was contained in an affidavit. The affidavit was also used to support an application for transfer of the case to another judge. The appellant also contended that his affidavit contained true statements of fact which were not denied by the learned trial Judge. Paragraph 3 of the affidavit reads: "That on the instructions we have given to our solicitor including documents submitted he has advised us and we verily believe that he would serve a witness summons on his Lordship the Judge to give evidence in this suit". Paragraph 5 of the affidavit

reads: "That the Oban (Nigeria) Rubber Estate Limited paid directly to His Lordship the sum of £488.15 being balance out of 700 guineas 'legal debt' on the 10th day of April 1969, out of the trust fund".

The learned trial Judge, Bassey J. held the above affidavit imputed some immorality to him, and so found him guilty of contempt of his Court and sentenced him to a fine of £78 or to imprisonment for 3 months.

The learned trial Judge had drafted the charge himself and also put the appellant in the witness box instead of the dock and cross examined him himself. He finally held "It is my view that an affidavit before the Court that amounts to contempt of Court is as much Contempt before the Court as any other act before the Court...."

From the ruling the learned Judge implied that the contempt was committed *in facie curiae*, but on appeal to the Supreme Court, the Judgement which was delivered per Lewis J.S.C., a number of findings were made *inter alia* as follows:

1. That the statements complained about in the affidavit could not be said to be contemptuous in the normal, natural and balanced way.
2. That if the learned trial Judge had wanted to deal with the case summarily, he should have placed the appellant in the dock and not compel him to go into the witness box to give evidence.
3. That since the trial Judge appeared to have been acting under his common law powers preserved by Section 6 of the Criminal Procedure Code and also under Section 133 of the Criminal Code, he was in error as the case should have been tried by a different Court.

Gani Fawehinmi Vs. State¹³

The facts of the case before the alleged contempt by Chief Gani Fawehinmi went as follows: On Sunday the 19th October, 1986, Mr. Dele Giwa, a Journalist and Editor-in-chief of a weekly magazine, *Newswatch*, was killed in his residence at Ikeja in Lagos State by a parcel bomb.

On the 3rd of November, 1986, the appellant herein a friend and legal adviser to Mr. Giwa (deceased) submitted to the Director of Public Prosecution a 39 page document of 39 pages containing all the details of the investigation he had conducted together with an information accusing two army officers of the death of Dele Giwa.

Pursuant to Section 342 of the Criminal Procedure Law of Lagos State the appellant requested the then DPP to exercise his discretion whether or not he would prosecute the said military officers for the murder of Dele Giwa and if he declined to prosecute, to endorse a certificate to that effect on the information submitted to him by the appellant. This was to enable the later to prosecute the officers for the murder.

The facts leading to the alleged contempt were as follows:

Following two judgements obtained against the appellant at an Ikeja High Court before Ilori J. in suits Nos. ID/312/88 and ID/313/88 the appellant filed a motion for stay of execution of the said judgements at the said High Court.

However, on the 10th October, 1989, Chief F.R.A. Williams who was counsel to the plaintiffs in the said suits wrote a letter to the Ag. Chief Judge of Lagos State requesting that the suits be transferred from Ilori J. to another judge of the High Court of Lagos on the ground that his youngest son was engaged to be married to one of the daughters of Ilori J. Pursuant to that letter, Ayorinde Acting Chief Judge made an order transferring the suits from Ilori, J. sitting in Ikeja Judicial Division to himself sitting in Lagos Judicial Division.

On 5th December, 1989, when the motion for stay of execution was to be heard before Ayorinde, Ag. C.J. of Lagos State, Chief Gani Fawehinmi, the appellant in this appeal filed a motion praying for an order transferring the said suits from the Acting Chief Judge to another judge of the High Court of Lagos for hearing and determination. The application was supported by a seventeen paragraph affidavit in which the reason for the transfer was stated in paragraph 8 thereof as follows: "That I have observed very seriously that since Ayorinde, J., became the Acting Judge of Lagos State most of the cases filed by my chambers against either the Federal Government or Lagos State Government have been assigned to himself and all his Lordship's decision had been in favour of the government".

Following the affidavit, the Acting Chief Judge ordered Chief Gani Fawehinmi to appear before him on another day to answer or explain why he should not be committed for contempt.

Chief Fawehinmi appeared before the learned Acting Chief Judge as ordered, admitted swearing to the said affidavit, cited Secs. 33 (4) (5) (6) of the 1979 Nigerian Constitution¹⁴ and demanded that he should be formally charged with the offence before being found guilty. He had come to Court pursuant to the order but that was not a charge.

The learned Judge rejected Chief Fawehinmi's submissions, found him guilty of contempt, and sentenced him to imprisonment for one year.

On appeal to the Supreme Court, it was held *inter alia* that the procedure adopted by the learned acting Chief Judge was wrong and the appeal was allowed.

Dedewa Vs. The State¹⁵

In the above case the appellants had merely written a letter to the Registrar of Warri High Court requesting him to bring to the notice of the learned trial Judge Atake J. (as he then was) their apprehension that they might not get justice in their case because both the learned trial Judge and the defendant in the case were Isekiris while the appellants were Urhobos and the subject-matter of the proceedings concerned Isekiris communal land Trust of which Atake J. was said to be a beneficiary. They, therefore requested that the case be transferred to a judge who was neither Isekuri nor Urhobo. They were convicted on contempt instantly.

On appeal to the Supreme Court it was held per Coker J.S.C. that the letter was grossly contemptuous of Court although the procedure adopted at the trial was defective. The Supreme Court said, *inter alia*, "We are satisfied that the grounds of appeal argued impugning the propriety of the procedure followed by the learned trial Judge in this case must succeed. We regretfully come to the conclusion, as we undoubtedly concluded, that the conduct and action of the appellants are depraved in the extreme and that a clearer case of the foulest form of contempt is hardly imaginable. Our indignation is no less directed against the learned trial judge himself by whose mistake it has been possible for the appellants to escape the punishment which is commensurate with the gravity of their transgressions. The power to commit is not retained for the personal aggrandizement of a Judge or whoever mans the Court; the powers are created, maintained and retained for the purpose of preserving the honour and the dignity of the Court and so the Judge holds the power on behalf of the Court and traditions of his office and he should eschew any type of temperamental outburst as would let him lose his own control of the situation and his own appreciation of the correct method of procedure".

*Bayo Vs. A.G. Mid-west*¹⁶

In this case the alleged act of contempt was contained not in an affidavit, but in the writing of a letter addressed to the learned trial Judge himself and copied to the Accountant General of the State, protesting against the payment out of certain money from the Court to certain persons contrary to an order of the Supreme Court that the money should not be so paid.

The learned trial Judge, Atake J. (as he, then was) who had earlier directed the Registrar to pay out the money, regarded the appellants letter as an affront to him and an attempt to obstruct the courts order.

The appellant promptly appealed to the Supreme Court. There, it was held per Ademola C.J.N. that Atake J. could not try the case himself as he was deeply involved in the matter.

*Franklin Atake V. A.G. Federation and Anor*¹⁷

This case offers a clear distinction and proves a sharp contrast with the cases discussed above. The facts of Atake's case are as follows:

Senator Atake, referred to as Hon. Justice Atake (Retired), and who himself was the learned trial judge in the cases of *Bayo V. A.G. Mid West*¹⁸ and *Dedawa V. The State*,¹⁹ where the two appellants were committed for contempt by Atake J. himself (as he, then was) filed an action in the Federal High Court, presided over by Hon. Justice Anyaebunam. In the action filed against the President and the Attorney General of the Federation (as Respondents) Senator Atake sought a declaration that the Allocation of Revenue Federation Account of 1981 was illegal,

null and void and Court injunction restraining the President from applying it. After hearing arguments on both sides the learned Chief Judge fixed March 13, 1981 for ruling. Before the Judge could read his ruling on the appointed day the appellant raised a preliminary objection. The appellant asked for a transfer of the case to another Judge, arguing that he would not receive justice since the Chief Judge had recently been conferred with a National Honour of O.F.R. by the President - one of the defendants in the case. The Court compelled Senator Atake to withdraw the remarks. He did so reluctantly.

The application for transfer of the case was rejected by the Chief Judge. Senator Atake, the appellant thereby filed a motion for leave to appeal against the ruling of the Chief Judge, alleging, *inter alia*, that the entire decision was a nullity in that there was a likelihood of bias.

Before Atake could move the motion, the Chief Judge requested him to withdraw the first ground which was that the entire decision was a nullity in that there was a likelihood of bias. The Chief Judge also gave him five minutes to apologise.

Senator Atake (the retired Hon. Justice Atake) replied to the Chief Judge's order and request thus: "You upset me. I have a right to file my ground of appeal", and the presiding Judge of the Federal High Court ruled instantly "Having refused to withdraw and apologise I commit you to prison until you apologise and withdraw the ground which I regard as contempt in the face of this honourable court".

Senator Atake — the appellant's appeal against his committal for contempt was rejected and dismissed by both the Court of Appeal and the Supreme Court which upheld the contempt.

One feature common to most cases of committal for contempt especially in the lower Courts is that there is notable lack of self control on the part of the judge, resulting in emotional or temperamental outburst. In the heat of such emotion coupled with the desire to prove his worth and offer immediate reprisals, the judge pays no attention to procedure. This was quite evident in the case of *Dedawa Vs. State*,²⁰ *Bayo Vs. A.G. Mid West*,²¹ *Gani Fawehinmi Vs. State*,²² *Abachom Vs. State*,²³ *Awosanya Vs. Board of Customs*,²⁴ all of which have been discussed, and in some other Nigerian cases.

Another striking feature is that judges in the lower Courts found for contempt when applications were brought before the courts for transfer of cases to other courts since this inferred either directly or indirectly that one could not get justice from a particular Court. A deeper reflection on this shows a greater degree of psychological elements for, under normal circumstances, one would be quite happy to let go the case to be tried by another judge in order to avoid accusations of bias, since no human being is perfect, not even nature. This impinges seriously on Section 33 of the Constitution which guarantees the rights to freedom of speech and fair hearing.²⁵ We must admit that this is a peculiar problem of development, common to most developing countries, for in developed countries where the

fundamental human rights of citizens are fully guaranteed, certain conclusions are given more careful thoughts.

Clear Need

Notwithstanding the general apprehension about the power of Nigerian Courts to punish for contempt and the probable over-reaction of the Courts in certain cases, the Courts are perfectly justified in certain committals for contempt and clearly need the power to maintain their dignity and to ensure compliance with Court processes. Considering the case of *Atake Vs. A. G. Federation*²⁶, one sees a clear need for the Courts to possess the power to punish and commit instantly for contempt. For it was highly unimaginable that a retired judge who himself had once committed others for contempt could give such blatant disregard for the Court.

Another epoch-making case that justified committal for contempt was *Emmanuel Joseph Uko V. University of Cross River State, E.E. Esthai, Professor Eyo Okon and Mr. M. O. Dickson*²⁷

In the above case, the plaintiff — Barrister Emmanuel Joseph Uko who had recently been called to the Nigerian Bar wished to resume duty in the University of Cross River State, Uyo, where he had served as Assistant Registrar before he was granted Leave of Absence without pay to complete the LL.B. and B.L. programmes.

On July 7, 1991 the plaintiff wrote to the defendants that he had completed his studies and would wish to resume duty on August 30, 1991 having been granted approved Leave of Absence by the defendants. The defendants replied that the letter of grant of Leave of Absence referred to contained nothing authorising the plaintiff to resume duty on 30th August, 1991 and that the proper thing to do was to re-apply for consideration for re-absorption into the University Service.

On August 22, 1992, the plaintiff wrote back to the defendants showing the distinction between Leave of Absence without pay and Study Leave Without Pay, arguing that he was wrongly treated as if he was granted Study Leave without pay. He further argued that only guaranteees of Study Leave Without Pay were entitled to re-apply for consideration for re-absorption and that since he was granted Leave of absence without pay, he was entitled to automatic re-absorption. The defendants thereafter refused to reply to the plaintiffs' letter or to take any further action on the plaintiff's demand to resume duty.

The plaintiff, on 18th September, 1991 thereby filed an action in the Uyo High Court under Order 6, Rule 2, proceeding by way of Originating Summons, praying the Court *inter alia* to interpret the documents before it and rule whether he was not granted Leave of Absence and consequently entitled to automatic re-absorption. This was supported with a twelve paragraph affidavit. The defendants objected to the mode of commencement of action by originating summons. The Court over-ruled that commencement by means of originating summons was in order. The case was heard and ruling fixed for September 23, 1991.

The Court per Hon. Justice Eder R. Nkop ruled "that the plaintiff is entitled to resume duty as Assistant Registrar with effect from August 30, 1991 and is entitled to his salary, allowances and all other rights and privileges from that date, having duly notified the defendants of his completion of the course and his intention to resume duties on the said date."

The Court order on the defendants ordering them to re-absorb the plaintiff and allow him to resume his duties was ignored by the defendants. The Registrar of the University — Mr. M.O. Dickson argued that it was only the Vice Chancellor — Professor Eyo Okon who could direct him to re-absorb the plaintiff.

Consequent upon the refusal and delay in obeying the Court order (at a time when UNICROSS was about to be fully taken over by the Federal Government as a Federal University) the plaintiff brought a motion for committal under Order 42 Rule 2 (b), for failure to obey Court order.

Only two of the four defendants — Mr. M.O. Dickson, the Registrar and Mr. S. Brown, representing the University showed up in Court. The other two defendants were absent. Before the motion could be moved the defendants present in Court spoke through their Counsel that the case should be adjourned to enable them have enough time to file a motion for the substantive suit to be re-listed for fresh hearing in the same Court. The presiding judge, who had heard the substantive suit and ruled on it wondered why the defendants wanted the same case to be re-listed for fresh hearing in his Court. The defendants thus directly and clearly displayed a sense of arrogance and unwillingness to obey the Court order until the case was re-listed for fresh hearing by the same judge. The defendants present in Court were then committed instantly for Contempt of Court until they purged themselves of the contempt and the Court ruled, *inter alia*, that the same case previously heard and determined by the same court would not be re-listed for another hearing. If the defendants wished, they could appeal against that judgement.

The defendants then made spirited efforts to purge themselves of the contempt by complying with the Court order and re-absorbing the plaintiff, before they were released from prison custody the following day.

Contempt in Facie Curiae Distinguished from Contempt Ex-facie Curie

In the above case-Emmanuel Uko V. University of Cross River State and 3 others²⁸ it is tempting to infer that the contempt was committed outside the face of the Court as the order of Court was to be obeyed outside the Court. But the truth is that, as in *Atake's* case, the contempt was committed *in facie curiae* (in the face of the Court) since it was in the Court and before the Honourable Judge that the defendants disclosed through their counsel that they would not obey the previous order of the Court until the case was adjourned enabling them to have time to file another motion to re-list the substantive suit, already determined by the same Court for hearing. The contemnors were therefore rightly punished "brevi manu" in court as the contempts were committed "*Coram iudice*". The other defendants who were absent in Court escaped the wrath of justice.

In *Ene Oka V. The State*²⁹, it was held that where Contempt of Court is punished "*brevi manu*" in Court no warrant is necessary for the apprehension of the offender as he is always in Court. But in other cases of contempt committed *ex facie curiae* (outside the face of the Court) committal is not instantly. The proper procedure of apprehension or arrest, charge, prosecution etc. must be strictly followed. This falls in line with the Supreme Court decisions in the cases of *Debuwa, Bayo, Gani Fawehinmi, Abachon and Awosanya* already discussed.

The Supreme Court of Nigeria has therefore adopted a pragmatic approach and played a prominent role in distinguishing between the two types of contempt, thereby correcting the mistakes of some lower Courts.

Conclusions

While acknowledging that the summary power to punish for contempt is a power which a Court must of necessity possess, we must admit that at certain times it has been inappropriately exercised, while at other times it has been fairly used. In the words of their Lordships in *Parashuraman Deteram Shandashani V. King Emperor*³⁰, its usefulness depends on the wisdom and restraint with which it is exercised, and to use it to suppress methods of advocacy which are merely offensive is to use it for a purpose for which it was never intended. As already quoted in *Debuwa V. The State*²² the Supreme Court said "..... The power to commit for contempt is not retained for the personal aggrandisement of a judge of whomver mans the Court; the powers are created, maintained and retained for the purpose of preserving the honour and the dignity of the Court and so the judge holds the power on behalf of the Court and the traditions of the Court and he should eschew any type of temperamental outburst as would let him lose his own control of the situation and his own appreciation of the correct method of procedure".

In *Sunday Okoduwa Vs. The State*³¹ the Supreme Court per Nnamani (Deceased) J.S.C. (as he then was) at page 345 said: "It is settled that it is not Contempt of Court to criticise the conduct of a judge or the conduct of a Court even if such criticism is strongly worded, provided that the criticism is fair, temperate and made in good faith.

The case of *Architects Registration Council of Nigeria (ARCON) Vs. FASSASSA*³² illustrates the point that there is neither a clear definition, nor a well "demarcated boundary" to determine what is contempt. In the above case, Chief Rotimi Williams, learned Counsel, was accused of committing the worst type of contempt by accusing the highest Court of the land — the Supreme Court - of bias. Yet he was not punished for contempt.

Shall we then say that Contempt of Court, like beauty, is in the eye of the beholder.

