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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**

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## *BOOK REVIEWS*



# *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 LL.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. Rohatgi 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 students of the Faculty, Debi S. Saini. This is followed by articles penned by two foreign scholars — Emmanuel J. UKO of Nigeria and Y. Shehnaz Meer of South Africa. Colleagues in the Faculty who have written for this volume are Dr. Harish Chander, Dr. Nomita 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. Nomita 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 Nomita who has well established herself as an academic lawyer and legal-aid activist.

While reviving 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 transformation' in the Indian society provide endless insights into the intricate interplay of law and life. His celebrated work *Inequalities and the Law*[1], 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 Myrdal[2] that social inequalities stand as the root cause of economic inequalities. He regrets that various economic policies pursued by the government have benefitted only the intermediate sections are groups and have failed to reduce the deprivations suffered by the 'poorest of the poor[3], namely, the untouchables, 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]

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Pending careful evaluation of other aspects of inequalities explored by Professor Sivarammayya, I seek here to understand his views on constitutional equality and its compatibility with the idea of reservations. Such an endeavour would be both befitting 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 Sivarammayya 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[7]. 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. Porportional equality, on the other hard is concerned with group rights and does not share the episodal characteristics.[8] 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 nine[9] Judges in the *Mandal* case have deprited 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, Schedules Tribes and backward classes. No preference of any kind in the area of employment can be given do 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 an 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 dessert in *Thomas*, the Supreme Court, thus unammously 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 theoritical point of view this approach is intellectually vacuus because on earlier occassions preference for other desparate categories had been tested under Article 14[11] 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 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 mentarian concept of equality can be constricted. 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. Sivarammayya, *Inequalities and The Law* (1984) Eastern Book Co. Lucknow.
2. Gunnar Myrdal, *The Challenge of World Poverty* Ch. III (1970) cited in B. Sivarammayya *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* A.I.R. 1976 S.C. 490.
7. *Supra n. j at 36.*
8. Id at 37
9. M. H. Kania CJ, M. N. Venkatachaliah, 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. Rajendran* V. *State of Madras* A.I.R. 1968 SC 1012, *Subhasini V State of Mysore* A.I.R. 1966. My 40, *Jacob Mathew V State of Kerala* A.I.R. 1964 ker. 39. *Chitra Ghosh V Union of India* A.I.R. 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 righteousness. 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 eraction with him. Although apparently he gives the impression of being erved and to some extent also aloof, he is full of warmth and humour. He joys telling professional and other annecdotes. But at the same time he is ry sensitive towards the feelings of others and would never say anything it hurts a person either in his presence or even at his back. For that reason ave 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 nsmitted from generation to generation through words of mouth and not of pen. is tradition can be prominently marked among the legal academics who, com- red to their counter-parts in the West, write very little. Although Professor aramayya is also a product and part of that tradition, he falls within the category those few who are an exception to that tradition. As is evident from the appendid t of his writings, from the very beginning of his career he has been consistently blishing. Not only that, the range of his writings extends from family law to nstitutional law to issues of women and children, poverty and bonded labour; uality and affirmative action, uniform civil code, property and specific relief and cing. Although serious research needs to be done in each of these areas to assess contribution of Professor Sivaramayya even on a cursory reading one gets pressed by the simplicity and lucidity of his style, depth of learning and concern r the most important and timely issues. While some of his writings have fluenced legislative policies others have been authoritatively cited even by the ex court of the land.

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

We all know of the late origin and limited role of the academic discipline in e common law system which we have received from the United Kingdom. Unlike e civil law system where the academic discipline in law is entrenched in long tablished tradition and plays the dominant role in the shaping and guiding of the gal 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 vigrously 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 gracefully 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 wordly 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 Gurudeva 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 fully 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 bechelor'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).
2. LAW AND POVERTY : CASES AND MATERIALS (1973, N.M. Tripathi, Bombay) (Coeditor)
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Professor Sivaramayya is married to Mrs. Leela Sivaramayya who through her own academic interests, hard work, simplicity and complete devotion and dedication to her husband and his cause has in every respect cooperated in sustaining his scholarly pursuits. They have two very bright daughters. The elder Neeraja after her M. A. from the Delhi School of Economics and brief teaching at the University of Delhi, is now doing her Ph. D. in economics at the Columbia University, New York. The younger Jyotsna is a student of M. A. in sociology at the Delhi School of Economics, University of Delhi.