END NOTES

1. See "Federal Republic of Nigeria Official Gazette" No. 5, Vol. 67 of 1980.
2. *Ibid.*, page 64

3. See Section 33 of the 1979 Nigerian Constitution.
4. Some Sociological Studies have concluded that developmental processes entail greater hardships.
5. See E. Fuller Torrey, *The Mind Game: Witchdoctors and Psychiatrists* (Bantam Books, Inc. N.Y. 1973).
6. See Decree..... of 1984 which prescribed capital punishment for certain drug offences. Gloria Okon was reportedly sentenced to death by firing squad under that provision. Today the NIDLEA advocates for the return of capital punishment for drug trafficking.
7. 13 W.A.C.A. p. 313.
8. (1945) AC 268.
9. (1954) Vol. 21 NLR at p.19.
10. See Cap 82, Magistrate's Court of Lagos Law, 1972.
11. (1975) 1 ALL NLR 106.
12. (1970) 1 ALL NLR 69.
13. (1990) 5 NWLR part 148, page 42.
14. This is the Section of the Constitution which guarantees Fundamental Human Rights of Citizens.
15. (1975) 1 ALL NLR Part 1 at page 16.
16. (1971) 1 ALL NLR 342 at 352.
17. (1982) II SC page 175.
18. (1971) 1 ALL NLR 242 at 352.
19. (1975) 1 ALL NLR Part 1 at p.16.
20. *Supra.*
21. *Supra.*
22. *Supra.*
23. *Supra.*
24. *Supra.*
25. See Section 33 of the 1979 Nigerian Constitution.
26. *Supra.*
27. Suit No. HU/13/791 (Unreported) High Court of Justice, Uyo, Akwa Ibom State.
28. *Supra.*
29. (1979) 1 ALL NLR 60.
30. *Supra.*
31. *Supra.*
32. (1988) 2 NWLR part 76 page 333.

Litigating with Fundamental Rights: Rights Litigation and Social Action Litigation in India

YASMIN SHEHNAZ MEER*

Introduction

India, the world's largest democracy, is a federal republic of 23 States and 8 Union Territories administered from a powerful Centre, Delhi. India is a vast country spanning 3,287,000 kilometres with a population of 900 million. It has a collection of nations, cultures, religions and languages more diverse than any country in the world. India has 15 major regional languages, 250 minor regional languages and followers of every major religion — Hindu, Mohammedan, Christian, Sikh, Buddhist.

Within the rich tapestry of the 5000 year antiquity of Indian civilisation, the period of the British Raj and the 45 years since independence are of short duration. They are however a significant chapter in the history of freedom struggles in the 20th Century and the Indian experience is of great relevance to the continuing struggles of this Century.

On August 15, 1947 India became Independent and faced the enormous challenge of introducing a new social and economic order, restoring human dignity and justice and uniting its population in the face of widespread diversity after 40 years of British Rule. The Indian Constitution rose to meet these challenges "not as a neutral parchment" but as a "proud document" containing within itself a policy of "distributive justice".¹

The preamble of the Indian Constitution makes a commitment to secure to all citizens of India

"JUSTICE, social, economic and political;

LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status, of opportunity; and to promote among them all

FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation."

The Constitution guarantees specific enforceable fundamental rights² and sets out non-justiciable directive principles of State policy and governance aimed at the furtherance of social justice.³ There are also adequate safeguards provided to minorities,⁴ and special provisions relating to backward and Tribal classes, the Anglo Indian community, Scheduled Castes and Scheduled Tribes.⁵

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The British Raj bequeathed to India a Colonial legal heritage and a transactional highly individualistic jurisprudence structured around a free market economy and dominated by the right duty pattern.⁶ This jurisprudence was ill-equipped to meet the challenges of distributive justice and the accessing of law to the underprivileged millions. For the first three decades after independence the judiciary in India laboured unsuccessfully within the confines of a borrowed foreign legal culture and jurisprudence to administer justice with the result that the bulk of the population of India "knew only the majesty of the Court without having felt its justice".⁷ Little or no attempt was made to legally enforce the fundamental rights enshrined in the Constitution and these rights remained largely academic.

The situation changed dramatically in the late 1970's. A remarkable phenomenon emerged in India — a home grown Indian jurisprudence and legal culture — Public Interest Litigation or Social Action Litigation aimed at making law and justice accessible to the poor and underprivileged. It brought with it a vibrant and vital innovation, that of rights litigation and in the years that followed, public interest litigation helped to breathe life into the constitutionally enshrined fundamental rights.

This paper attempts to examine some aspects of Public Interest Litigation/Social Action Litigation in India, some of the major cases as illustrations of rights litigation in the Indian Supreme Court, and attempts an assessment and evaluation based on my experience and research in India during September and October, 1991.

This paper is prompted also by the belief that India's rights litigation and the creative measures it has adopted in distributing justice through Public Interest Litigation/Social Action Litigation is of significance to a South Africa poised on the brink of a new order and yet to embark on a Bill of Rights litigation. Public Interest Litigation/Social Action Litigation in India is characterised by bold, creative and imaginative rights litigation. It has been integrally concerned with widely interpreting and enforcing the fundamental rights contained in Articles 12 to 35 of the Constitution so that these Sections have become a sanctuary of human values especially for the poor and underprivileged. Social Action Litigation/Public Interest Litigation allows them to use the Constitution expansively to enforce the rights to life, to livelihood, to human dignity, to equality, to freedom, cultural and educational rights, to be protected from pollution

At the outset it is appropriate to explain the terms "Social Action Litigation" and "Public Interest Litigation" which are used interchangeably in relation to the Indian legal culture which emerged in the late 1970's. In India the term "Social Action Litigation" rather than the better known "Public Interest Litigation" is regarded as more appropriate. The term Public Interest Litigation is associated with American Public Interest Law which is seen to differ significantly from Indian Public Interest Law. One of India's foremost jurists and commentators on Social Action Litigation, Upendra Baxi, in distinguishing Indian Social Action Litigation from American Public Interest Litigation cites the latter as being concerned with civic participation in Government decision making rather than State repression or Governmental lawlessness. "Nor did American Public Interest Litigation focus on

the rural poor."⁸ For Baxi American Public Interest Litigation is part of legal liberalism "within an advanced industrial capitalist society"⁹. This differs significantly from the class oriented Indian Social Action Litigation aimed at making justice accessible to those who are denied their constitutional rights and are unable themselves to apply to court for legal relief, or as is so eloquently put by one commentator, (who interestingly enough uses the term Public Interest Litigation).

"Public Interest Litigation activism is propounding the notion that the Constitution of India can be used both symbolically and substantively, as a medium of non-revolutionary struggle against domination and abuses of power. Public Interest Litigation is thus seen as empowering the victims to use the Courts to enforce the Government to fulfil its commitments."¹⁰

Characteristics of Social Action Litigation

Judicial Activism: Social Action Litigation was spearheaded by another remarkable phenomenon — the Activist Judge, bold, creative and imaginative enough to mould the existing legal game rules into a new specifically Indian legal culture with the goal of making law accessible to India's poor and giving effect to the aspirations of the Constitution. They broke with legal traditions of British Indian vintage steeped in positivism.

Public Interest Litigation in India is described as "Judge induced and Judge led"¹¹ and it is widely believed that much of this phenomenon can be attributed to the innovations and creativity of two outstanding Judges, Justices V. R. Krishna Iyer and P. N. Bhagwati (later Chief Justice) both committed relentlessly to the cause of justice for the underprivileged. Judge Krishna Iyer's insistence "that law is meant for the people and not the people for the law"¹² and Judge Bhagwati's concern for the rights of the poor and underprivileged reverberate through their judgments.

In the following excerpt from his judgment in *Fertilizer Corporation Kamgar Union, Sindri v. Union of India* Judge Krishna Iyer enunciated the need for Public Interest Law in the clearest terms

"Law is a social auditor and this audit function could be put into action when someone with real public interest ignites the jurisdiction In a society where freedoms suffer from atrophy, the activism is essential for participative public justice, some risks have to be taken and more opportunities opened for public minded citizens to rely on the legal process and not to be repelled from it by narrow pedantry now surrounding *locus standi*."¹³

Explaining the emergence of the Indian activist Judge, Judge P. N. Bhagwati has asserted, "The Indian Constitution contains in addition to a chapter on fundamental rights, non-justiciable directive principles of State policy and they constitute the most important and creative part of the Constitution They hold out social justice as the central feature of the new Constitutional order The directive principles are fundamental in the governance of the country so that not only the legislature and the executive but also the judiciary are bound to act in

furtherance of them discharging their functions. This basic mandate of the Constitution motivated and inspired some Judges to become social activists. They realised that in the early years of its existence the instrumental use of formalist jurisprudence made by the Supreme Court had benefited only the advantaged classes and had given an impression of the Supreme Court acting as a roadblock in the way of progress. With this realisation, these justices leapt into action, presenting new ideas, opening new possibilities, and starting to assert and to exercise almost explosively, judicial power in aid of the disadvantaged. They broke rank from the old tradition and embarked upon unorthodox and unconventional strategies for bringing justice to the poor. Thus came into being public interest litigation with its characteristic social justice dimension."¹⁴

And also,

"the Judges in India have asked themselves the question: Can Judges really escape addressing themselves to substantial questions of social justice? Can they simply follow the legal text when they are aware that their actions will perpetuate inequality and injustice? Can they restrict their enquiry into law and life within the narrow confines of a narrowly defined rule of law?"¹⁵

For the activist Judge the answer to this is clearly "no" and indeed many a landmark Indian judgment abounds with illustrations of Judicial Activism. Baxi, commenting on the activist Judge has stated, "They sort to mould Constitutional interpretation and doctrine in unmistakably and emotionally surcharged people oriented ways. Populist rhetoric is writ large in many judicial opinions."¹⁶

The following oft quoted extract of former Chief Justice Dwivedi is an illustration.

"The Constitution is not intended to be the arena of the legal quibbling for men with long purses. It is made for the common people. It should generally be so construed as that they can understand and appreciate it. The more they understand it the more they love it and the more they prize it."¹⁷

And further :

"It is really the poor, starved and mindless millions who need the Court's protection for securing to themselves the enjoyment of human rights. In the absence of an explicit mandate, the Court should abstain from just striking down a Constitutional amendment which makes an endeavour to wipe out every tear from every eye."¹⁸

"The Supreme Court of India is at long last becoming after 32 years of the Republic, the Supreme Court for Indians"¹⁹ wrote Baxi in a 1979-1980 glowing tribute to Social Action Litigation in the Supreme Court of India. Baxi then goes on to remove some of the gloss of this initial tribute when he examines some of the factors which have contributed to the emergence of Social Action Litigation in India. Baxi sees Social Action Litigation as a distinctive byproduct of the 1975-1977 emergency and judicial activism as "an aspect of post emergency catharsis", "an expiatory syndrome" and "an attempt to refurbish the image of the Court tarnished by a few emergency decisions."²⁰

This of course is not to ignore that the major legal movement drew its impetus also from pre-emergency circumstances and conditions within Indian society spanning numerous decades.

The activist judge, bold and adventurous enough to break with Anglo-Saxon perceptions of the judicial role, has transformed the Court room from "an arena of legal quibbling for men with long purses" to an arena of hope for the oppressed.

Legal Strategies

Social Action Litigation displays the use of innovative, unorthodox and unconventional strategies to enforce the fundamental and legal rights of the poor and underprivileged, unable themselves to apply for legal relief. Some of these methods are set out below.

1. Widening of the doctrine of Standing

In a radical departure from the traditional individualistic rules of standing which permit only a party who has suffered a legal injury personally to approach the Court for relief, the doctrine of *locus standi* has been widened to allow any public spirited individual or group to file a case on behalf of those, themselves unable to do so by virtue of circumstances. This is in keeping with the policy of distributive justice and the adjudication of collective rights.

The principle was established by Bhagwati J. in *S P Gupta v. President of India*²¹

"Where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any Constitutional or legal right, and such person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the Court for relief, any member of the public can maintain an application for an appropriate direction or order"

Judge Krishna Iyer recognised the need for a wider basis of access to justice in India which in his opinion still suffered from "the pathology of mid-Victorian concepts about causes of action"²²

Referring to the widening of *locus standi* he stated:-

"The Court is not bound by the restraints of traditional English Writs or blinkered rule of standing of British Indian vintage but can innovate and liberalise processual jurisprudence in constitutional litigation for the purpose of remedying governmental lawlessness, law enforcement, lapses and excesses. As a strategy to solve the problem of access to justice, the Court can shift from traditional individualism of *locus standi* to the community orientation of public interest litigation"²³

He goes on to sound a note of caution, for the widened *locus standi* approach does not permit any member of the public indiscriminately to approach the Court as a public interest litigant for the underprivileged.

"Public Interest Litigation is part of the process of participative justice, and "standing" in civil litigation of that pattern must have liberal reception at the judicial doorsteps If a citizen is no more than a wayfarer or officious interloper without any interest or concern beyond what belongs to anyone of the 660 million people of this country, the door of the Court will not be ajar for him. But if he belongs to an organisation which has special interest in the subject-matter, if he has some concern deeper than that of a busy body, he cannot be told off at the gates, although whether the issue raised by him is justiciable may still remain to be considered."²⁴

Public Interest Litigation case law is filled with examples of the expanded locus standi. In *Olga Tellis v. Bombay Municipal Corporation*²⁵, the petitioner was a journalist and not a pavement dweller. Yet as a concerned member of the public he, together with other interested groups, successfully petitioned the Court on behalf of Bombay pavement dwellers to stay their evictions.

2. Epistolary Jurisdiction

In a simplification of accepted legal proceedings a public interest litigation suit may be initiated by the mere writing of a letter to a Court or a Judge. In the words of Bhagwati J.:-

"Where the weaker sections of the community are concerned who are living in poverty and destitution who are helpless victims of an exploitative society and who do not have easy access to justice, this Court will not insist on a regular Writ Petition to be filed by the public spirited individual espousing their cause and seeking relief for them. This Court will readily respond even to a letter addressed by such individual acting *pro bono publico*."²⁶

In 1987 Bhagwati, (then Chief Justice), went a step further by maintaining that any communication to any particular Judge in the form of letter or even in the form of a telegram was enough and could be converted into a writ petition without any verification²⁷

In the case *Mukesh Advani v. State of Madhya Pradesh*²⁷ the Court accepted a clipping of a newspaper article on the sordid state of bonded labourers working in stone quarries in Madhya Pradesh, as the basis for a petition.

3. Fact finding commissions

The evidentiary burden is removed from litigants in public interest litigation cases by the appointment of fact finding commissions. Acknowledging the difficulties for poor underprivileged litigants to adduce evidence in support of their allegations, the Court appointed Commissions of enquiry to undertake fact finding missions, submit reports and make recommendations. The disadvantaged petitioner is thus relieved of the burden of proof. Fact finding Commissions are used extensively and effectively.

In *R L & E Kendra Dehradun v. State of Uttar Pradesh*,²⁸ in a petition concerning the detrimental effects of mining of certain limestone quarries

an interim order was granted on the basis of an expert recommending the closure of the quarries. In *Bandhua Mukti Morcha v. Union of India* and *Others*²⁹, in responding to a letter complaining about the bonded labour system in Haryana State, the Court appointed experts to study the social and legal aspects of the problem and two advocates to enquire into factual allegations. In *Wangla v. Union of India*³⁰ the fact finding Commission appointed by the Court was mandated to examine the quality of butter which had been imported into the country soon after the Chernobyl nuclear incident. In *Dr George Mampilly v. State of Kerala*³¹, in response to a Writ Petition to prevent the State Government from introducing the sale of arrack in polythene bags or containers, a serious health hazard, an expert was appointed to investigate the hazards and on the basis of his report the Writ Petition was allowed.

4. Interim orders and monitoring by the Court

In Social Action Litigation judicial involvement does not end with the granting of an order. In a bid to ensure corrective action, Courts monitor the implementation of their directions at periodic intervals to secure the enforcement thereof.

Baxi refers to the practice as "creeping jurisdiction" in the following passage, "The Court rules through interim orders and directions. Bit by bit, it seeks improvement in the administration making it more responsible than before to the Constitutional ethic and law. Creeping jurisdiction takes over direction of administration in a particular arena from the executive."³²

In *Sheela Barse v. Union Government of India*³³, case brought by a journalist for the protection of women in police custody, the Supreme Court granted various directives and thereafter appointed a woman judicial officer to visit the police lockups periodically and report to the High Court whether the directives were being carried out. In *M. C. Mehta (1) v. Union of India*³⁴ the Court dealt with a petition for the closing of certain chemical plants due to the leakage of Oleum gas. In an interim order the Court permitted the plant to start temporarily subject to the strict observance of 11 conditions laid down by it, the violation of which would result in the permission being withdrawn.

5. Flexible remedies

New remedies aimed at initiating affirmative action on the part of the State, have been introduced. *Mukesh Advani v. State of Madhya Pradesh*³⁵ dealt with a writ for the liberation of bonded labourers. By the time the Supreme Court obtained a report from its fact finding Commissioner all the bonded labourers dealt with in the Writ had been liberated. Acting affirmatively, the Court nonetheless gave an order to the Central and State governments to prevent the recurrence of bonded labour, to take suitable steps for the implementation of labour laws and minimum wages, promoting legal awareness and ensuring medical assistance and schooling facilities.

It has been recognised that the suffering of the disadvantaged cannot be relieved merely by issuance of prerogative writs of certiorari, mandamus, the granting of damages or injunctive relief.³⁶

6. The Press and Social Action Groups

An interesting feature of Social Action Litigation in India is that the press has acted as a catalyst for much legal activity. Investigative Journalism has highlighted a number of instances of governmental lawlessness and has served to jolt social action groups into legal action. One of the very first Social Action Litigation cases arose out of a piece of investigative journalism. *Hussainara Khatoon v. State of Bihar*³⁷ was prompted by an Advocate, Kapila Hingorani's sense of outrage at the plight of undertrial prisoners, reported in a newspaper. She initiated a Writ application on their behalf and thus propelled Social Action Litigation before the Courts and the public eye.

The Subject Matter of Social Action Litigation

In Social Action Litigation the grievance is mainly about the violation of constitutional or legal rights by Governmental action or inaction. "Much of Social Action Litigation focuses on exposing repression by the agencies of the State...close to this category are cases which seek to ensure that authorities of the State fulfil the obligations of law under which they exist and function...The other distinctive feature of Social Action Litigation proceedings is that all of them are Article 32 petitions; that is Writ proceedings for the enforcement of fundamental rights."³⁸

It is actually Articles 32 and 226 of the Indian Constitution which are the conduits for bringing Social Action Litigation petitions to Court. If a fundamental right is violated one may approach either the Supreme Court or High Court for relief under Article 32 of the Constitution.³⁹ If one has suffered a "legal wrong" one may apply to the High Court of the State under Article 226 of the Constitution.

Public Interest Litigation Cells

Epistolarly jurisdiction has resulted in Courts being inundated with letters complaining about supposed public interest violations. These are dealt with by Public Interest Litigation cells established in the Supreme Court and most High Courts whose functions are to scrutinize and sift communications so that only matters worthy of judicial attention are placed before a Judge. A meeting with the Supreme Court Public Interest Litigation cell in Delhi revealed that over 350 letters are received there each week. Cases which fall outside the ambit of Public Interest Litigation are either returned to the petitioners, directed to the nearest legal aid committee for legal aid and advice, or where appropriate referred to the police for investigation.

Social Action Litigation Cases as an Illustration of Rights Litigation

A Survey of some of the great Social Action Litigation cases in India depicts the powerful combination and achievements of judicial creativity and a Constitution enforcing fundamental rights. By granting a wide interpretation to the fundamental rights under Articles 12 to 35 of the Constitution, the Courts have transformed much constitutional litigation into Social Action Litigation.

It is appropriate to begin a discussion of Public Interest Litigation case law with the landmark case, *Maneka Gandhi v. Union of India*,⁴⁰ for the precedent of establishing new rights as aspects of fundamental rights begins with this case.

In the *Maneka Gandhi* case, the Supreme Court interpreted a fundamental right as a positive right for the first time. Before this case fundamental rights were viewed as imposing negative obligations on the state only, so that if it acted in violation of a fundamental right, such act was struck down by the Court. The right guaranteed under Article 21 of the Constitution, "no person shall be deprived of his life or personal liberty except according to procedure established by law", was interpreted positively as requiring any State action which interfered with life or liberty to be "right", "just" and "fair". So significant is this case perceived to the development of Social Action Litigation, that there is a view that Social Action Litigation would not have taken root in India but for the activist interpretation given to the right to personal liberty therein.

"..... in post-Maneka decisions that article came to be interpreted as a sanctuary of human values prescribing fair procedure and forbidding barbarities, punitive and processual. In its quest for justice to the weaker sections the Court first created new "positive rights" as aspects of fundamental rights and then proceeded to enforce those rights by directing the State to create necessary conditions for the enjoyment of those rights."⁴¹

The sections of the Constitution guaranteeing fundamental rights have indeed become a haven for the oppressed. They are tested and enforced extensively in many a Social Action Litigation case. Rights Litigation in the Indian Courts is best illustrated by a resume of some of the major cases. The following discussion deals with each case in relation to the right it upheld.

The Right to a Speedy Trial

*Hasanraja Khatoon v. State of Bihar*⁴² launched the concept of Social Action Litigation in the public mind. It established the right to a speedy trial (i.e. a reasonably expeditious trial) and legal aid as an integral and essential part of the fundamental rights to life and liberty enshrined in Article 21 of the Constitution.

An Advocate, Kapila Hingorani was so shocked by a newspaper report describing the conditions of undertrial prisoners, that she brought a *habeas corpus* application for their release. (Some of these prisoners had spent longer periods awaiting trial than they would have been sentenced to, had they been convicted).⁴³ The case served as a catalyst for the release of undertrial prisoners in the State

of Bihar and for the filing of petitions on behalf of undertrial prisoners in several other States.

Through six hearings and six interim orders the horrors of undertrial prisoners unfolded as well as the Courts burning anger,

"It is a travesty of justice that many poor accused, little Indians, are forced into long cellular servitude for little offences because the bail procedure is beyond their meagre means and trials don't commence and even if they do, they never conclude. There can be little doubt, after the dynamic interpretation placed by this Court on Article 21 in *Maneka Gandhi v. Union of India*, that a procedure which keeps such large numbers of people behind bars without trial so long cannot possibly be regarded as reasonable, just or fair so as to be in conformity with the requirement of that article."⁴⁴

and,

"It is high time that the public conscience is awakened and the government as well as the judiciary begin to realise that in the dark cells of our prisons there are large numbers of men and women who are waiting in vain for justice — a commodity which is tragically beyond their reach and grasp. Law has become for them an instrument of injustice and they are helpless and despairing victims of the callousness of the legal and judicial system. The time has come when the legal and judicial system has to be revamped and restructured so that such injustices do not occur and disfigure the fair and otherwise luminous face of our nascent democracy."⁴⁵

The Right to Human Dignity

In *Doctor Upendra Baxi v. The State of Uttar Pradesh*⁴⁶ the right to human dignity was held to be implicit in the fundamental right to life and liberty enshrined in Article 21 of the Constitution. A letter sent to the Supreme Court by two law professors, urging an examination of a protective home for women in Agra where inmates were living under barbaric conditions, was converted into a Writ petition. The Court came to the relief of these women.

The Right to be Free from Exploitation

*Bandhua Mukti Morcha v. Union of India and Others*⁴⁷ (which highlights the horrible working conditions and exploitation of bonded labourers in the State of Haryana), established the right to be free from exploitation as part of the fundamental right to life and liberty in Article 21 of the Constitution. A letter addressed to the Supreme Court complaining about the prevalence of the bonded labour system in violation of the law (the Abolition Act of 1975), was treated as a Writ petition under Article 32 of the Constitution. The Court appointed Commissioners to investigate the allegations and experts to study the working conditions of bonded labourers. The Writ Petition was allowed and detailed directions issued to the government of the State of Haryana as to the freeing of the labourers and the future monitoring of their employment and conditions.

An interesting aspect is that the letter to the Court initiating this case was not presented as a Writ Petition, but the Court creatively converted it into a Petition under Article 21 of the Constitution. It held that Article 21 included the right to be free from exploitation.⁴⁸

The Right to Livelihood

Oiga Tellis v. Bombay Municipal Corporation 49

"Portrays the plight of persons who live on pavements and in slums in the city of Bombay. Rabid dogs in search of stinking meat and cats in search of hungry rats keep them company. They cook and sleep where they please, for no conveniences are available to them. Their daughters come of age, bathe under the nosy gaze of passers-by unmindful of the feminine sense of bashfulness."⁵⁰

The case arose out of a series of Public Interest Litigation petitions filed by the pavement dwellers themselves, journalists and Social Action Groups on behalf of certain pavement dwellers in Bombay who were facing forced eviction and demolition of their dwellings by the Bombay Municipal Corporation. They claimed that their eviction would mean the deprivation of their means of livelihood as hawkers, casual labourers, domestic servants, construction workers and luggage carriers in the city of Bombay. Their contention was that they had a fundamental right to live, a right which could not be exercised without the means of livelihood. By giving a wide interpretation to the right to life guaranteed in Article 21 of the Constitution the Court held that the right to life included the right to livelihood.

"The sweep of the right to life conferred by Article 21 is wide and far reaching. Life means something more than mere animal existence. It does not mean merely that life cannot be extinguished or taken away That is but one aspect of the right to life. An equally important facet of that right is the right to livelihood because, no person can live without the means of living, that is the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live If there is an obligation upon the State to secure to the citizens an adequate means of livelihood and the right to work, it would be sheer pedantry to exclude the right to livelihood from the content of the right to life Deprive a person of his right to livelihood and you shall have deprived him of his life."⁵¹

Similarly in *State of Himachal Pradesh v. Umedram*,⁵² the Harjiam (Untouchable) residents of certain villages in the district of Shimla commenced a petition by sending a letter to the Chief Justice of the State of Himachal Pradesh complaining that by failing to complete five kilometres of road the State Government denied them access to and deprived them of the right to livelihood and life guaranteed by Article 21 of the Constitution. The Court held that the right to life in Article 21 embraced also the quality of life and "that for the residents of hilly areas, access to

roads was access to life itself". It ordered the completion of the road and directed a financial allocation by the State government for that purpose.

The Right Against Pollution

In *Rural Litigation and Entitlement Kendra, Dehradun v. The State of Uttar Pradesh*,⁵³ the Supreme Court established the right to be free from pollution for the first time.

A Writ Petition under Article 32 of the Constitution brought to the notice of the Supreme Court that mining operations in certain limestone quarries were causing environmental and ecological imbalance to the detriment of the people living in the Mussoori Hill range forming part of the Himalayas. In an order closing down mining operations in some of the mines, the Court upheld,

"the right of the people to live in a healthy environment with minimal disturbance of ecological balance and without avoidable hazard to them and to their cattle, homes and agricultural land and undue affectation of air, water and environment".⁵⁴

The Right to be Protected from Industrial Hazards and Environmental Pollution

The right to be protected from industrial hazards and environmental pollution was established by the Supreme Court in *M.C. Mehta (1) v. The Union of India*.⁵⁵ An Advocate, M.C. Mehta petitioned against the re-opening of certain plants of a Food and Fertilising Company, Shriram Foods and Fertilizers Industries, arising out of the leakage of Oleum gas from one of its units in 1985. Several persons were affected and one died. Acknowledging that Shriram manufactured and possessed hazardous and lethal chemicals and gases which posed a danger to life, the Court acknowledged also that complete elimination of the risk to the population at large lay in the relocation of the plant in an area without human habitation. However, as it was reluctant to impinge upon areas under the jurisdiction of the executive, the Court left it to the Government to evolve a national policy for the location of toxic or hazardous industries.⁵⁶

Of interest is the fact that although Shriram Fertilizers was a private corporation, as opposed to the State, the Court allowed a Public Interest Litigation case to be brought against it, as it was "carrying on an industry which was ultimately intended to be carried out by the government itself, was subject to law's controlling environmental protection and was moreover engaged in an activity which had the potential to invade the fundamental right to life of large sections of the people."⁵⁷ The Court accordingly held that Shriram Fertilizers was "state" within the ambit of Article 12 and stated that the purpose of this expansion of Article 12 was to "inject respect for human rights and social conscience in our corporate sector."⁵⁸

The Right to a Clean and Hygienic Environment

"The Ganga Water Pollution Case"

In *M C Mehta v. Union of India*⁵⁹, popularly known as the Ganga Water Pollution case, the same Advocate as in the *Shriram* case sought a petition under Article 32 of the Constitution for the Court to issue directions to all those responsible for the pollution of the river Ganga, affecting the lives of people who used the water and the aquatic life in the river. The petition sought to enforce the fundamental right to a clean and hygienic environment as part of the right to life in terms of Article 21. This case focused on the widespread pollution of the river Ganga by the discharge of trade effluents and sewage from tanneries into the river. The Court issues directions to the tanneries to stop operations and not to let out effluents either directly or indirectly into the river without subjecting them to a pre-treatment process.⁶⁰

The Right to Legal Aid

*Sheela Barse v. Union of India*⁶¹ established the right to Legal Aid. In dealing with a petition complaining of custodial violence to women prisoners confined in police lockups, the Supreme Court emphasised the right to Legal Aid as a constitutional imperative mandated by Articles 39, 14 and 21 of the Constitution. In a hard-hitting attack on lawyers, exhorting them to assist the indigent, the judgment states,

"Lawyers must realise that law is not a pleasant retreat where we are concerned merely with mechanical interpretation of rules made by the legislature, but it is a teeming open ended avenue through which most of the traffic of human existence passes. There are many casualties of this traffic and it is the function of the legal profession to help these casualties in a spirit of dedication and service. It is for the lawyers to minimise the number of these casualties who still go without legal assistance. If lawyers, instead of coming to the rescue of persons in distress exploit and prey upon them, the legal profession will come into disrepute and large masses of people in the country would lose faith in lawyers and that would be destructive to democracy and the rule of law."⁶²

Another Right to Life Case

In the case of *Panikulangara v. Union of India*⁶³ a petition was brought to the Supreme Court for the banning of injurious and harmful drugs on the grounds that these drugs violated the right to life guaranteed by Article 21. While accepting that the right to life in Article 21 included the protection of health, the Supreme Court refused to interfere with the drug policy of the government on the grounds that it was beyond the judicial function to lay down the drug policy for the government.

Prevention of Abuse of Power and Maintenance of Rule of Law Through Public Interest Litigation

In the case *D N Satyanarayana v. N. T. Ramo Rao*⁶⁴ several Writ petitions were filed before the High Court of Andhra Pradesh under Article 226 of the Constitution

alleging abuse of power, corruption, nepotism and fiscal crimes by the Chief Minister of Telugu Desam. The Court held that it was appropriate for it to make an order because Public Interest Litigation could be utilised for the prevention of abuse of power and the maintenance of the rule of law.

The Right to Freedom of Speech

This fundamental right was upheld in the case of *Indira Jaising v. Union of India*.⁶⁵ A Writ was initiated before the Bombay High Court by an Advocate who complained about the infringement of her fundamental right to free speech and expression by the Indian television (Doordarshan) authorities who deleted her comments on the Muslim Women's Bill in a television interview. She claimed that the deletion amounted to a censorship of her view in violation of Article 19(1)(a) of the Constitution. The Court held that Doordarshan (Indian television) had violated the petitioner's right to freedom of speech and expression without any authority of law. The television authorities were directed to invite the petitioner to express her views if they decided in future to telecast a programme on such a topic.

Right to Equal Pay for Equal Work

This right was upheld by Bhagwati, CJ, in the case *Dhirendra Chamoli v. State of Uttar Pradesh*.⁶⁶ A letter was addressed to the Supreme Court by two employees in Dehradun stating that there were a number of persons in their establishment employed as casual workers on daily wages who were doing the same work performed by regular class 4 employees, but were not being paid the same salary and allowances as the latter. The argument by the Government of India stated that since there were no sanctioned posts to which regular appointments could be made, the casual workers could not claim the same salary and allowances as were given to the regular employees.

Finding that equal pay for equal work was implicit in the equality guarantee under Article 14 of the Constitution Chief Justice Bhagwati stated:

"It must be remembered that in this country where there is so much unemployment the choice for the majority of people is to starve or to take employment on whatever exploitative terms are offered by the employer. The fact that these employees accepted employment with full knowledge that they would be paid only daily wages and that they will not get the same salary and conditions of service as other class 4 employees cannot provide an escape to the Central government to avoid the mandate of equality enshrined in Article 14."⁶⁷

Many of these rights are accepted and in some instances enforced universally. In India itself the promise of these rights atleast has been on paper in the Constitution since Independence. It took Judicial Activism and Social Action Litigation to act as catalysts for their enforcement. For South Africans most of these rights are still to be accepted and enforced.

Assessment and Evaluation

A 1987 article on Public Interest Litigation in the Indian Supreme Court cites the observations of Avram Chayes, a Harvard Law Professor on American Public Law Litigation,

"..... this new kind of litigation is so fundamentally different that some might say it is recognisable as a law suit only because it takes place in a Court room before an official called a Judge." ⁶⁸

None of the reactions to Social Action Litigation in India have been quite as extreme, and an examination of some of the critiques reveals that no one has condemned this development outright. However, predictably the unconventional and unorthodox nature of Social Action Litigation has been the butt of considerable concern and some important criticisms have been articulated.

The most oft heard criticism is that the Courts are taking over the function of the administration and involving themselves in policy determination, an arena best left to the executive. They are not justified in taking over the administration in the guise of correcting governmental error or excesses. ⁶⁹

Some Judges have themselves cautioned against this tendency. One Judge believes;

"there is always the possibility for a Judge in Public Interest Litigation of succumbing to the temptation of crossing into territory which properly pertains to the legislature or executive and in the process of correcting executive error or removing legislative omissions. The Court can so easily find itself in policy making of a quality and to a degree characteristic of a political authority and indeed runs the risk of being mistaken for one. In the name of alleviating grave public injury the justices are arrogating to themselves the role of administrators or overseers, looking after the day to day management of all non-functioning and malfunctioning public bodies." ⁷⁰

There is also concern among "traditionalists" about judicial "despotism" ⁷¹ — whereby judges bring into play their own value choices or philosophies different from those declared by the political process and in doing so activist judges are accountable to none except their own conscience and to the logic of their own decision.

In defence activist judges state that the Court can exert some pressure and influence the use of power, but assert that it is beyond them to supervise the executive functions, improve the channels of administration or initiate a particular ameliorative or social legislation. ⁷²

Undoubtedly the judiciary in India does concern itself with the functioning of the administrative perhaps more so than in other countries but this has not erased the lines separating the powers of the governmental institutions nor has it diminished the credibility of the judiciary. Activist judges themselves recognise and respect their limited role *vis-a-vis* policy making.

The following principles clarified by one of the main commentators on public interest law apply sets out these limitations: ⁷³

- (i) the Courts can be activated only if the executive is remiss in fulfilling its constitutional obligations to the poor or the disadvantaged;
- (ii) the Courts can act as critics and monitors of the government but it is beyond them to exert the administration or indulge in continuing surveillance of public bodies;
- (iii) the Courts will respond only if there already exists an ameliorative legislation for the welfare of the poor and exploited. It is beyond them to force the government to initiate a particular legislation;
- (iv) the public mind may be greatly shocked by events but the Courts cannot easily be activated and will be reluctant to order the setting up of a parallel investigation unless they are fully satisfied that the statutory agency is not functioning properly;
- (v) the medium of Public Interest Litigation cannot be used for political gains or for enquiring into the role of politicians. Nor can it be used to settle private disputes." ⁷⁵

Procedural Problems

Determining the "seriousness" and bona fides of the Public Interest Litigation petitioner and ascertaining if he/she really is the champion of the cause of the group represented is recognised as a problem. ⁷⁴ One judge cautioned that Public Interest Litigation must be accompanied by adequate judicial control so as to prevent this technique from being used as, "an instrument of coercion, blackmail or for other oblique motive." ⁷⁵

The relaxed standards of proof and reliance on expert Commissions to adduce evidence is a cause of concern and it has been suggested that this may give the Court a partial and possibly biased view. ⁷⁶

Another problem has been referred to as "chronic over commitment to the judiciary to enlarge justice". ⁷⁷ This and the relaxed rule of standing has resulted in Courts being inundated with requests for relief from all manners of suffering.