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 retain[1] 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 researches 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

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individual or collective. The paper is based on field work conducted at Faridabad Industrial Complex in respect of the processing of collective labour disputes[7] in private sector industries.

## Data Sources and Research Methodology[8]

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

situations can be described as formal? Atkinson argues that a situation may be perceived as formal *when the more interactional details are different from conversational 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 1 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 1: 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 Interviewees***

| *Are Tribunal Proceedings Formal?* | *Practising Lawyers* | | *Union Leaders* | | *Management Consultants* | |
|---|---|---|---|---|---|---|
| | *No.* | | *No.* | | *No.* | |
| Yes | 11 | (40.8) | 16 | (50.0) | 9 | (52.9) |
| 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 restrictions[18] 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 compromised 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 shuttling between the Tribunal and the Labour Court Offices and Civil Courts, depending 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 Proceedinigs? | Union/Workmen's Representatives | | Management Representatives | |
|---|---|---|---|---|
| | No. | | No. | |
| 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 No. | | Unions Leaders No. | | Management Consultants No. | |
|---|---|---|---|---|---|---|
| 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 Interviews

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 ones[19] 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 - fourth 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 No. | | Management's Representatives 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 No. | | Union Leaders No. | | Management Consultants 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"[20] 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 No. | | Management Representatives 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 Perceive Issues Merely as Legal in Collective Disputes? | Practising Lawyers No. | | Union Leaders No. | | Management Consultants 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. Mamkootam, *Trade Unionism: Myth and Reality* (1982).
5. Studies in this area have also just begun to emerge. See, for example, P. Gopal Krishnan, "Adjudicative Process under the Industrial Disputes Act", unpublished, ICSSR, New Delhi (1978), K.L. Bhatia, *Administration of Workmen's 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 Categorisation and Production of Formal Interaction", 33 *British Journal of Sociology*, 86.
10. *Supra* n.6 Sec. 36(3).
11. *Id.*, Sec. 36 (4).
12. *Id.*, Sec. 7A (4).
13. *Id.*, Sec. 11(2).
14. *Id.*, Sec. 11 (1).
15. *Workmen of Dimakuchi Tea Estate* v. *Dimakuchi Tea Estate* (1958) I LLJ 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).
18. *Supra* n.11.
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20. Debi S. Saini, *"Compulsory Adjudication of Industrial Disputes: Juridification of Industrial Relations"*, 27, *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, Amsterdeam, 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[1] 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 grievances 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" perpetuated against him.

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It must be noted that injustice could be either real or immaginary, imminent or impeding; 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 Consitution[3] guaranteeing freedom of speech, Nigerian Lawyers and others appearing before Nigerian Judges frequently seek to enforce their rights in this regards. 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 studies[4] 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 reality[5]. 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 dishonourly conduct to the judiciary where the intention of the lawyer was otherwise and probably to save himself from embarassment.

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 sparringly invoked but in Africa capital punishment is readily applied. At one time, the sanctions against drug traffickers in Nigeria was death by firing squad[6]. 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 Queen[7]

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 counsels act of gross disrespect and show of discorteous 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 Emperor**[8]

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. Ojomo**[9]

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 Onitilis' 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 Customs**[11]

Here, the appellant — the Senior Magistrate in Lagos was found guilty of criminal contempt by Honourable Justice Belgore, 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 wilful 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 State**[12]

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. State**[13]

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 Constitution[14] 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.

**Deduwa Vs. The State**[15]

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 Itsekiris while the appellants were Urhobos and the subject-matter of the proceedings concerned Itsekiris 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 Itsekuri 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 dicussed 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 *Deduwa 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 Deduwa 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. Eshiet, 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 guarantees 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 Setpember, 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 overruled 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 Edet 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 others*[28] 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 judice*". The other defendants who were absent in Court escaped the wrath of justice.

In *Ene Oku* 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 Deduwa, Bayo, Gani Fawehinmi, Abachom 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 *Deduwa* 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 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 the 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".

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. *FASSASSI*[32] illustrates the point that there is neither a clear definiton, 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 Gazettee"* 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 NDLEA 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 guaranttees 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/137/91 (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 reglion — Hindu, Mohammedon, 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 rights[2] 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 differe 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 capalist 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-revoluntary 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 pehnomenon 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 insistance "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 benefitted 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 there 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 rheteric 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 intervener 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 verification[27].