Judge Shopping

Epistolar jurisdiction has meant that petitioners may select the judges to whom they wish to present their cases. This and the practice of judges retaining the petitions addressed to them, has resulted in Social Action Litigation remaining the tharrena of a few judges with a commitment to the cause of Social Action Litigation.

It has been stated that the practice of retaining Public Interest Litigation petitions by the addressee Justice "erodes the institutional personality of the Supreme Court and deprives the Chief Justice of India of his docket management power." ⁷⁸

It is also maintained that this practice "confers a privilege on the complainant to choose judge or a Forum of his own choice which is clearly subversive of the judicial process which enjoins that no litigant can choose his Forum." ⁷⁹

It is pointed out that this result of epistolary jurisdiction deprives many justices of the "much needed exposure to social action litigation, and in the process the learning capacity of the Court as an institution is constricted."⁸⁰

Lack of Sustained Commitment on the Part of Petitioners

It has been charged that Public Interest Litigation initiators are drawn from intellectual elites who spontaneously react to episodic acts of lawlessness, who have no specific target group to liberate or sustained social commitment towards them. These social action groups often lack an enduring relationship with the dispossessed and victimised groups.⁸¹

This does not however detract from the reality that India has a large number of social activists groups and possibly a group to represent almost every malady within the society. The ombudsman type function of such groups should not be underestimated.

Efficacy of Public Interest Litigation

The harsh socio-economic realities of India do not make it possible for distributive justice and Social Action Litigation to remove the sufferings which are brought to Court. One critic aptly states that, "judicial activism" cannot be a substitute for executive efficiency and the social and economic change in a society organised around privilege, patronage and power, cannot be brought about just by a few Public Interest Litigation actions, however well intentioned."⁸²

In fairness even the proponents of Social Action Litigation do no claim to be able to change the face of Indian society through legal strategies. They use it in an attempt to counter lawlessness and redistribute justice.

Judicial Socialism

Critics of judicial activism have labelled it "judicial socialism". The tendency of the activist judges to focus on the welfare goals enshrined in the directive principles in the constitution has prompted the response that the "Hegelian Marxist socialism of the activist judges misunderstands the nature of the Indian polity."⁸³

Conclusion

Judicial activism and creativity, a constitution enshrining fundamental rights and a socially active society, imbued with a heightened sense of rights awareness and a culture of resistance to oppression, have assisted the process of distributing justice in India, despite the harsh socio-economic realities, poverty and misery.

India's Social Action Litigation experiment deserves the attention of many legal systems, First World and Third, Eastern and Western, coloured by formal and substantive disparities in law.

Comparative Legal Studies should be approached with caution and one should certainly guard against indiscriminately superimposing foreign legal models, regard being had to differing political, cultural and socio-economic conditions. However for a South African legal system suffering from a credibility crisis, almost bereft of the Rule of Law and plagued by official lawlessness, the Indian Social Action Litigation experience model has many lessons. The designing of a home grown jurisprudence and legal culture aimed at redistributing justice, the bold, creative and innovative example of the activist Judge, unafraid to break with traditions of the past, the widening of the doctrine of standing and introduction of other appropriate legal strategies, the expansive judicial interpretation of fundamental rights especially the right to life and finally the Indian Supreme Court's willingness to venture into the sphere of Environmental Litigation and circumscribe fearlessly corporate rights in relation thereto, are areas which a South African Judiciary and Legal System steeped in Positivism would do well to take note of.

The similarities between India and South Africa — the diversities of race, religion, language and culture, the contrasts between wealth and massive poverty, as well as the vibrant freedom struggles which characterise both societies, make the Indian Social Action Litigation model all the more compelling and relevant.

The "new South Africa" must usher in some restructuring of the legal system, legal institutions and strategies if respect for law and the Rule of Law is to be restored. Part and parcel of the oft spoken about redistributions in South Africa must be the redistribution of justice and law. Towards that end there will be a new constitution and a Bill of Rights catapulting us officially into new terrain, Rights Litigation. For although there has always been a tradition of human rights lawyers attempting to enforce human rights through the law in South Africa, their efforts have been despite the law and not because of it.

Our experience of rights enforcement in South Africa has taken the form of a challenge to assert rights by finding legal loopholes in Apartheid laws founded upon the denial of the most basic human rights. The experience of rights litigation within the framework of a Bill of Rights will be a new and very different one, given that thus far we have enforced rights in the absence of entrenched fundamental rights.

In the forging of our new legal culture, and the developing of our rights enforcement techniques and strategy we will look also to other models, and that of India must be one.

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11. See *supra* note 8 at page 95.
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21. A.I.R. 1982 S.C.C. 149 at 189.
22. Cited in the judgment at *supra* note 13 at p 586.
23. *Municipal Council, Rattlam v. Varadchand* (1980) 4 S.C.C. at 170 - 171.
24. See *supra* note 13 at page 587.
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27. See *Bandhua Mukti Morcha v. Union of India* (1984) 3 S.C.C. 161, and Annual Survey of Indian Law 1987 Vol XXXIII at p. 143.
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34. A.I.R. 1983 S.C. 378.
35. (1986) 2 S.C.C. 176.
36. See *supra* note 29.
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The Management's Prerogative of Discipline in India

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The concept of 'industrial discipline' is a comprehensive expression which includes the orderly behaviour of labour in accordance with the rules of the organization and the laws of the country and also orderly and responsible conduct on the part of the employers with a view to render reasonable amount of efficient services to the society for which the venture has been established. Such a conception of industrial discipline is imperative because the productivity and discipline are not only essential for the workers or employers alone but also for the society as a whole which is dependent upon the orderly productivity in the industrial sector. In this context Professor Avins has remarked:¹

"... the law of industrial discipline is an independent body of law and not a branch of contract law, and is most akin to the penal law. It is a series of sanctions given to a unit of society commanding facilities for the production of goods or the rendering of services, and necessary to safeguard that unit of production. Without the law of industrial discipline, society's productive facilities could not function, just as without the penal law, society itself could not function."

Many a times industrial indiscipline breeds even from the antagonism and friction between the employer and labour. And if we visualise labour indiscipline without having an insight into its various contributing circumstances it will not really help in strengthening and stabilising the industrial discipline in society.²

Legal Basis of Management's Prerogative of Discipline

The legal basis of the 'management's prerogative of discipline' in all employments is the contract of employment between the employer and the employee. By entering into the contract an employee undertakes to perform personal services to the employer and with respect to the physical performance of his services is subject to control or right to control of the employer. In this respect the employee is bound to obey the orders of the employer not only as to the work which he shall execute, but also as to the details of the work and the manner as to how the work should be executed.³ There can be no act of indiscipline on the part of the employee without

a valid contract of employment. The contract of employment may be expressed or implied. Which means that a contract of employment may be inferred from the conduct of the parties i.e., the employer and the employee which goes to show that such a contract was intended although never expressed.⁴

Generally it is assumed that the question of discipline of employees is a question of contract, whether it is expressed or implied, which is the foundation of all employments. However, in practice it is observed that the employment contracts are largely silent about the matters of discipline on the part of employees.⁵ Rules of discipline may be found vaguely either in the terms of employment or in the work rules⁶ but primarily the rules of discipline are to be found in the judge-made law. Analysis of the cases which have come before the courts relating to employees indiscipline shows that employees discipline is by and large a matter common to all types of employments irrespective of the nature of employment in which the employee is engaged. It is, of course, true that the terms of contract of employment may modify or change the rules so developed by the courts with respect to peculiar or special nature of employment relationship but it is to be found in practice that usually the terms do not change such rules so developed. The rules relating to employees discipline have been evolved by the courts generally with reference to the status of an employee rather than in the context of the contract of employment. And, therefore, the rules relating to employees indiscipline "typically have only the most tenuous connection with the contract of employment."⁷ Thus the question of the employees indiscipline is more a question of rules which attach an incidence of employment relationship itself rather the question of the express or implied terms of the contract of employment. In this connection Avins has rightly observed:⁸

"The courts have generally thought of misconduct as a branch of contract of service. Yet, if there are two cardinal principles of contract law, they are that only such damages can be recovered as were actually suffered, with the corollary that no punitive damages can be recovered, and that liability attaches for breach of contract without fault. The law of industrial discipline is the exact opposite on both points. It can be repeatedly observed that no punishment can be inflicted without fault, regardless of the damage caused, and that fault may be punished although no damage actually occurs, if it creates a risk of damage. Even in tort-law, punitive damages are reserved for a limited class of intentional torts."

It may, however, be pointed out that the work discipline can be looked from three aspects. Firstly there may be sanctions imposed, external to the employment relationship, by some social security legislation upon the employee seeking benefits in cases where they have been guilty of conduct which the social security law seeks to deter or penalise. Secondly, there may be civil or criminal remedies available to the employer in the courts or tribunals as a means disciplining the employees which may arise out of the contract of employment itself, for instance, in the case of claim for damages by the employer against an employee who acts specifically in the breach of his contract. And, thirdly, there are always some disciplinary rules imposed by employers inside the employment relationship.⁹ It is

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primarily with the third aspect of the law of the 'management's prerogative' of industrial discipline with which we are concerned in this paper. Management's prerogative to take disciplinary action against the employees in the employment relationship under the law of industrial discipline extends technically to only such behaviour on the part of the employees which is termed as 'Misconduct'. And no punitive action can be taken by the employer unless the fault of the employee is established in some form of misconduct on his part during the employment relationship. Such management's prerogative to punish an employee is an implied right of the management and does not necessarily flow from the terms and conditions of employment. It is a prerogative which flows from the law of master and servant.¹⁰

The prerogative of the employer to dismiss the services of an employee on the ground of 'Misconduct' was established at common law by the early and middle years of the nineteenth century. At common law the established rule was that the employer had no obligation to give reasons for dismissal to the employee at the time of dismissal. It was considered sufficient that he should be able to satisfy the court that he was justified in dismissing the services in case the employee sued employer for wrongful dismissal.¹¹

Common law went even a step further by establishing the rule that the dismissal of an employee could be justified even on facts not known to the employer at the time of dismissal or on facts not acted upon at the time of dismissal. This rule is clearly illustrated in *Ridgway v. Hungerford Market Company*¹² where the plaintiff was employed as a clerk of the defendant's company. After the decision had been taken to dismiss him he entered a protest note against his dismissal and the election of his successor in the minute of the company. It was held by the court that he could be justifiably dismissed for this misconduct even though this was not the predominant cause of his dismissal. It was ruled that having good ground of dismissal it is not essential for the employer to state it to the servant or to act upon it. It is enough that such conduct exists and is an improper conduct in fact. In this case Paterson J. observed:¹³

"If we were to hold that it was necessary to trace the dismissal to the act which is to justify it, it would follow that a master, who had made up his mind to dismiss a servant, would give the servant, if he discovered his master's intention, licence to act just as he pleased afterwards."

Similarly in *Spotswood v. Barron*,¹⁴ in an action for the wrongful dismissal by the employer the employer could justifiably plead mis-appropriation as a defence which was unknown until after the dismissal of the employee.

The above rule of common law that the employer is under no obligation to state reasons to the employee for dismissal at the time of dismissal is not ordinarily applicable in India with respect to the employees covered under the Industrial Disputes Act, those employed by the statutory bodies and the government servants covered under Art. 311 of the Constitution of India. It is, of course, right that the employer has an inherent prerogative to suitably punish a delinquent employee, including inflicting a punishment by dismissing his services, in the interest of

maintaining good order and discipline in his establishment. However, with the emergence of the concept of *Social Justice* the inherent prerogative of the employer has been subjected to many restrictions in order to be fair to an employee so as to protect him against any arbitrary, vindictive or capricious action on the part of the employer. It is ordinarily expected of an employer before dismissing the services of his employee to inform him clearly, precisely and accurately of the specific charges levelled against him.¹⁵ The object is that the delinquent workman must know that he is charged and should have the amplest opportunity to defend himself otherwise he will be condemned unheard.¹⁶ And before imposing any punishment on the delinquent workman an employer is ordinarily expected to conduct a proper domestic enquiry in accordance with the provisions of the Standing Orders, if applicable, and the principles of natural justice.¹⁷ Although it has been held by the Supreme Court in *Workmen of Firestone Tyre and Rubber Co. Ltd. v. The Management*¹⁸ that it is not always essential for the management to hold a domestic enquiry before dismissal because the management can prove merits of dismissal before the tribunal itself even though a domestic enquiry is required under the *standing orders* of the company. The necessity of holding a domestic enquiry has been pointed out by Valdingangam J., in the above case in the following words:¹⁹

"No doubt it has been emphasised in the various decisions of this court that an employer is expected to hold a proper enquiry before dismissing or discharging a workman. If that requirement is satisfied, the employer will by and large escape the attack that he has acted arbitrarily or *mala fide* or by way of victimization. If he has held a proper enquiry, normally his *bona fide* will be established."

Ordinarily in each and every case because *mala fide*, victimization and arbitrary action is the attack against the management action of dismissal of a workman the employer is expected to hold the formality of proper domestic enquiry before dismissal which is a very serious procedural constraint to the management prerogative to take disciplinary action. Thus, we observe a substantial erosion of the inherent prerogative of the management to take disciplinary action against a workman.

Management's Right to Take Disciplinary Action

At common law it was an absolute prerogative of the management to take disciplinary action and impose the quantum of punishment to the erring delinquent employee subject to the terms of the contract of employment. But with the recognition of the right of collective bargaining by the trade unions the courts in India started diminishing this absolute right gradually by granting reinstatement of workman in case the dismissal was unjustified. As has been observed by the Supreme Court in *Indian Iron and Steel Company Ltd. v. Their Workman*²⁰

"Undoubtedly, the management of a concern has power to direct its internal administration and discipline; but the power is not unlimited and when a dispute arises, the Industrial Tribunals have been given the power to see whether the termination of service of a workman is justified and to appropriate

relief. In cases of dismissal on misconduct the Tribunal does not, however, act as a court of appeal and substitute its own judgment for that of the management. It will interfere,

- (i) when there is want of good faith;
- (ii) when there is victimization or unfair labour practice;
- (iii) when the management has been guilty of a basic error or violation of a principle of natural justice and
- (iv) when on the materials the finding is completely baseless or perverse."

Until 1971 even though the tribunal had the power to change the decision of the management on the above mentioned grounds it was well recognised that the prerogative to take disciplinary action and decide upon the quantum of punishment, on the justified misconduct on the part of the workman, were mainly management functions.²¹ But with the introduction of Section 11-A in the Industrial Disputes Act, by the amendment Act of 1971, even this function of the management has been entrusted to the tribunals in the disciplinary matters.²² Before 1971 the tribunal had no power to interfere with the findings of misconduct recorded in domestic enquiry unless the findings were perverse or the punishment was so harsh to lead to an inference of victimization or unfair labour practice. The tribunal was not supposed to act as a court of appeal against the findings of the domestic enquiry.²³ However, now the position has changed with the introduction of Section 11-A in the Industrial Disputes Act. It has been held by the Supreme Court in the following words:

"The words "in the course of adjudication proceedings, the tribunal is satisfied that the order of discharge or dismissal was not justified," clearly indicate that the Tribunal is now clothed with the power to reappraise the evidence in the domestic enquiry and satisfy itself with the said evidence relied on by an employer establishing the misconduct alleged against a workman. What was originally a plausible conclusion that could be drawn by an employer from the evidence, has given place to the satisfaction being arrived at by the Tribunal that the finding of misconduct is correct

The Tribunal is now at liberty to consider not only whether the finding of misconduct recorded by an employer is correct, but also to differ from the said finding if a proper case is made out. What was once largely in the realm of the satisfaction of the employer, has ceased to be so, and now it is the satisfaction of the Tribunal that finally decides the matter."

Thus whenever any disciplinary action is taken by the management against a workman and the matter is raised as an industrial dispute it is the Labour Court or Tribunal which finally decides the matter both on the question of law as well as on the question of facts relating to the justification of the action of dismissal and also on the question of the quantum of punishment to be awarded to the delinquent workman. In this way practically the hands of the management have been crippled to take disciplinary action against a workman realising fully the difficulties of prolonged litigation and the approach of the tribunals to give lesser punishment

and reinstatement to workmen in cases of dismissal. Such a situation further deteriorates healthy industrial relations and helps in encouraging industrial discipline on the part of the workmen.

Even where the management wants to terminate the services of a workman under the contract of service, Standing Orders, or under the terms of an award of a tribunal by giving proper notice or salary in lieu of notice, not by way of punishment as dismissal but as a discharge *simpliciter*, the management's hands are not free from the intervention of the tribunals power to interfere with the action taken by the management. It has been held by the Supreme Court that in these cases the test has to be:²⁴

"whether the act of the employer is *bonafide* or not. If the act is *malafide*, or appears to be a colourable exercise of the powers conferred on the employer either by the terms of the contract or by the standing orders, then notwithstanding the form of the order, industrial adjudication would examine the substance and would direct reinstatement in a fit case."

Moreover it has been held by the Supreme Court in *Central Inland Water Transport Corporation Ltd. v. Brojo Nath Ganguli*²⁵ that the rule empowering the Govt Corporation to terminate the services of its permanent employees by giving notice or pay in lieu of notice period is opposed to public policy and violative of Article 14 and Directive principles contained in Articles 39(a) and 41.

The court further held that considering the inequality of bargaining power of the parties the notice clause in the contract of employment was void under Section 23 of the Contract Act as opposed to public policy besides being *ultra vires* of Article 14 of the Constitution of India.²⁶ However it was clarified by the court that the clause conferring on the employee the right to resign is not void.

Even in the cases of loss of confidence on workmen the courts are prepared to lift the veil against the order of the management of simple discharge. In one of the interesting case²⁷ where the management discharged a workman by giving him one month's notice under the contract of service and the relevant standing orders. The management's contention before the labour court was that the workman was untraceable smuggler of inside information and therefore, the management lost confidence in him. In this case the labour court accepted the contention of the management but in special leave to appeal to the Supreme Court the court reversed the order of the management on the ground that the grounds for suspicion were not disclosed earlier and meanwhile the management gave two increments also. The Supreme Court found that the management's action was not *bonafide* and held that²⁸

"The Tribunal has the power and, indeed, the duty to x-ray the order and discover the true nature, if the object and effect, or the attendant circumstances and the ulterior purpose be to dismiss the employee because he is an evil to be eliminated."

and further ruled that²⁹ "Loss of confidence is no new armour for the management, otherwise security of tenure, ensured by new industrial jurisprudence and authen-

ticated by a catena of the cases of this Court, of course can be subverted by this neo formula."