   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 evidenciary 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 leackage 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 nonethless gave an order to the Central and State governments to prevent the recurrance 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 prorogative writs of certiorari, mandamus, the granting of damages or injuctive 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 undetrial 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

Epistolary 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 approriate 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

*Hussainara 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 requirment 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 horrific 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 peition 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

*Olga 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]

Similary in *State of Himachil Pradesh* v. *Umedram* [52], the Harijan (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 laws 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 acquatic 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 *Panikulagara* 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 Satyanaryana* 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 take places 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 creditability 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 aptly 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."

**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**

Epistolary 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 tharena 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 chose 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 under-estimated.

### 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 disparaties 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.

## END NOTES

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3. Part 4 Articles 36 -51 of the Indian Constitution.
4. Article 29 of the Indian Constitution.
5. Part XVI of the Indian Constitution.

6. Chief Justice Sri P.N. Bhagwati, "Judicial Activism and Public Interest Litigation" 1985, page 13 (Publisher Jagrut Bharat, Dharwat).
7. *Id* at 14.
8. Upendra Baxi, "Taking Suffering Seriously .. Social Action Litigation in the Supreme Court of India" 1979/1980 Delhi Law Review page 93.
9. *Id.*
10. Parmanand Singh, "Public Interest Litigation", Annual Survey of Indian Law 1988, page 123.
11. See *supra* note 8 at page 95.
12. See *supra* note 8 at page 96.
13. *Fertiliser Corporation Kamgar Union, Sindri* v. *The Union of India* (1981) S.C.C. at 584.
14. See note 6 supra at pages 11 and 12.
15. Bhagwati P.N., "Beaurocrats? Phonographers? Creators? The Times of India 21 - 23 September 1986 reproduced in Agarwala, "The legal philosophy of P.N. Bhagwati" 14 Indian Bar Review 136 (1987).
16. See *supra* note 8 at page 97.
17. *Kesavananda Bharti* v. *State of Kerala*, 1973 - S.C.C. 225 at 947 paragraph 1947.
18. *Id* at 949 paragraph 1953.
19. See *supra* note 8 at page 91.
20. See *supra* note 8 at page 97.
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, Ratlam* v. *Varadichand* (1980) 4 S.C.C. at 170 - 171.
24. See *supra* note 13 at page 587.
25. (1985) 3 S.C.C. 545.
26. See *supra* note 21 at page 189.
27. See *Bandhua Mukti Morcha* v. *Union of India* (1984) 3 S.C.C. 161; and Annual Survey of Indian Law 1987 Vol XXIII at p. 143.
28. A.I.R. 1985 S.C. 1368.
29. A.I.R. 1985 S.C. 652.
30. (1984) 3 S.C.C. 161.
31. (1988) 1 Scale 188.
32. A.I.R. 1985 Ker. 24.
33. See *supra* note 8 at page 106.
34. A.I.R. 1983 S.C. 378.
35. (1986) 2 S.C.C. 176.
36. See *supra* note 29.
37. See Supra note 6 at page 21.
38. A.I.R. 1979 S.C. 1360.
39. See *supra* note 8 at page 103.
40. 36.
41. (1978) 1 S.C.C. 248.
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44. For a detailed discussion of the undertrial case see Upendra Baxi, "The Supreme Court under Trial: Undertrials and the Supreme Court", 1980 (1) S.C.C. (Journ.) p 37.
45. Per Bhagwati J. A.I.R. 1979 S.C. 1360 at 1361.
46. *Id.* at 1361.
47. (1986) 4 S.C.C. 106.
48. (1984) 3 S.C.C. 161.
49. *Id.* at 811 - 812.
50. (1985) 3 S.C.C. 545.
51. *Id.* at 555.
52. *Id.* at 572.
53. (1986) 2 S.C.C. 68.
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55. *Id.* at 656.
56. (1986) 2 S.C.C. 176; (1987) 1 S.C.C. 395.



57. See also Parmanand Singh, Public Interest Litigation, Annual Survey of Indian Law, 1986 Vol. XXII at page 495 - 496.
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59. *Id.* 417; See also Parmanand Singh, Public Interest Litigation, Annual Survey of Indian Law, 1987 Vol. XXIII at 140 - 142 for a fuller discussion.
60. (1987) 4 S.C. 463.
61. See also supra note 60 at 144 - 146.
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63. *Id.* at 380.
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65. A.I.R. 1988 A P 144.
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70. See comments by Justice Pathak in Bandhua Mukti Morcha *supra* note 31 at 224 - 234.
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79. See the Judgment of Pathak J. in *Bandhua Mukti Morchi* v. *Union of India* (1984) 3 S.C.C. 161 at 229.
80. See *supra* note 8 at page 105.
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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

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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 rules[6] 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 attatch as 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 attatches 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

primarily with the third aspect of the law of the 'management's preroative' 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 Patteson 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. *Barrow*[14] in an action for the wrongful dismissal by the employee 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 Vaidialingam 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 indiscipline 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 trubunals 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 case[27] 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 that[28]

"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 that[29] "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, misdemenour, 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 *Glouston & Co. Ltd.* v. *Corry*[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 *Wessex 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. *Its 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 assailent and the victim. And in this case the delinquent workman had assaulted a Chargeman outside the factory because the Chargeman was in favour of introducing the incentive bopus 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 participators 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.[60]

(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. Agnani* v. *Badri Das*[63] where workman was charged with misconduct, that on a particular day an incident had occured between him and an outsider during which hot words and absuses 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 Patrika (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 given 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 chargeman 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 assailent the victim.

However, in *Sumnuggur 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. *Kushal 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 then honourable.[72]

From the perusal of the cases and concept of misconduct in common law and at 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, witholding 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 reprimanding 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 for administering such punishment some procedure for proper proof is required 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 Pilai 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 *Binny 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]

*Witholding increment in a graded scale of pay*

Witholding 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. Witholding 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 witholding 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 inspite of the repeated warnings the workman continues to be inefficient then it would be proper and justified for the management to withold the increment of the workman. Witholding 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 witholding 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 Nanalal 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 witholding an increment is not a punishment against an employee. It also contended that the bank had the right to withold the increment of any employee any time it liked. The bank also centended 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 *Subramanium 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.[92]

*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 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 ommissions 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 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 guide line 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 *Wational 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 *mala fide*. 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 inspite of the fact



that the order did not fructify 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 subsistance 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 witholding

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 of dishonesty connected with the property of the company which was 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]

> "..*primafacie* 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 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 that[110]

> "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 *Laws* 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 Hepple 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.[116]

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 Sureme 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 mere 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 managemen'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



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 Saurastra* (1962) I L.L.J. 119 (S.C.)
4. See *Thorn* v. *London Corporation* (1875) L.R. 10 Ex. 112: (1976) I 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. Hepple and O'Higgins, *Industrial Employment Law: An Introduction*, (1971) London, p 105.
10. *Elgin Mills Co. Ltd.* v. *Suti Mill Majdoor Union, Kanpur* (1951) I L.L.J. 184
11. See the case of *Beeston* 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 but the employer could prove the fact.
15. *Central Bank of India* v. *Karunamoy Banerjee* (1967) II L.L.J. 739 S.C.
16. See *Meenglas Tea Estate* v. *Its Workmen* (1963) II L.L.J. 392 (S.C.) and *Laxmi Devi Sugar Mills Ltd* v. *Nand Kishore Singh* (1956) II L.L.J. 439 (S.C.)
17. *Associated Cement Companies Ltd.*, v. *Their Workmen* (1963) II L.L.J. 396 (S.C.)
18. (1973) I L.L.J. 278 (S.C.)
19. Id. at 297
20. A.I.R. (1958) S.C. 130 at 138. The principles were further reiterated in *G. Mekenzie and Co. Ltd.* v. *Its Workmen* (1959) I L.L.J. 285 and *State Bank of India* v. *R.K. Jain* (1971) II L.L.J. 599 (S.C.) per Vaidialingam 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.* Ibid.