Thus it would be easily observed from the above legal position and decided cases that what was once the management's prerogative to take disciplinary action has practically become the prerogative of the tribunals whether to take disciplinary action or not against a workman simply on the grounds of social justice and new industrial jurisprudence.

The Concept and Scope of Misconduct

The word 'Misconduct' has not been defined either under the Industrial Disputes Act or under the Industrial Employment (Standing Orders) Act, 1946. "Misconduct is a generic term and means to conduct amiss; bad behaviour; unlawful behaviour or conduct. It includes malfeasance, misdemeanour, delinquency and offence. The term 'misconduct' does not necessarily imply corruption or criminal intent."³⁰ The word in its scope carries wide meanings as provided in the dictionary like "improper behaviour, intentional wrong doing or deliberate violation of a rule of standard of behaviour." It is because of the width and flexibility of the word involved that Lord James in *Glaxo & Co. Ltd. v. Cory*³¹ rightly observed that 'there is no fixed rule of law defining the degree of misconduct which will justify dismissal'.³² However for any misconduct justifying dismissal is a question of fact alone.³³ For this no rigid standards can be laid down.

However, in employer and employee relationship there are some express and implied duties of the servants towards his master. And, therefore, any breach of either implied or express duties by the employee towards the employer would constitute misconduct.

Duties of a Servant at Common Law

At common law it is the duty of the servant to obey all those orders which the master is justified to give under the contract of employment. And it is always a question of fact for the jury to determine whether the order of the master was such which the servant was bound to obey.³⁴ The servant under common law is also bound to disclose facts to the master which affect master's interest. For instance in *Swain v. West*³⁵ it was held that the General Manager of the company owed the duty to the company under the terms of the written agreement to disclose the dishonesty of the Managing Director. It is also the duty of the servant to discharge his duties faithfully and truly under the contract of service and he would commit breach of contract in case he accepted bribe or pecuniary reward for performing his duty for his master's business. In one case known as *Wesssex Dairies v. Smith*³⁶ it was held that the servant has no right to solicit his master's customers.

In common law it is also expected of the servant to exercise reasonable care while performing his duties so that no damage is caused to his business or property. It is not an absolute liability but his liability is if it is proved that the servant has been negligent resulting in loss or damage to the master.³⁷ The servant is also liable

to account for all money and property received by him on master's behalf. Moreover, a servant is expected to observe silence about his master's business as a reasonable man. And a servant who talked about his master's business could be dismissed summarily.³⁸ At common law even incompetence to perform the job was considered to be misconduct. The justification for this was on the ground that at the time of entering into the contract of service the servant warranted his competence and failure to fulfill warranty amounts to misconduct justifying dismissal. Thus in *Harmer v. Cornelius*³⁹ the plaintiff was engaged as a painter by the defendant on the basis of an advertisement and he sent his picture work. But he was found to be incompetent within two days. Plaintiff's action for wrongful dismissal failed because he was found to be incompetent.

A servant is under an obligation to indemnify the master against his wrongful acts for which his master has been held liable to pay damages. This is based on the basic relationship of the master and servant. And as such the servant can be sued by the master for the damages and costs which the master has been held liable to pay. For instance in *Lister v. Romford Ice and Cold Storage Co. Ltd.*⁴⁰ where a lorry driver had injured his father when he had taken him along with him as his mate. The father claimed damages from the company. And the company could then successfully sue the son, its employee, for claiming damages for breach of an implied term to use reasonable care.

Misconduct in Industrial Employment in India

In India the word 'misconduct' has acquired a special and specific connotation with respect to the industrial workmen. Misconduct does not mean mere inefficiency or slackness in duties. It means something in the nature of a positive act and it has to be deliberate. Therefore, when we talk of misconduct of a workman it means that there has to be some positive act or conduct on the part of the workman which is incompatible with the express or implied terms of the contract between the employer and the workman. Thus if the workman intentionally and deliberately disobeys order of any superior would be considered to be one of the species of misconduct.⁴¹ In *Tata Oil Mills Co. Ltd. v. His Workmen*⁴² Justice Gajendragadkar held that in order to constitute misconduct of drunkenness, fighting, ritous or disorderly or indecent behaviour within or without the factory as provided in the Standing Orders 22 (viii) of the company the appellant should be able to show that the disorderly or riotous behaviour had some rational connection with the employment of assault on the victim. And in this case the delinquent workman had assaulted a Chageman outside the factory because the Chageman was in favour of introducing the incentive bonus scheme in the company. Thus the act of the delinquent workman was held to be misconduct and attracted Standing Order 22 (viii) of the company entitling dismissal.

Schedule I, Clause 14(3)⁴³ of the Model Standing Orders provides that the following acts and omissions shall be treated as misconduct:

- (a) wilful insubordination or disobedience, whether alone or in combination with others, to any lawful and reasonable order of the superior;

- (b) theft, fraud or dishonesty in connection with the employer's business or property;
- (c) wilful damage or loss of employer's goods or property;
- (d) taking or giving bribes or any illegal gratification;
- (e) habitual absence without leave, or absence without leave for more than ten days;
- (f) habitual late attendance;
- (g) habitual breach of any law applicable to the establishment;
- (h) riotous or disorderly behaviour during working hours at the establishment or any act subversive of discipline;
- (i) habitual negligence or neglect of work;
- (j) frequent repetition of any act or omission for which a fine may be imposed to maximum of 2 per cent of the wages in a month or
- (k) striking work or inciting others to strike in contravention of the provisions of any law, or rule having force of law.

It may be pointed out that the acts of misconduct listed above are merely illustrative and not exhaustive.⁴⁴ There could be many other types of acts which may amount to misconduct even though they have not been provided in the Standing Orders. It has been held by the Supreme Court in *Mahendra Singh Dantwal v. Hindustan Motors Ltd. and others*⁴⁵ that "Standing orders of the company only describe certain cases of misconduct and same cannot be exhaustive of all species of misconduct which a workman may commit. Even though the given conduct may not come within the specific terms of misconducts described in the standing orders, it may still be a misconduct, in the special facts of a case, which it may not be possible to condone and for which the employer may take appropriate action. Ordinarily the standing orders may limit the concept but not invariably."⁴⁶

The scope of misconduct is very wide from mere technical default to serious subversive conduct rendering an employee wholly unfit for employment.⁴⁷ The scope is also wider in industrial law than in criminal law.⁴⁸ A judgment of a Criminal court acquitting an accused would not bar disciplinary proceedings against him on the basis of the same facts as the standard of proof is different in both these proceedings.⁴⁹

But what is important is to establish whether in the context of his conduct in relation to the employment with which he is charged is inconsistent with the faithful discharge of his duties. This point has been lucidly explained by Lopes, L.J. in the case of *Pearce v. Foster*⁵⁰ as under:⁵¹

"If a servant conducts himself in a way inconsistent with the faithful discharge of his duties in the service, it is misconduct, according to my view, need not be misconduct in the carrying on of the service or the business. It is sufficient if it is conduct which is prejudicial or is likely to be prejudicial to the interests or to the reputation of the master and the master will be justified, not only if he discovers at the time, but also if he discovers it afterwards, in dismissing that servant."

In *Sinclair v. Neighbour*⁵² where a manager of a bottling shop was dismissed by his employer because he borrowed money from the till for the purpose of gambling. The employer would not give permission had he asked for it. The manager contended that he was not dishonest as he had no intention of misappropriation of money without repaying it. However, his dismissal was justified by the court on the ground that the conduct was incompatible with the continuance of employment because their relationship was of a confidential nature. It was held by Sachs L.J. in the following words:⁵³

"It is well established law that a servant can be instantly dismissed when his conduct is such that it not only amounts to a wrongful act inconsistent with his duty towards his master but is also inconsistent with the continuance of confidence between them."

From the survey of cases the following conducts have been held to be misconduct warranting the dismissal of the delinquent employees. The cases are not exhaustive but merely illustrative.

(1) Habitual negligence or neglect of work on the part of the workman. Such a conduct requires that the workman is as a matter of habit neglectful of his duties. And, therefore, stray incidents of negligence do not constitute misconduct but it has to be shown that he has been guilty of negligence on several occasions.⁵⁴ Unless the conduct, even though a single act, may amount to gross negligence which may entail serious consequences.⁵⁵

(2) Absence without leave if proved complying with the procedure provided under the Standing orders or with the rules of natural justice etc., may entail dismissal for misconduct.⁵⁶

(3) Habitual late attendance of a workman who came late six times during the last twelve months and was warned thrice before and he still persisted on late coming without justifiable excuse was held to be justifiably dismissed by the employer.⁵⁷

(4) Participation in an illegal strike may also entail the consequence of dismissal. Though it has been held that all the workmen who participated in the illegal strike cannot be dismissed.⁵⁸

"To determine the question of punishment, a clear distinction has to be made between those workman who not only joined in such strike, but also took part in obstructing the loyal workmen from carrying on their work, or took part in violent demonstrations or acted in defiance of law and order, on the one hand, and those workmen who were more or less silent participants in such a strike, on the other hand."

Also there should not be any discrimination between one workman and the others for participation in an illegal strike. For instance in *Burn and Co. Ltd. v. Their Workmen*⁵⁹ the Supreme Court held that to dismiss the concerned workman for participation in an illegal strike is not justifiable in the circumstances of the case because a large number of others were taken back on the job after participation in the illegal strike whereas this workman was not, particularly where no distinction could be made between the dismissed workman and those who were taken back.

Moreover, it has been emphasized by the Supreme Court that before dismissing the concerned workman for participation in an illegal strike it must be proved by holding a proper domestic enquiry in each and every case separately. The theory of collective guilt has been rejected in industrial jurisprudence.

(5) Go-Slow or slowing down work either by concerted action or an individual workman in reducing production is breach of duty and is considered as misconduct in industrial law. It has been considered to be a serious misconduct and would expose workmen to dismissal from service.⁶¹

(6) Similarly 'Gherao' if it amounts to any of the several offences of the Indian Penal Code is also misconduct for which there can be dismissal of the workmen.⁶²

(7) Acts subversive of discipline also amount to misconduct. But such act should have some impact on the working of the concern. For instance in *W.M. Agrani v. Badri Das*⁶³ where workman was charged with misconduct, that on a particular day an incident had occurred between him and an outsider during which hot words and abuses were exchanged. The quarrel had taken place in the workers colony which was outside the premises of the factory, and the matter in regard to which quarrel took place had nothing to do with the working of the concern. It was held by Justice Gajendragadkar that bearing in mind the back-ground and the nature of the quarrel and the time and place where it took place, it could not be said it was one constituting misconduct for which the employer could take action by way of punishment. A private quarrel between an employee of the concern and an outsider which takes place outside the premises of the concern and outside the working hours of the employee and which has nothing to do with his work or the work of the other employees of the concern is not misconduct for which the employer can take punitive action. However it has been held by the Supreme Court in *Munchandani Electrical and Radio Industries Ltd. v. Their Workmen*⁶⁴ where an assault took place in a railway train was considered to be subversive of discipline in the establishment because the act relates or subverts the discipline in the establishment even though committed outside the establishment.

(8) Acts amounting to insubordination or disobedience also amount to misconduct. Continued refusal by an employee to accept order or assignments from a person appointed by the employer as his superior is insubordination. In *Ananda Bazar Patika (Pvt) Ltd. v. Their Employees*⁶⁵ the employer company had in its services X working as a news reporter. The Chief reporter went on leave and before going on leave appointed one Y to work as acting Chief reporter. X took exception to this arrangement and interviewed the Managing director and then he was not satisfied with the interview. He wrote a letter to the managing director setting out his grievance and hung up a copy on the notice board. Thereafter he refused to accept any assignments from the acting Chief reporter, and this was reported to the managing director. But even then X continued in his ways and he was asked to give written explanation of his conduct. X submitted a written explanation in which he insisted that he would not take any orders from the acting Chief reporter. An enquiry was held into his conduct after serving him with a charge-sheet and the enquiry officer came to the conclusion on the evidence before him that X was guilty

of deliberate disobedience of lawful orders and insubordination. Accordingly the management discharged his services. It was held by the court that in this case the conduct of the reporter clearly amounted to insubordination and the order of discharge made by the employer was justified.

(9) Similarly riotous and disorderly behaviour amounts to misconduct justifying dismissal. In *Tata Oil Mills Co. Ltd. v. Its Workmen*⁶⁶ it was held by the Supreme Court that an assault on the charge-man of the factory by the delinquent workman even outside the factory amounts to riotous and disorderly behaviour on the part of the workman. Though it was also emphasised by the court that in such cases there must be the rational connection with the employment of the assailant the victim.

However, in *Sannuggur Jute Factory Co. Ltd. v. Their Workmen*⁶⁷ where the charge against the workman was of "riotous behaviour during the working hours", as he had dragged another workman with the help of four others one morning near the gates of the factory and had robbed him of the money he had on his person. The defence of the workman was that he had previously given loan to him at the time of his daughter's marriage and that on his making a demand for its return he had raised a false hue and cry of returning the amount of the loan. The evidence of the witnesses produced in support of the charge was that on reaching the spot they saw the delinquent workman and four others sitting there and that on the enquiry by them the victim told them that his money had been taken away by the delinquent workman and when told to return the money the money was actually returned. On these facts the tribunal came to the conclusion that the charge of riotous behaviour was not proved and directed reinstatement. In appeal the Supreme Court upheld the findings of the tribunal and held that the evidence was not sufficient to establish the charge that the delinquent workman had robbed money and that he and his companions were guilty of riotous conduct.

(10) Even damage to the property or reputation of the employer amounts to misconduct. In one case the Supreme Court justified disciplinary action against a workman for the misconduct of damage to the reputation of the employer.⁶⁸ In this case the delinquent workman made a complaint in writing to the police that the Assistant Manager and the Labour Officer of the company had broken open the lock of the room of the workman and thrown away his belongings. On investigation it was found by the police that this was a false case and the complaint was dismissed. The management dismissed the services of the workman on the ground of acts subversive of discipline. It was held by the Supreme Court that the act amounted to subversive of discipline in undermining the authority of the officers affecting thereby peace and good order in the factory.

(11) Theft, dishonesty and fraud connected with the employment constitute serious misconducts which justify dismissal of the delinquent workman.⁶⁹ In *Delhi Cloth and General Mills v. Kishal Bhan*⁷⁰ it was held by the Supreme Court that stealing of a bicycle of a co-workman by the delinquent amounts to misconduct for which he could be justifiably dismissed by the management for misconduct or even for the loss of confidence on him.

(12) Commission of criminal offence either of moral turpitude or otherwise also amount to misconduct which may justify dismissal. However, in these cases a distinction has to be made between those offences which have connection and bearing on employment relationship and others which do not have any relation with the working of the concern. In those cases where the crime has connection with the employment the management can proceed independently to hold a domestic enquiry and prove the charge and dismiss the services of the delinquent workman irrespective of the fact what happens in the proceedings of the criminal court. But where the crime is unconnected with the employment and if there is acquittal of the workman ordinarily the findings of the Criminal Court have got to be respected.⁷¹ Unless the acquittal is other than honourable.⁷²

From the perusal of the cases and concept of misconduct in common law and as present in industrial law in India it may be seen that the concept has by and large remained as wide as it used to be at common law except that the seriousness and gravity of the misconduct has to be much more grave and serious on facts than it used to be in common law. However, one aspect of misconduct is strikingly missing in the modern industrial jurisprudence in India. This is relating to incompetence as misconduct which was well recognised at common law.⁷³ is not within the scope and concept of modern industrial law in India. This means that once a person is recruited permanently by the employer he cannot be dismissed even if he is absolutely incompetent for the job he has been recruited. Such a situation does affect the co-workers and the industrial production which might ultimately lead to industrial indiscipline.

Punishments for Misconduct

As we have already discussed that the law of industrial discipline is more akin to the penal law rather than as a branch of contract law,⁷⁴ we have to look for a series of sanctions in the form of punishments in order to maintain proper industrial discipline. In fact at common law generally the rule is one of dismissal or nothing else. At common law the right to suspend or to demote will not be implied in the contract of employment. Suspension or demotion in the absence of special provision in the contract of employment would amount to wrongful repudiation of the contract by the employer.⁷⁵ These rules of common law themselves provide a valuable protection against the imposition of disciplinary measures upon the employee, without his prior agreement, against him.⁷⁶ However, if we look at the wide right of summary dismissal at common law available to the employer we find that at common law in fact only a rough justice was provided rather than a proper procedure wherein a series of sanctions could not be available with the employer in order to maintain proper industrial discipline.

Precisely for the above reasons it is better for any industrial organisation, in order to have good and healthy industrial relations practices, should provide for alternative penalties or punishments differing in severity like reprimand, warning, fine, withholding increments, demotion, suspension, discharge or dismissal etc.

(a) Reprimand:

To reprimand means to give a 'Sharp rebuke' to a workman for his minor lapses in performing the job or for very trivial misconducts relating to discipline. This remedy appears to be very simple but in fact it is one of the most effective sanctions against a workman in his day to day performance of job. Such reprimands for even simple lapses are observed quite seriously by the co-workers and other employees in the organisation and if given at a proper time to a proper person do have the demonstration effect on others which improves the efficiency and discipline in the establishment. This punishment can be given even without following particular procedures on the basis of the complaints of the supervisors or co-workers. This remedy has practical effect on the workman without damaging his record of service because it is not to be given in writing. If such reprimands are given by the managerial staff to the concerned workman it does also boost the morale of the supervisors and co-workers, and discourages others to commit similar lapses in future. Because a proper procedure of reprimand shows that the workmen are being watched carefully and all are being protected properly in the establishment.

However, it may be pointed out in passing reference that wherever unions are strong the management is not practically able to use the punishment of reprimand - a workman for fear of harassment by the unions and workmen. Such practice is used very effectively in smaller private concerns with the desired results to maintain proper industrial discipline. It is suggested that if this form of punishment is used with proper grievance procedure then to a great extent the minor lapses which many a times lead to big industrial disputes will be avoided and would create better industrial discipline in the establishment.

(b) Warning:

Warning is a milder form of punishment which may be administered to a workman for his blameworthy conduct. The management might prefer to give this punishment either orally or in writing. If it is orally given then it is the same form of punishment as reprimand. However, if it is given in writing only then for the purposes of industrial adjudication it may be taken into consideration for imposing disciplinary action, in the form of discharge or dismissal, in future against the concerned workman.⁷⁷ Since this is one form of disciplinary punishment recognised under the law this can be imposed only after giving him the opportunity to explain his conduct alleged against him and after considering his explanation. Even though does not require the elaborate procedure for proving the guilt as in the case of punishments like discharge or dismissal.

Warning once administered against a workman may not actually affect much materially at that very time but does affect psychologically the concerned workman and also it may be taken into consideration for future disciplinary action against him. In *Shankar Pillai v. Kerala State*⁷⁸ it was held by the learned judge Pillai that the previous punishments suffered by the delinquent employee which are well known to him may be taken into consideration in deciding measure of punishment though not for establishing his guilt in the departmental disciplinary proceedings.

Often it may be necessary for the punishing authority to look into the past record of service and even be desirable to do so. But if such record of his past service is to be taken into consideration against the delinquent he would be entitled to offer his explanation concerning it. In any event such record would be irrelevant and not to be used for finding his guilt of any charge levelled against him.

In the above case the petitioner was a police constable at a police station and was also doing his duty as a station writer. After an audit he was charged with twenty six charges including temporary misappropriation of funds, falsification of accounts and for failure to maintain cash book. After about a week the constable filed the explanation denying the charges. However, he was dismissed without any proper enquiry. The prosecution wanted to rely on the past punishments against him but the court held that there having been no enquiry against him it must be held that he had no reasonable opportunity within the meaning of Article 311(2) of the Constitution of India. Therefore, the order of dismissal against the petitioner was quashed.⁷⁹

However, in *Hamdard Dawakhana v. Its Workmen*⁸⁰ where one X was dismissed by the management because there was a quarrel between X and other workman Y. The quarrel disturbed the working of the establishment and was clearly against the rules of discipline laid down for the workmen in the establishment. A charge-sheet was given and after explanation was obtained the enquiry was held. In this enquiry evidence was led and the offending workman was given an opportunity to cross-examine the said evidence. The enquiry officer found that both X and Y were to be blamed and he recommended stoppage of increments for both the employees as he considered that the dismissal was a severe punishment. On examining the report the manager agreed with the enquiry officer and gave Y the punishment of stoppage of increments for six months because he had a clean record of past service. But X was dismissed because he did not have clean record. On reference the tribunal considered the order of dismissal as unjustified and ordered reinstatement because the conclusion of the manager on the basis of enquiry was perverse. In this connection the Supreme Court observed that it is relevant to remember that the manager has referred to the previous conduct of X. On several occasions in the past he had been warned and once in the case of theft his increment was stopped and he was transferred to another section. The manager also wrote to the father of X against his son's conduct and he was also warned if he continued his activities in the manner adopted by him the appellant would not be able to keep him in service. And in the light of these blemishes in his past record that the manager decided to dismiss him and therefore it does not amount to victimization as found by the tribunal. Hence the dismissal of the delinquent was sustained by the court by allowing the special leave to appeal.⁸¹

Similarly in *India Marine Service (Pvt) Ltd. v. Their workmen*⁸² on a charge of insubordination against a clerk for having abused and objectionable language to his superior in the office. As a consequence the charge-sheet was issued to the delinquent workman and was asked to give written explanation for his rude and insolent behaviour towards his superior officer. On the basis of the enquiry the Managing Director wrote:⁸³

"After giving your matter our very careful consideration we have, therefore, painfully come to the decision that in the interest of discipline and business you should be forthwith dismissed from our service. Accordingly your service will not longer be required by us from today. In taking this action against you we have also taken into consideration your past record which is very much against you."

The court held that the last sentence of the letter suggests that past record was taken into consideration. But it does not follow from that was the effective reason for dismissing him. The managing director having made up his mind that the workman's services must be terminated in the interest of discipline that he added one sentence to give additional weight to the decision already arrived at. Therefore, the dismissal by the management was held to be proper in law.⁸⁴

Whereas in *Bhry Ltd. v. Their Workmen*⁸⁵ where during the enquiry proceedings the management wanted to rely upon the witness against the delinquent workman who was not given a chance to cross-examine the witness for the purposes of past blemished record of the delinquent workman nor the concerned workman was asked to state anything by way of explanation.⁸⁶ Moreover the court found that the "language of the order leaves no doubt in our mind that it was the cumulative effect of the lapses on the part of the respondent that resulted in the order of termination."⁸⁷ Therefore, the court held that it is extremely doubtful whether manager would have ordered dismissal of the delinquent workman had the witness not drawn his attention to the past lapses of the respondent about which he was not allowed to have a say and therefore the court upheld the reinstatement ordered by the tribunal and dismissed the appeal.⁸⁸

Withholding increment in a graded scale of pay

Withholding increment of an employee is yet another form of punishment which can be inflicted on a delinquent workman for his misconduct. In the case of graded scale of employees with annual increments in the scale the increments are to be given automatically to the concerned workman till either the efficiency bar is reached in the scale or the maximum of the scale is reached. Withholding of increment as a punishment is possible for misconduct in case either it is provided in the contract of employment, or it is provided in the standing orders of the concern or if it can be positively proved that this is the practice of the industry. Stoppage of annual increment on any occasion when it is normally due would be considered as a punishment to the concerned employee.

However, it may be pointed out that in some concerns it is considered that annual increments constitute recognition of not merely the growing needs of a workman's family, but also the growing experience and consequent efficiency of the workman. The question of efficiency, in such cases, is very relevant consideration for the management for awarding annual increments. The employer has a right to expect from his employees a certain minimum level of efficiency. And in case it is found by the management that a particular employee has failed to achieve that level of efficiency it would be justified in withholding the increment. In such cases it may be pointed out that it is not proper for the management to stop the annual

increment all of a sudden at the end of the year. In such cases the workman should have been informed in writing from time to time about his deficiency and continued inefficiency so that he is given the opportunity to improve and perform better efficiency on his job. If it is found that in spite of the repeated warnings the workman continues to be inefficient then it would be proper and justified for the management to withhold the increment of the workman. Withholding of increments for continued inefficiency is not a punishment but can be either provided in the contract of service or as a implied condition of service.

But withholding of increment of a workman otherwise is a major punishment as the accumulative effect of losing an increment would be materially considerable and therefore such form of punishment has to be provided for such misconducts which generally justify discharge or dismissal of a workman. Therefore, this punishment can be inflicted upon a workman for proved inefficiency or the acts of misconducts for which a proper procedure ought to be followed so that the workman concerned is given a fair opportunity to explain his conduct.

In *Rasiklal Nandlal Joshi v. Bank of Baroda*⁸⁹ X a bank employee was suspended without rhyme or reason by the bank on 11th Nov. 1953. X asked for the reasons for suspension from the bank but the reasons were not given for more than two months. After that he was charged for misconduct and an enquiry was held. But the enquiry held against him did not confirm the order of suspension against him. No charge was proved against him nor any copy of the memorandum of enquiry was supplied to him. However, the bank wrongfully denied the annual increment to him from 12th of Nov. 1954.

In the above case the bank contended that withholding an increment is not a punishment against an employee. It also contended that the bank had the right to withhold the increment of any employee any time it liked. The bank also contended that it is not covered within the words "dismissal or otherwise" as a punishment as required under Section 22 of the Industrial Disputes (Appellate Tribunal) Act 1950.

It was held by the Labour Appellate Tribunal in the above case that when the legislature has deliberately used the words 'punishment by dismissal or otherwise', the word 'otherwise' has got a very wide scope. When the legislature provided that an employer could not punish by dismissal or otherwise any of his employees, it intended to mean that an employee could not be punished in any way. And, therefore, it was held that denial of increment to the concerned workman amounted to punishment pending appeal must be held to be in contravention of section 22 of the Act. It even went a step further in holding that considering from the monetary point of view it amounts to fine which is certainly punishment.⁹⁰

Similarly in *Subramaniam and others v. International General Electric Co. (India) Ltd.*⁹¹, where an agreement between the workmen and the company was in existence which provided *inter alia*, for annual increments although no wage scale was fixed. The employees subsequently demanded for increased increments which were not given and also they did not succeed in securing adjudication of that dispute. The company refused to give the increments under the existing agreement. It was held that from the above circumstances it cannot be held that the employees

had given up their right to get the annual increments due under the existing agreement. If an employee is not satisfied with the existing scale of pay or increment and asks for better scale of pay or increments it does not mean that he renounces or forgoes the existing scale of pay or increment. Hence it was ruled, like in the previous case discussed, that pending an appeal before the Labour Appellate tribunal refusal by the employer to pay annual increments due under the existing agreement must be held to be in contravention of Section 22 of the Act.

Fine:

Fine as a punishment against a workman is yet another form of punishment which may be inflicted for the minor lapses or blameworthy conduct on the part of the workman. Practically fine means a deduction from the wages of an employee by way of punishment. Otherwise the employer has no right under the law to recover any kind of fine from the employee. This right to impose fine on a workman by way of punishment is never read as an implied term in the contract of employment. The right to recover fines from a workman is not a general right with the management for this it has to be provided in the standing orders of the concern for the specific lapses on the part of the workman. However, it may be suggested that this method if provided in the standing orders or in the contract of employment itself can be practically very useful for the managements as it affects materially the workman concerned and in these days generally no person would like any kind of deductions from his wages. This mode of punishment can act as a proper correctional method against the erring workman. However, the right of the management to impose fines on the workman is subject to the provisions of Section 8 of the Payment of Wages Act, 1936, which reads as under:

- "Fines - (1) No fines shall be imposed on any employed person save in respect of such acts and omissions on his part as the employer, with the previous approval of the State Government or the prescribed authority, may have specified by notice under Sub-section (2).
- (2) A notice specifying such acts and omissions shall be exhibited in the prescribed manner on the premises in which employment is carried on or in the case of persons employed upon a railway (otherwise than factory), at the prescribed place or places.
- (3) No fine shall be imposed on any employed person until he has been given an opportunity of showing cause against the fine, or otherwise than in accordance with such procedure as may be prescribed for imposition of fines.
- (4) The total amount of fine which may be imposed in any one wage-period on any employed person shall not exceed an amount equal to half an anna in the rupee of the wages payable to him in respect of that wage-period.
- (5) No fine shall be imposed on any employed person who is under the age of fifteen years.
- (6) No fine imposed on any employed person shall be recovered from him by instalments or after the expiry of sixty days from the day it was imposed.
- (7) Every fine shall be deemed to have been imposed on the day of the act or omission in regard to which it was imposed.
- "

(8) All fines and all realisations thereof shall be recorded in a register to be kept by the person responsible for the payment of wages under S. 3 in such form as may be prescribed and all such realisations shall be applied only to such purposes beneficial to the persons employed in the factory or establishment as approved by the prescribed authority."

Under the Model Standing Orders framed by the Central Government under the Industrial Employment (Standing Orders) Act, 1946, it has been provided that a maximum of 2 per cent can be imposed as a fine for any blameworthy conduct of a workman. This is not a law but as a general guideline provided to the management of the industrial establishments. Fines being a punishment can be imposed only after proper proof and procedure which may be provided in the standing orders of the concern.

Demotion:

Demotion is a very serious punishment against a workman like discharge or dismissal. In this case a workman is down-graded to a lower grade or rank in service. This punishment is never implied in the contract of employment. However, it can be inflicted on a delinquent workman for the severity of misconduct after a proper enquiry and proof if it is provided for either in the contract of employment or in the standing orders for specified misconducts or if the workman himself agrees to serve on a lower grade after accepting the verdict of the management for the proved misconduct against him with his own consent. This punishment is regarded as one analogous to the 'reduction in rank' as provided for in Art. 311 of the Indian Constitution.

In *National Engineering Employees Union v. Kulkarni (R.K.) and another*⁹³ where the management terminated the services of an employee on and from the date of the order but having regard to his prior career gave an option of serving as a mechanic in the garage department on the same salary provided he exercised his option by 9th of March, 1961. The worker did not resume his duties in the department he was offered the employment as a mechanic. On raising the industrial dispute it was held by the labour court that the order of termination in fact amounted to an order of demotion and the court ordered further inquiry on the question whether the order was *malafide*. The management challenged this order in the writ petition before the High Court of Bombay. It was contended in the writ petition that order is not order of demotion as found by the learned judge and his finding is erroneous.

The High Court of Bombay through Justice Patel held that the finding of the labour court is not justified. The court observed that it is clear on record that the workman did not report for accepting the new appointment on or before 9th March, 1961. He in fact sent a medical certificate that he was ailing and would be unfit to perform his duties till 16th of March, 1961. He went to the office on 16th March and he was asked to go out. Hence the actual effect of the order is that his services have been ended either because he did not avail of the option or because he went after the appointed date and time and was not allowed to avail of the option. It further held that on these findings it is impossible to contend that in spite of the fact

that the order did not frustrate the order is still one of demotion. The court ruled that the order of the labour court is set aside and is directed to hear merits and pass appropriate orders.⁹⁴

The above case has clarified that an order to be the order of demotion by the management has to be either couched in such a language that it is directly stating to demote a workman or in fact a workman has to work in the lower grade in order to say that the order is in fact an order of demotion.

Suspension

Suspension means "dismissal mitigated at the discretion of the employer by a promise to re-employ."⁹⁵ With respect to continuing contract of service between the employer and workman it means that the relationship between the master and servant remain in abeyance temporarily for a certain period.⁹⁶ The effect of suspending the workman from service means that the relationship between the employer and employee is temporarily suspended with the consequence that the servant is not bound to render service and the master is not bound to pay.⁹⁷

At the outset it may be pointed out that there is distinction between suspension as a punishment and suspension pending enquiry. Ordinarily the period of suspension as a punishment should not exceed maximum period of four days at a time under Rule 14(2) of the Industrial Employment (Standing Orders) Central Rules, 1946.

Under the ordinary law of master and servant the power to suspend a workman is not implied as a term in the contract of service. The right to suspend can arise only either as an express term in the contract itself or under statutory provisions governing such contracts like certified Standing Orders of the concern, etc.⁹⁸ And in the absence of such right the employer has no power to suspend without wages and if he does suspend without such power he will have to pay full wages during the suspension period.⁹⁹ Even though the suspension order affects the employee injuriously the employee still continues to be in service.¹⁰⁰

In *Hotel Imperial v. Hotel Workers Union*¹⁰¹ the Supreme Court held that in view of the fact that Section 33 of the Industrial Disputes Act makes a basic change in the ordinary law of master and servant by imposing a ban on the master's right to dismiss or discharge a workman who is found guilty of misconduct without the permission of the tribunal, the employer has the right to suspend the workman even without wages during the period of permission from the tribunal. However, in the year 1986 the Supreme Court in *Fakirbhai v. Presiding Officer and another*¹⁰² has ruled that dismissal of a workman without the payment of subsistence allowance during the period of permission from the tribunal violates principles of natural justice because the workman cannot defend himself properly.

Suspension as a punishment has to be provided either under the contract of service or under any statutory provision or under the standing orders of the concern as a lesser punishment instead of discharge or dismissal for misconduct. Otherwise the employer does not have the power to suspend a workman without wages. If the employer has the power to suspend a workman as a punishment then the workman will not be entitled to any wages during the suspension period. Rather withholding

of wages for the period of suspension is itself considered to be a punishment.¹⁰³ Whereas if suspension as a punishment is not permitted under the contract of service or statutory provision or under the standing orders then the workman would be permitted to get full wages for the suspension period because he is deemed to be in service for that period. And any suspension by way of punishment is permitted under the law only after a proper enquiry and proof of the guilt of misconduct.¹⁰⁴

Discharge :

In industrial law in India these days there are two kinds of discharges recognised under the law. One is called discharge *simpliciter* where the service is terminated by giving agreed notice or payment in lieu of notice under the contract of service or under the standing orders. Such a discharge is the termination of service for any reason which is not for any misconduct and is not considered as a punishment in law. For instance in *Workmen of Sudder Office v. Management*,¹⁰⁵ where a godown clerk of the company was asked by the management to collect one month's pay in lieu of notice and other benefits under clause 9 of the standing orders of the company for the loss of confidence. When the industrial dispute was raised about the termination of the by the workman the labour court found that the workman was guilty of misconduct under the standing orders of the company. The Labour Appellate Tribunal directed reinstatement of the workman. However, the High Court in the above said case reversed the order and held that the management's order was not one for misconduct but was an order of termination simpliciter under clause 9 of the standing orders. Even the Supreme Court upheld the order of the High Court and observed:¹⁰⁶

"...*prima facie* it may appear that the management in this case was charging the workman in respect of a matter which may be a misconduct under the standing orders, ultimately we are satisfied that the management has passed the order of termination simpliciter and the order does not amount one of dismissal by way of punishment".