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. *I.G. 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. *Mouat* (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. *Cf. Tournier* v. *National Provincial Bank* (1924) 1 K.B. 461
39. (1858) 5 C.B.N.S. 236
40. (1957) A.C. 555
41. *Presidency Talkies* 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 Victorial 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. *Spedigam* v. *State of Kerala* (1970) I 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) I L.L.J. 117 (S.C.)
55. *Caltex (India) Ltd.* v. *Engene 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) I L.L.J. 260 S.C. where seven persons when in police custody absented themselves for 14 days were dismissed properly.
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) I L.L.J. 13 at 26
59. (1959) I L.L.J. 450 (S.C.)
60. *Gujrat Steel Tubes* v. *Gujarat Steel Mazdoor Sangh* (1980) I 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 'Gherao' and its consequences.
63. (1963) I L.L.J. 684
64. (1975) I L.L.J. 391 (S.C.)
65. (1963) II L.L.J. 429



66. Supra note 25
67. (1964) I L.L.J. 634
68. *Hindustan General Electrical Corporation Ltd.* v. *Biswanath Prasad* (1971) II L.L.J. 340 (S.C.)
69. *Tika Ram & Sons Ltd.* v. *Their Workmen* (1960) I L.L.J. 514 (S.C.)
70. (1960) I L.L.J. 520
71. *Banta Singh* v. *National Coal Development Corporation* (1969) I L.L.J. 664 (Pat.)
72. *R.P. Kapur* v. *Union of India* A.I.R. (1964) S.C. 787 at 792
73. See *Harmer* v. *Cornelius*, Supra note 40
74. See A. Avins, supra note 1 at pp v-vi
75. See *Hanley* v. *Pease & Partners Ltd.*. (1915) All. E. R. 698 (On Suspension) And *Marrit* 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)* I L.L.J. 621.
78. Id. at 622
79. Ibid.
80. (1962) II L.L.J. 772
81. Id. at 776-778
82. (1963) I L.L.J. 122 (S.C.) per Mudholkar J.
83. Id. at 124
84. Ibid.
85. (1972) I 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) I L.L.J. 226 (Punj.)
89. (1956) I L.L.J. 103 (L.A.T.)
90. Id. at 104
91. (1956) I L.L.J. 346 (L.A.T.)
92. Id. at 347-348
93. (1968) II L.L.J. 82 (Bom) per Patel J.
94. Id. at 83-84
95. *Marshall* v. *English Electric Co. Ltd.* (1945) I 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) I L.L.J. 665 (S.C.)
101. Supra, note 99
102. A.I.R. (1986) S.C. 1168
103. *Kesordm 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. *Swaransingh Laxmansingh* v. *Bombay Garage (Ahemdabad) 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. *Jupiter 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 Guntur* (1978) Lab. I.C. 1699 at 1702
117. (1959) I L.L.J. 285 at 289 (S.C.)
118. (1976) Lab. I.C. 4 (S.C.)
119. Id. at 8
120. B.F. Willcox, *Laboir Law and Labour Relations*, (1968) I.L.I. (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, provided the particular measures chosen can accomplish their objectives and do 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

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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 Malaysis, 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 form[1] 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 chargeability 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.

**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 8A 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 requred 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 deeds 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 office 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 wilful defraud 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 dealine. 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 Ist instalment is paid, the number of instalments permitted is determined in accordance with the following table :

| Ist 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 Decord 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 dis-satisfied 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 annual 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 wilful defraud.

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 1(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 wilfully 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

(c) Gives any false answer, whether verbally or in writing, to any question or request for information asked or made by the IRD in accordance with the provisions of the Act; or

(d) Prepares, maintains or authorises the preparation or maintenance of any false books, accounts or other records, or falsifies or authorises the falsifications/ of any books of accounts or records; or

(e) Makes use of any fraud, art or connivance whatsoever or authorises the use of any such fraud, art of connivance.

On conviction of the offendes under section 96, the offender will be liable to a penalty which equals to 300% of the tax undercharged by reason of evasion. In addition, the offender will also become liable to a fine not exceeding $ 10,000 and/or to imprisonment for a term not exceeding three years.

All of the above offences may be compounded by the IRD.

The Act also provides for penalties for offences committed by IRD officers on matters such as demanding from taxpayers amounts in excess of the assessed amounts, etc.

## END NOTES

1. Hereinafter referred as IRD.
2. The principal return forms currently issued by the IRD are -

| | | |
|---|---|---|
| Individuals ... ... | Form B | |
| Companies ... ... | Form C | |
| Partnerships ... | ... | Form D |
| Non-Resident Individuals ... | ... | Form M |
| Trusts & Estates ... | ... | Form T |

3. (1966) 2 MLJ 282.