Although discharge simpliciter is permitted under the law if it is covered under the contract of service or under the standing orders yet if any dispute is raised about the discharge the management will always have to prove its *bona-fides* in terminating the service by way of discharge *simpliciter*.¹⁰⁷

These days many standing orders of the industrial establishments provide for discharge in lieu of dismissal as a milder punishment for the misconduct on the part of a workman. The method of punishment is considered to be milder punishment than dismissal because for one thing that it does not cast any slur or stigma against the concerned workman. Even though like dismissal the contract of service of the workman comes to an end in the case discharge yet the workman does not lose any benefit which might have accrued to him upto the particular date of termination. Hence discharge and dismissal have acquired different implications and connotations and one cannot be equated with the other though they might overlap to a great extent.¹⁰⁸

Dismissal :

Dismissal is the most severe and drastic form of punishment which can be inflicted by the management against a delinquent workman, for his act of misconduct. Such a punishment can be inflicted against a workman only after complying with the requirements of procedure under the standing orders of the concern, if any, or after complying with the rules of natural justice. Which means ordinarily no workman can be dismissed for misconduct unless he has been given proper opportunity to defend himself against the charges which are proved in a fair and proper domestic enquiry.

The management's right to dismiss a workman is based on the common law right which is either derived from the expressed terms of contract or implied terms. This implies that employers can limit or extend this right by providing for certain acts of misconducts either in the service rules or in the certified standing orders which otherwise may not form the basis of dismissal of workman. However, where there are no service rules or standing orders the right of the management under the common law to dismiss an employee remains effective. The acts or omissions which may constitute misconduct would be implied on the basis of the common sense understanding of breach of duties under common law, by the delinquent workman, towards the employer. The test always in such cases is whether the conduct complained of against a workman amounts to a breach of an important term in the contract of employment.¹⁰⁹

In common law it is considered that¹¹⁰

"Certain terms, particularly certain implied terms, will be regarded by the judges as always *prima facie* being important, e.g., the obligation not to steal one's employer's property; the obligation not to deal with his property dishonestly, not to damage it deliberately; the obligation to obey reasonable and lawful orders etc."

Although breach of an important term may not necessarily give rise to dismissal if the employee has a reasonable excuse or justification for his conduct. For instance in *Lewis v. London Chronicle Ltd.*¹¹¹ where an employee obeyed her immediate departmental head instead of the orders of the managing director of the company. There being conflicting orders and only one of such orders could be obeyed and therefore it was held that her disobedience was excusable and did not justify to dismiss her summarily.¹¹² Moreover, what would constitute to be an important term would depend on the nature of the business or industry and the position of the employee.¹¹³ Mis-conduct to justify dismissal is not dependent upon proof that such misconduct has serious consequences but it depends on the nature of the conduct itself.¹¹⁴ Ordinarily single acts of misconduct are less likely to give right to dismissal than is a persistent pattern of misconduct. Moreover in cases of misconduct the decisions of other cases are of little relevance. Finally it may be right to agree with Heple and O'Higgins that "... in any particular case it is usually only possible to guess the answer to the question, "Does this misconduct justify in law summary dismissal?" The more serious the misconduct the likelier it is that court will regard it as justifying summary dismissal, the more trivial the less likely is a court to uphold a right of summary dismissal."¹¹⁵

It is a management prerogative whether to dismiss an employee or not. It is a right which flows from common law and given to the master to protect his own interest. It does not mean that the management always takes the action of dismissal. It is the choice of the management on the basis of the misconduct as to which action it would like to take. It may choose to dismiss an employee or discharge him or otherwise leave him with warning only. But once an employer has chosen to condone the misconduct of a workman by choosing not to punish by dismissal his right is taken away under the law. However, the condonation ought to be unconditional unequivocal, and unqualified in order to be valid in law.¹¹⁵

Indian industrial adjudication through a plethora of cases has laid down that the act of the management in dismissing a workman must be a *bona fide* act. Which means while dismissing it must follow a proper procedure by holding a domestic enquiry, by arriving at the conclusions of the enquiry and while actually punishing a workman all acts must be exercised in a *bona fide* manner. In this connection the Supreme Court has held in *G. McKenzie & Co. v. Its Workmen*¹¹⁷

"In determining misconduct, the management must have facts to base its conclusions and it must act in good faith without caprice or discrimination and without motive or vindictiveness, intimidation or resorting to unfair labour practice and there must be no infraction of the accepted rules of natural justice."

However, it may be indicated that if there is a clear proof of misconduct then there can be no question of victimization because it has been held by the Supreme Court in *Bharat Iron Works v. Bhagubhai Balubhai Patel*¹¹⁸ that a proved conduct of misconduct is antithesis of victimization. And more severe punishment will not justify the conclusion that there has been victimization. Though in case the tribunal has the clear proof of victimization the tribunal will have the jurisdiction to interfere with the order of dismissal of the management.¹¹⁹

Conclusions

Hence it will be observed, through the legal position as discussed above and the illustrated cases relating to the management's right to take disciplinary action against the delinquent workman, that the management's action is always viewed with suspicion and the decision of the management is upheld by the labour courts and tribunals only if it is clearly established that the management's action is *bona fide* and justified on facts of a case involved. This strict scrutiny of facts of cases relating to misconduct and consequential punishment is more of a recent origin than it used to be in common law. And therefore, the management's prerogative to take disciplinary action is substantially curtailed being subject to the strict scrutiny of courts which has affected the morale of the management to a great extent in India.

As a result of providing good security of job to the workmen it has been observed:

"One important aspect of this problem is that at least in our country, while attempting to maintain discipline, the Management and Supervisory staff meet with

1993 THE MANAGEMENT'S PREROGATIVE OF DISCIPLINE IN INDIA 81

violent opposition from the workmen. Provocations of trivial nature appear to have resulted in violent assaults on those seeking to enforce discipline."¹²⁰

And "... what poses a serious and chronic problem for the Management is the general spirit of indiscipline and defiance which is prevalent, lack of cooperation and the unwillingness on the part of the workmen to do his full share of work."¹²¹

In fact in such matters a balance has to be secured between the security of job of the workmen which ensures efficient labour force and the interest of the maintenance of discipline in industry which only ensures efficient services to the society at the reasonable price level. And these interests of workmen, industry and society are equally important which ought to be balanced at a proper plane by labour legislation and its application through interpretation of courts in industrial adjudication.

END NOTES

1. A. Avins: *Employee's Misconduct: As Cause for Discipline and Dismissal in India and the Commonwealth* (1968), Allahabad, pp. v-vi.
2. See Justice Black's dissenting judgment in *National Labour Relations Board v. Fansteel Metallurgical Corporation*, 306 U.S. 240 (1939).
3. See *Halbury's Laws of England* (3rd Ed.), Vol. 25, p. 498 and *Shankar Balaji Waje v. State of Saurashtra* (1962) 11 L.L.J. 119 (S.C.).
4. See *Thorn v. London Corporation* (1875) L.R. 10 Ex. 112; (1976) 1 A.C. 120 (H.L.).
5. *Supra* note 1 at p. 218.
6. For Government Servants these may be found in Fundamental Civil Service rules and for Industrial Establishments employing 100 or more workmen in the rules framed under the Industrial Employment (Standing Orders) Act, 1946.
7. *Supra* note 1 at p. 218.
8. *Id.* at p. v.
9. B. A. Hopple and O' Higgins, *Industrial Employment Law: An Introduction*, (1971) London, p. 105.
10. *Elgin Mills Co. Ltd. v. Sui Mui Maclaur Union, Kamrup* (1951) 11 L.L.J. 184
11. See the case of *Besson v. Collier* (1827) 4 Bing. 309. The rule has been confirmed in England even in the year 1964 by Lord Reid in *Ridge v. Baldwin* (1964) A.C. 40 at 65, while explaining the legal position relating to the case of a pure master and servant.
12. (1835) 3 A. & E. 171
13. *Id.* at 179
14. (1850) 5 Ex. 110. See also *Boston Deep Sea Fishing Co. v. Ansell* (1888) 39 Ch.D. 339, where an employee could be justifiably dismissed for an isolated act of fraud discovered after actually he was dismissed by the employer could prove the fact.
15. *Central Bank of India v. Karunamooy Banerjee* (1967) 11 L.L.J. 739 S.C.
16. See *Meetas Tea Estate v. Its Workmen* (1963) 11 L.L.J. 439 (S.C.)
17. *Associated Cement Companies Ltd. v. Their Workmen* (1963) 11 L.L.J. 396 (S.C.)
18. (1973) 11 L.L.J. 278 (S.C.)
19. *Id.* at 297
20. A.L.R. (1958) S.C. 130 at 138. The principles were further reiterated in *G. McKenzie and Co. Ltd. v. Its Workmen* (1959) 11 L.L.J. 285 and *State Bank of India v. R.K. Jain* (1971) 11 L.L.J. 599 (S.C.) per Vaidalingam J.
21. *Supra* note 18.
22. Section 11-A of the Industrial Disputes Act provides:
Powers of Labour Courts, Tribunals, and National Tribunals to give appropriate relief in case of discharge or dismissal of workman: Where an industrial dispute relating to the discharge or dismissal of a workman has been referred to a Labour Court, Tribunal or National Tribunal for adjudication and, in the course of adjudication proceedings, the Labour Court, Tribunal or National

Tribunal, as the case may be, is satisfied that the order of discharge or dismissal was not justified, it may, by its award, set aside the order of discharge or dismissal and direct reinstatement of the workman on such terms and conditions, if any, as it thinks fit, or give such other relief to the workman including the award of any lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require:

Provided that in any proceeding under this section the Labour Court, Tribunal or National Tribunal, as the case may be, shall rely only on the materials on record and shall not take any fresh evidence in relation to the matter.

See also the case of *Firestone Tyre and Rubber Co. Ltd.*

23. *Supra* note 20 at 138
24. (1964) 2 S.C.R. 125 at 130-31.
25. A.I.R. 1986 S.C. 1571
26. *Ibid.*
27. *L. Michael v. Johnson Pumps Ltd.* A.I.R. (1975) S.C. 661
28. *Id.* at 666
29. *Ibid.*
30. *Bhagwat Parshad v. J.C. Police and others* A.I.R. (1970) P & H 81 at 84.
31. (1906) A.C. 122.
32. *Id.* at 129.
33. *Amor v. Fearon* (1839) 9 A & E 548
34. *Price v. Mowat* (1862) 11 C.B.N.S. 508
35. (1936) 3 All. E. R. 261
36. (1935) 2 K.B. 80.
37. *Nickson v. Brohan*, 10 Mod. 109
38. *C. Tourner v. National Provincial Bank* (1924) 1 K.B. 461
39. (1858) 5 C.B.N.S. 236
40. (1957) A.C. 555
41. *Presidency Talks v. N.S. Natarajan* (1968) II L.L.J. 801
42. (1964) II L.L.J. 113-116 (S.C.)
43. Model Standing Orders have been framed by the Central Government in the Industrial Employment (Standing Orders) Central Rules, 1946, framed under the Industrial Employment (Standing Orders) Act, 1946.
44. *New Victoria Mills Co. Ltd. v. Labour Court* (1970) Lab. I.C. 428 at 431 (All.)
45. (1979) II L.L.J. 259
46. *Id.* at 254
47. *Delhi Cloth and General Mills v. Its Workmen* (1969) II L.L.J. 755 (S.C.)
48. *New Victoria Mills Co. Ltd. v. Labour Court* (1970) Lab.I.C. 428 (All.)
49. *Speedyam v. State of Kerala* (1970) II L.L.J. 718 (Ker.)
50. (1886) 17 Q.B.D. 536
51. *Id.* at 542
52. (1967) 2 Q.B. 279
53. *Id.* at 289
54. *Andhra Scientific Co. Ltd. v. A. Seshagiri Rao* (1961) II L.L.J. 117 (S.C.)
55. *Catler (India) Ltd. v. Eugene Fernandes* (1957) I L.L.J. 1 (S.C.) where a single act of smoking was considered to be proper justifying dismissal.
56. *Indian Iron and Steel Co. v. Their Workmen* (1958) II L.L.J. 260 S.C. where seven persons when in police custody absented themselves for 14 days were dismissed proprio.
57. *Tobacco Manufacturing (India) Ltd. v. Cigarette Factory Worker's Union* (1953) II L.L.J. 42 (L.A.T.)
58. *India General Navigation & Railway Co. Ltd. v. Their Workmen* (1980) II L.L.J. 13 at 26
59. (1959) II L.L.J. 450 (S.C.)
60. *Gujarat Steel Tubes v. Gujarat Steel Mazdoor Sangh* (1980) II L.L.J. 137 (S.C.) per Krishna Iyer J.
61. *Bharat Sugar Mills Ltd. v. Jai Singh* (1961) II L.L.J. 644 (S.C.)
62. See *Jay Engineering Works Ltd. v. State of West Bengal* A.I.R. (1968) Cal. 407, for detailed discussion on the concept of 'Gheto' and its consequences.
63. (1963) II L.L.J. 684
64. (1975) II L.L.J. 391 (S.C.)
65. (1963) II L.L.J. 429

66. *Supra* note 25
67. (1964) II L.L.J. 634
68. *Hindustan General Electrical Corporation Ltd. v. Biswanath Prasad* (1971) II L.L.J. 340 (S.C.)
69. *The Ram & Sons Ltd. v. Their Workmen* (1960) II L.L.J. 514 (S.C.)
70. (1960) II L.L.J. 520
71. *Bania Singh v. National Coal Development Corporation* (1969) II L.L.J. 664 (Par.)
72. *R.P. Kapur v. Union of India* A.I.R. (1964) S.C. 787 at 792
73. See *Harner v. Corneliuz*, *Supra* note 40
74. See A. Avins, *supra* note, J. at pp v-vi
75. See *Hanley v. Pease & Partners Ltd.* (1915) All. E.R. 698 (On Suspension) *And Martin v. Oxford Co-operative Society Ltd.* (No.2) 1 Q. B. 186 (On demotion)
76. See M.R. Freedland, *The Contract of Employment*, Oxford, (1976) at page 226.
77. *Shankar Pillai v. Kerala State and another* (1960) II L.L.J. 621.
78. *Id.* at 622
79. *Ibid.*
80. (1962) II L.L.J. 772
81. *Id.* at 776-778
82. (1963) II L.L.J. 122 (S.C.) per Mudholkar J.
83. *Id.* at 124
84. *Ibid.*
85. (1972) II L.L.J. 478 (S.C.)
86. *Id.* at 482
87. *Id.* at 484
88. *Ibid.* See also *Shri Gopal Paper Mills Ltd. v. Industrial Tribunal Punjab and others* (1963) II L.L.J. 226 (Punj.)
89. (1956) II L.L.J. 103 (L.A.T.)
90. *Id.* at 104
91. (1956) II L.L.J. 346 (L.A.T.)
92. *Id.* at 347-348
93. (1968) II L.L.J. 82 (3em) per Parul J.
94. *Id.* at 83-84
95. *Marshall v. English Electric Co. Ltd.* (1945) 1 All. E.R. 653 at 655
96. *Divisional Superintendent Northern Railway v. Mukand Lal* (1957) II L.L.J. 453 at 456
97. *V.P. Gindronia v. State of M.P.* (1970) II L.L.J. 143 at 149
98. *Hotel Imperial v. Hotel Workers Union* (1959) II L.L.J. 544 at 548
99. *Ibid.*
100. *Khem Chand v. Union of India* (1963) II L.L.J. 665 (S.C.)
101. *Supra*, note 99
102. A.I.R. (1986) S.C. 1168
103. *Kesordan Cotton Mills Ltd. v. Gangadhar* (1963) II L.L.J. 371 at 378 (S.C.)
104. *Supra* note 99 at 548-51
105. (1971) II L.L.J. 620 (S.C.)
106. *Id.* at 628
107. *Supra* note 28 and *Supra* note 61
108. *Swarasigh Laxman Singh v. Bombay Garage (Ahmedabad) Ltd.* (1961) II L.L.J. 40 (Guj.)
109. *Laws v. London Chronicle Ltd.* (1959) I W.L.R. 698 at 701
110. *Supra* note 9 at p 120
111. *Supra* note 110
112. *Ibid.*
113. *Juplier General Insurance Co. Ltd. v. Shroff* (1937) All. E.R. 67 at 73 per Lord Maugham J.
114. *Savage v. British Indian Steam Navigation Co.* (1930) 46 T.L.R. 294
115. *Supra* note 9 at pp 120-21
116. *Cooperative Central Bank Ltd. v. Labour, Court Gujrat* (1978) Lab. I.C. 1699 at 1702
117. (1959) II L.L.J. 285 at 289 (S.C.)
118. (1976) Lab. I.C. 4 (S.C.)
119. *Id.* at 8
120. B.F. Willcox, *Labour Law and Labour Relations*, (1968) II L.L.J. (G.S. Sharma ed.) at p 205
121. *Id.* at 206

Tax Administration in Singapore

NOMITA AGGARWAL *

Taxation is a major instrument of social and economic policy. It has mainly three goals - to transfer resources from the private to the public sector; to distribute the cost of government fairly by income classes and among people in approximately the same economic circumstances and to promote economic growth, stability and efficiency. From these standpoints, the Singapore tax system is a source of satisfaction; it is as a whole either proportional to income or slightly progressive, depending on who bears the burden of the major taxes. Tax policy is generally regarded as a legitimate device for promoting economic growth and stability, not permit individual and corporations to escape tax entirely. Within these broad areas of agreement, there is considerable controversy about the relative emphasis that should be placed on equity and economic objectives. These issues involve difficult technical questions of law, accounting and economics. They are often obscured by misunderstanding, lack of information and even misrepresentation. Yet, they have important implications for the welfare of every citizen and for the vitality of the economy.

Income tax was first introduced in the British colony of Singapore in 1918 by the British Government. The tax was initially called "War Tax" as its purpose was to finance the first world war. In 1920, after the end of the war, War Tax was changed into income tax. In 1922, the British Government abolished income tax for her colonies.

In 1941, the British Government attempted to revive the War Tax when the Second World War threatened to spread to this region. However, before the War Tax could be collected, the Japanese invaded Singapore and collected the tax instead during their regime from 1942 to 1945. The Income Tax ordinance came into operation on January 1, 1948 after two years of preparation. The Singapore Ordinance was then identical to the Malayan Ordinance and both Ordinances were administered on a Pan Malayan basis whereby a Singapore resident deriving income from Malaya would be assessed to tax in Singapore as though the income was derived from Singapore and a resident of Malaya deriving income from Singapore would like wise be assessed to tax in Malaya. The tax authorities of both countries would then account to each other taxes collected on behalf of the other country.