# Hostile Takeovers: Causes, Consequences and Control

SUMAN GUPTA*

Takeovers and related activities have raised important issues both for business decisions and for public policy formulation. No company is regarded safe from a takeover possibility. The daily newspapers are filled with cases of merger and acquisitions, tender offers (both friendly and hostile), spin-offs, divestitures, corporate restructuring, changes in ownership structure, and struggles for corporate control.

The idea of hostile tender offer was alien a decade ago. Managements respected the other peoples right to manage their businesses. Today designing strategies for mergers and acquisitions and planning defences against hostile takeovers is preoccupation of many corporate managements of well run companies. Takeover entrepreneurs are a new phenomenon on the financial scene. They justify their tactics as a battle against *entrenched* management. They exploit the greed and gullibility of speculators and the appetite of the press for excitement. They devote much efforts to the artful use of public relations. If they have track record, they receive capital from institutions and wealthy individuals.

The hostile takeover begins with a *'raider'* - a company or an individual who buys a small percentage of the 'target' share capital in the open market. When, as the raider expects, target's board of directors and its management spurn his takeover bid, the raider borrows money - buys more of the target's shares and goes directly to target's shareholders, offering them substantially more than the current share price on the stock exchange. If enough of the target's shareholders accept his offer, he not only controls a company, but make a tidy profit on the shares he bought at the lower market price. The target may only be able to escape the raider by finding a *'White Knight'*, that is, some one who is less odious to the management of the target company and willing to pay even more for its shares including those held by raider. Alternatively, the target company pays ransom to the raider - which is termed as *'Greenmail'* - and buys out at a fancy price.

Hostile takeovers do not create new markets, produce breakthroughs in research and yet we have not adequately identified the damages and dangers which the corporate takeovers pose to our market system. Nor the government has enacted legislation to guard against the hostile takeovers. We have not examined this problem fully. However, the persons who reap enormous profits from engineering takeover deals have perpetuated many myths in defence of takeovers. Let's examine a few of these myths.

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*Myth One:* Companies being bought out are poorly managed, so it is better to have them weeded out of the system.

Some argues that takeover bids constitutes a very important market force in economy, a force that benefits society at large as well as shareholders. The managers of a company with dispersed ownership must continuously be concerned that someone will make a takeover bid if they do not perform satisfactorily, thus takeover ensures good performance.[1]

"A manager who performs poorly either because of a conscious misallocation of the company's resources or because of inadequate skills, must constantly worry about the threat of a takeover. It is precisely this threat that managers consider when they are contemplating the division of large amount of resources from shareholders to themselves. The modern manager must constantly look over his or her shoulder for fear of a takeover bid."[2]

However, the fact is that the corporate raiders look for the companies that bear the marks of good management. Jensen argued that takeovers increase value and efficiency and move resources to their highest and best uses, thereby increasing shareholder value.[3] But others are skeptical. They argue that companies acquired are already efficient and their subsequent performance after acquisition is not improved.[4]

*Myth Two:* Corporate takeovers are a boon to individual investors, who receive an above-market price for their shares.

But, Shleifer and Summers[5] had argued that the gains to shareholders merely represent a redistribution away from labour and other stakeholders. SEC Chairman John Shad has pointed out that the justification (that takeover activity enhances shareholder wealth and returns on corporate assets) overlooks the fact that companies are ongoing institutions with their own history and momentum. Past decisions to borrow at times of low interest rates, to acquire cheap reserves or real estate, to invest in improved plant and equipment or to enter into new and growing business may create undervalued assets. But these values may signal managements' competence - not its incompetence. Management has not necessarily failed because a company's share price is temporarily low and does not yet reflect its improved prospects.[6]

Furthermore, in well run companies careful attention and obligations to employees, customers, suppliers and communities builds a storehouse of goodwill that does not always show up in share price. Current shareholders would benefit, of course, if a company pumped up its share price to realize immediate values. Such a move, however, might jeoparadize the long terms interests of the enterprise. Those who see the takeover as a vehicle for creating wealth rarely point out that it may leave the survivor too heavy with debt and thus handicapped in making future investment.

*Myth Three:* Unfriendly corporate takeovers benefit society because they increase efficiency in production and business management.