When Singapore joined Malaysia in 1963, changes were brought about to harmonize the system of taxation among member states. The Malayan Board of Income Tax, which was responsible for governing income tax matters of both

Singapore and Malaya prior to the formation of Malaysia, changed its name to "Malaysian Board of Income Tax" and enlarged its composition to include representatives from other member states.

In 1966 after Singapore's separation from Malaysia, both countries amended their tax laws to give effect to each country's independence. In Singapore, the Malaysian Board of Income Tax ceased to have jurisdiction and the Board's functions were taken over by the Minister of Finance and Comptroller of Income Tax. Each country then became responsible for assessing and collecting income tax on its own account.

Tax administration in Singapore

Section 63 of the Income Tax Act 1986 of Singapore declares that every person who is chargeable to tax is required to file a return of his income with the Inland Revenue Department.² It is this filing requirement that sets the wheel of the administrative machinery into motion.

The administrative machinery in Singapore can be discussed under following headings -

1. Returns
2. Assessments
3. Objections
4. Appeal procedures
5. Collections and
6. Penalties

Returns

At the beginning of every year of assessment, every person who is chargeable to tax is required to file a return of his income received during the basis period for that year of assessment. This return must be made on the prescribed form¹ issued by the IRD, and must be filed with the IRD within 21 days of its issue.

Any person who is chargeable to tax for any year of assessment but who has not received any return form from the IRD by 31st March for that year of assessment must notify the IRD by 14th of April of his chargeability.

An individual who arrives in Singapore during any year of assessment is required to give notice of his chargeability³ within one month of the date of his arrival in Singapore.

Although a tax return is to be filed within 21 days from the date of its issue, it is normally possible to ask for an extension of time to enable the required details to be compiled and collated. As a matter of practice, a reasonable extension of time is invariably granted by the IRD provided that it is furnished with a reasonable estimate of the applicant's chargeable income for that assessment year.

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Section 63A compliance

Where the accounting period in respect of any trade, business, profession or vocation ends on or before 30th September in any year, the person who carries on the trade, business, profession or vocation is required to provide the IRD with an estimate of his chargeable income within three months of the accounting year end.

The objective of section 63A is to enable the IRD to raise assessment and, therefore, to collect the tax due within a reasonable time after the end of the accounting period.

Returns to be made by Employer

An employer is obliged to provide the IRD with returns relating to his employees under the provisions of section 63(3) to (7). These returns are dealt with below:-

(1) Forms E, IR 84 and IR 8C (Section 68(2))

The IRD is empowered to require, by gazette notice, every employer to prepare and submit within 21 days of the notice a return containing full particulars of his employees and the remuneration, whether in cash or otherwise, paid or payable to them. This notice is gazetted at the beginning of each year.

The return must be made on prescribed forms provided by and obtainable from the IRD. These forms are -

- (a) *Form E*: Return by employer on remuneration paid.
- (b) *Form IR 8A*: This return requires the disclosure of details of the remuneration, whether in cash or otherwise, paid or payable to the employee.
- (c) *Form IR 8C*: Same as (b) above except that this form is used only for Government employees.

(2) Commencement of employment and Form IR 21

Under section 68(4), an employer who commences to employ an individual who is likely to be chargeable to tax is required to give notice to the IRD by way of the Form IR 21 within 3 months after the date of commencement of employment.

(3) Cessation of employment and Form IR 22

Section 68(5) requires that an employer gives notice to the IRD by way of Form IR 22 whenever an individual, who is not a Singapore citizen and who is likely to be chargeable to tax, ceases to be in his employ. This notification must be made not later than one month before the employee ceases to be employed in Singapore. However, the IRD may accept a shorter notice as it deems reasonable.

(4) Employees leaving Singapore

An employer who knows that his employee is about to leave or is intending to leave Singapore for a period exceeding three months is required to notify the IRD by way of Form IR 22. The notice must be given not later than one month before the employee's expected date of departure.

This notification procedure, which is imposed under Section 68(6), does not apply to an individual who is required to leave Singapore at frequent intervals in the course of his employment or who is a Singapore citizen.

In respect of an employee who has ceased or is about to cease to be employed in Singapore, the employer is obliged under section 68(7) to withhold payment of any moneys whatsoever which are or may be payable to the employee. Such moneys may not be released to the employee until 30 days after the date of notification to the IRD under section 68(5) of the Act.

Power of IRD to obtain information

The IRD is empowered, under the provisions of sections 64, 65 and 65A, to require, by way of notice in writing, the tax payer or any other person to provide further information relating to the return, or to produce any books, accounts or related documents or a statement containing details of the tax payers assets and liabilities for examination.

The IRD is further empowered under section 65B to have full and free access at all times to all buildings, places, books, documents and other papers for any of the purposes under the Act. It may also require a person to give orally or in writing such information concerning his or any other person's income, assets or liabilities as may be demanded for the purposes of the Act. This requirement to disclose information does not apply to a person who is under a statutory obligation to observe secrecy.

Any person who fails or neglects to comply with the requirements under sections 64, 65, 65A and 65B without reasonable excuse shall be guilty of an offence under the Act.

Assessments

An assessment is a notice in writing issued by the IRD and it sets out the amount of income chargeable to tax and the amount of income tax payable thereon. If the assessment is not contested within a prescribed time period, it will become final and conclusive. Subject to an error or mistake claim under section 93A or a late objection which is acceptable to the IRD, an assessment which has become final and conclusive cannot be re-opened by the taxpayer.

Types of Assessment

In practice, three types of assessments are in common use. The first assessment issued by the IRD for any year of assessment is commonly referred to as the 'original assessment'. Where the taxpayer is under-assessed, an additional assessment will be issued, or if there has been an over-assessment, an amended assessment will be issued instead.

The IRD is empowered under section 73 to raise an assessment or an additional assessment not only within the year of assessment concerned, but also within 12

years from the year of assessment concerned. Where fraud or willful default is involved, the IRD will not be time-barred from issuing the necessary assessments at any time for any year of assessments.

Under section 72(2), the IRD may raise an assessment which is commonly referred to as a 'best judgment' assessment. Such an assessment is issued when no return is filed by the taxpayer or where a return has been filed but, for whatever reasons, the IRD refuses to accept it. In a best judgment assessment, the chargeable income figure is determined by the IRD according to the best of its judgment, and it is not obliged to disclose to the taxpayer the source of the income included in the assessment or the reasons or basis on which the assessment was raised. In such instances, the onus is on the taxpayer to produce evidence to disprove the assessment.

Advance Assessment

Under normal circumstances, a notice of assessment for any year of assessment cannot be issued prior to that year of assessment. Even if one has been issued, the IRD will not be able to collect the tax assessed until on or after the first day of that year of assessment.

However, an assessment is permissible under section 72A in specified situations. An advance assessment may be issued by the IRD where:

- (1) In any year of assessment, a person ceases to carry on a trade, business, profession or vocation or
- (2) The IRD is of the opinion that any person possessing a source of income is about to leave Singapore and is likely to cease to possess that income in the year of assessment in which he leaves Singapore or in the following two years; or
- (3) The accounting period of any person who carries on a trade, business, profession or vocation ends on a date other than 31st December.

Objection against an assessment

Section 76 sets out the procedure for a dissatisfied taxpayer to dispute a notice of assessment issued by the IRD. Where a notice of assessment is to be disputed, a written notice of objection must be lodged with the IRD within 30 days of the date of the service of the notice of assessment. Additionally, the notice lodged must also state precisely the grounds for objection.

Where a valid notice of objection against an assessment is not lodged within the 30-day statutory time period, the notice of assessment will become final and conclusive. The only remedy available to the taxpayer in such instances is to make a late objection. The proviso to section 76(2) permits the IRD to consent to a late objection notice being brought outside the normal time limit if it is satisfied that the taxpayer's failure to meet the 30-day deadline was due to absence, sickness or other reasonable cause. The IRD must also be satisfied that the late objection was

made without unreasonable delay. If as a result of his objection, the taxpayer's chargeable income is amended by the IRD and he is agreeable to the amendment made, his tax affairs for that year of assessment will be finalised when a notice of the amended assessment is issued by the IRD. Should the taxpayer fail to reach any agreement with the IRD on the amount of his income on which he is chargeable to tax, he may ask the IRD to issue him with a notice of refusal to amend. With this notice of refusal to amend, the appeal machinery to higher courts through the Board of Review is set into motion.

An objection against a notice of assessment does not obviate the need to pay the tax assessed in the same notice within 30 days after the date of service of the notice. The position is spelt out in no uncertain terms of section 86: '.....tax for any year of assessment shall notwithstanding any objection or appeal against the assessment in which the tax is levied, be payable within one month after the service of the notice.....' The legal position is also supported by the case law decision in *CIT v A Co. Ltd.*

Finality of an Assessment

Section 84 provides that an assessment will become final and conclusive if a valid notice of objection has not been lodged against the assessment within the statutory time period of 30 days or if the assessment has been determined on appeal.

Once an assessment has become final and conclusive, it cannot be reopened. There are only two remedies open to the taxpayer. Firstly, the assessment may be re-opened by way of a late objection provided that the IRD is satisfied that there is reasonable cause for failure to lodge the objection within the 30-day deadline. Secondly, an assessment may be re-opened under specific circumstances provided for in section 93A by way of an error or mistake' claim.

Error or mistake claim

Where excessive tax has been paid by a taxpayer, owing to some error or mistake in the return or statement made, he may apply for relief under section 93A.

In determining the relief, the IRD may have regard to the result of granting relief in relation to the claimant's liability for other years as well as the year of claim. No relief will be given in respect of any error or mistake where the return or statement was, in fact, made in accordance with the practice generally prevailing at the time. This is so even if the practice is subsequently shown by the court to be wrong.

Typical cases in which a relief could be claimed under section 93A include -

- (a) Omission to claim expenses;
- (b) Interest from POSB Savings Account included in the return as bank interest received; and
- (c) Capital receipt shown as income.

The relief may be claimed by the taxpayer at any time within six years after his year of assessment. Application of the time limit for relief is shown in the following example:-

Example

A notice of assessment for the year of assessment 1980 was issued in the 1980 assessment year.

The time limit in this which a valid claim could be made is therefore 6 years to 31.12.1986.

Collection of Tax

The Limit for payment

The amount of tax stated in the notice of assessment must be paid to the IRD within one month after the notice of assessment is served. This statutory time limit must be observed notwithstanding any objection or appeal against the assessment. However, the IRD may, in its discretion, extend the time limit within which the payment must be made.

In practice, when an assessment is under objection, the IRD is normally prepared to withhold collection of a reasonable amount of the tax that is being disputed. However, this is subject to the taxpayer undertaking to pay a 5% penalty if any tax withheld from collection should subsequently become payable.

Under current practice, the tax raised in the assessment may be settled by instalments provided that arrangements are made by the taxpayers at the beginning of each tax year. For the purpose of this instalment payment arrangement, the tax payable is computed by reference to an estimated chargeable income figure submitted by the taxpayer at the early part of each assessment year, or within three months after the accounting year and where the provision of Section 63A is applicable. Once the final tax payable is determined, the tax payable for the remaining instalments will be varied accordingly.

The tax payable may be paid in equal instalment over a maximum period of ten months. Depending on the month in which the 1st instalment is paid, the number of instalments permitted is determined in accordance with the following table:

1st instalment paid in	Maximum number of instalments	Instalment months
January	10	Jan. to Oct.
February	8	Feb. to Sept.
March	6	March to Aug.
April	4	April to July
May	2	May to June

As regards an individual taxpayer who is chargeable to tax under section 10(1) (b), the current practice of the IRD is to allow payment of tax by monthly

instalments beginning from the month in which the assessment is raised and ending in December of the same year. This concession only applies to those individuals who are making payments through the Post Office Savings Bank's GIRO system.

Apart from the direct collection of tax due from the taxpayer, the IRD may also direct the taxpayer's employer to deduct the tax due from salaries payable to the former.

Late payment penalty, etc.

Where any tax due is not paid by the due date, a penalty of 5% of the tax due will be charged. If any of the outstanding tax remains unpaid within 60 days of the imposition of the 5% penalty, an additional penalty of 1% based on the outstanding tax will be imposed for each completed month that the tax remains unpaid. The total additional penalty that may be imposed by the IRD cannot exceed 12%. If after the imposition of the aggregate penalty of 17% the tax still remains outstanding, legal proceedings for the recovery of the tax due will be instituted by the IRD.

The IRD is conferred with wide powers to enforce collection of the tax due. Apart from the normal powers to institute legal proceedings for tax recovery, the IRD is also granted other powers such as those contained in section 87. Briefly, section 87 empowers the IRD to direct the Commissioner of Police and/or the Comptroller of Immigration to prevent any person from leaving Singapore if the IRD is of the opinion that person is about or likely to leave Singapore without settling his tax liability.

Repayment of tax

So long as the taxpayer is able to prove to the satisfaction of the IRD that he has overpaid his tax for any year of assessment, he is entitled to a refund of the tax overpaid. However, the repayment claim must be made within six years from the end of the year of assessment to which the claim relates.

Appeals against assessments

A taxpayer, having objected to an assessment, may ask the IRD to issue him with a notice of refusal to amend if he should fail to reach agreement with the IRD on such matters. With the notice of refusal to amend, the taxpayer will, firstly, be able to challenge the IRD's decision at the Board of Review.

The members of the Board of Review are appointed by the Minister from time to time. Once appointed, each member will hold office for 3 years and is eligible for re-appointment. At any sitting, at least three members of the Board must be present, and all matters coming before the Board at any sitting will be decided by a majority of votes of these members present. In the event of an equality of votes, the Chairman of the Board or any other presiding member will have a Deciding or Casting vote.

The Board's decision on a question of fact is final. It is not possible to appeal against its decision to the High Court unless it is an appeal on a question of law or of mixed law and fact. If either party is dissatisfied with the decision of the High Court, an appeal against its decision may be made to the Court of appeal and, if necessary, to the final appellate body, the Privy Council.

The appeal procedures

Upon receipt of the notice of refusal to amend, the taxpayer must lodge with the clerk of the Board a duplicate notice of appeal within 7 days of the notice of refusal to amend. Within 30 days of the date on which the notice of appeal was lodged, the taxpayer is required to lodge with the clerk a petition of appeal in quadruplicate containing a statement of the grounds of appeal.

The taxpayer is granted the right to no more than one-third of the total Board members who should not hear the appeal. The IRD is given a similar right, but the number of members if objected to, when added to the number objected to by the taxpayer, cannot exceed 50% of the total members of the Board. However, neither party is given the right of objection to the Chairman of the Board in presiding at the hearing.

Once the time and place for the hearing have been fixed, both the taxpayer and the IRD will be given a 14 day's notice. After hearing the appeal, the Board may confirm, reduce, increase or annul the assessment or make such order as it may deem fit.

Either party may appeal to the High Court from the decision of the Board on any question of law or of mixed law and fact. From there, a further appeal to the Court of Appeal and the Privy Council may be made.

Offences and penalties

In order to ensure the smooth functioning of the administrative machinery, penalties are imposed on various types of offences. The severity of the penalties inflicted depends on the nature of the offences committed. The penalty provision may be categorised into 3 broad groups. The first group deals with those acts which are stated to be offences against the Act. The second group relates to the filing of incorrect return and the provisions of incorrect information, and the last group deals with fraud and willful default.

Section 94(1) provides that any person who contravenes or fails to comply with any of the provisions of the Income Tax Act or any rules or regulations made thereunder shall be guilty of an offence against the Act. The acts which are considered to be offences against the Act include -

- (1) Failure to give notice of and to account for the withholding tax deducted from interest, royalties etc. (Sections 45, 45A and 45B).
- (2) Failure to give notice of estimated chargeable income (Section 63A).

The penalties set out in section 94 are applicable only if no other penalties are provided elsewhere in the Act. Thus, for an offence committed under section 45, namely failure to give notice of and to account for the withholding tax deducted from interest payments made to non-residents, the section 94 penalties cannot be imposed since separate penalties for the offence are already provided under section 45(5). Under section 94, the offender is, on conviction, liable to a fine not exceeding \$1,000/-. In default of payment, the offender is liable to imprisonment for a term not exceeding six months. The following types of offences are subjected to the section 94 penalties:-

- (a) Breaking official secrecy except permitted by the Act (Section 6).
- (b) Failure to give notice of estimated chargeable income (Section 63A).
- (c) Failure to give notice of chargeability to tax or failure to file a return (Section 60).
- (d) Failure to comply with the IRD's request for further returns (Section 64).
- (e) Failure to produce for the IRD's examination any books, documents, accounts, etc. (Section 65).
- (f) Failure to provide the IRD with a statement containing particulars of bank accounts, etc. (Section 65A).
- (g) Failure to comply with a notice issued by the IRD under section 65 B (2)
- (h) Obstructing IRD officers (Section 97A).

Upon conviction for the second subsequent offences for the same year of assessment under sections 63, 64, 65, 65A and 65B, the offender will become liable to a further penalty of \$ 50 for every day in which the offence is continued after the conviction.

The second group deals with penalties for filing incorrect returns by omitting therefrom or understanding therein any income which a person is required to make a return, or providing incorrect information in relation to any matter affecting his own liability or any other person or of a partnership (Section 95). The penalties provided for in section 95 depend on whether negligence is involved. Where no negligence is involved, the offender will, on conviction, be liable to a penalty which equals 100% of the tax undercharged by reason of the incorrect return or information submitted. In the case of negligence, or where there is no reasonable excuse for filing of incorrect return or provision of incorrect information, the offender will, on conviction, be liable to a penalty which equals to 200% of the tax undercharged. In addition, he will also be liable to a fine not exceeding \$ 5,000/- and/or imprisonment for a term not exceeding three years.

The third group of offences are dealt with under section 96, which covers any person who willfully tries to evade or assist other persons to evade tax. A person commits an offence when he -

- (a) Omits from a return any income which should be included; or
- (b) Makes any false statement or entry in any return; or