Size does not contribute to efficiency. It is small and middle size entreprencurial companies that experience the greatest growth. Some investors, of



course, might like a merger that creates a monopoly within an industry. Then, profits could be increased by raising prices. Of course, this practice does not benefit consumers or society. Mergers and takeovers are frequently paid for, in part, by selling off divisions and closing plants and this can be enormously disruptive to communities and devastating to displaced workers.

**Disadvantages of Hostile Takeovers**

The management of a well-run company invariably panics when the corporate raider calls. Management gets side-tracked from running a good business. It take defensive measures to protect the company. It hires expensive lawyers and investment bankers. Those fees skim off lot of cash that could have been channeled into improving products, research and development, or other investments.

To block a takeover, management sometimes tries to sponsor a leveraged buyback, in which the company borrows huge sums of money to buy back its shares from the raider at an exorbitant price.

Hostile takeovers are bad for economy because they force management into operating short-term. The businesses are run not for business results but for protection against the hostile takeover. Management is forced to concentrate on results in the next three months and are run so as to encourage the institutional investors to hold on to the company's shares rather than to toss them over board the moment the first hostile takeover bid appears.[7]

It is also becoming dangerous for any company to be liquid as it can attract raider who expects to repay himself, and the debt he incurs in bidding for the company, out of the company's own cash. Thus, companies, no matter how much cash they may need only a few months further on, hasten to squander the cash. Even worse, companies cut back on expenses for the future, such as research and development.

Hostile takeovers have heavy social costs as well. When factories and offices are cut back or closed, managers, craftsmen, and workers are dealt a severe blow. When termination benefits run out, it is always difficult to find a comparable job. The more specialized a person's skill, the greater the difficulty. Successful business leaders and top managers,who have built a business and have plenty of valuable experience to offer to society are suddenly taken out of a productive field of activity. Although they walk away with lots of cash (golden parachutes), they are no longer able to use their expertise in the creative activity they know best. It is a considerable loss to society and disheartening to those who have proved their leadership capabilities.

Thus, takeover activity represents the machinations of speculators who reflect the frenzy of a 'Casino Society'. This speculative activity is said to increase debt unduly and to erode equity resulting in an economy highly vulnerable to economic instability.[8] We should use our democratic system to correct the flaws that threaten out economy. Only then we stand a chance of competing successfully with market

economies smart enough to favour long-term growth as essential to innovation and healthy, free enterprise.

**Legal Aspects**

Special characteristics of securities which make them vulnerable to being used fraudulently mandate regulation to increase public confidence in securities markets. Further, because wide price fluctuations are likely to be associated with takeover activity, public policy has been concerned that investors be treated fairly.

**Position in United States**

In the USA, legislation and regulation have sought to carry over to the takeover activity of recent decades the philosophy of the securities acts of the 1930s. This is because the securities trading generally as well as takeover activity are so interlinked that they really cannot be seperated, and takeovers are carried out by means of securities markets. In United States the earliest securities legislation in the 1930s grew out of the collapse of confidence following the stock market crash of 1929. The Securities Act of 1933 called for registration of public offerings of securities. The Securities Exchange Act of 1934 established the Securities and Exchange Commission to regulate securities market practices; it also specified disclosure requirements for public companies (Section 13) as well as setting out the procedural requirements for proxy contests. A number of other securities laws in the late 1930s and 1940s applied to public utilities, bond indenture trustees, and investment companies.

The Securities Act of 1933 and Securities Exchange Act of 1934 provided the framework for subsequent regulation and most of the recent legislation has been in the form of amendments of these two acts. The Williams Act of 1968 amended the 1934 Act to regulate tender offers. Two main requirements were a filing with the SEC upon obtaining 5 percent ownership and a 20-day waiting period after making a tender offer. The disclosure requirements aim to give the target shareholders information that will enable them to receive more of the gains associated with the rise in the share price of the takeover target. The 20-day waiting period gives the target more time to evaluate the offer and/or to tailor a defense or seek multiple bids.

Generally, insider trading has little to do with acquisition activity. It refers to the tradings in their own companies' shares by corporate officers, directors, and other insiders. In U.S. it is largely controlled by Section 16 of the Securities Exchange Act, which requires insiders to report such transactions to the SEC on a regular basis. However, the volatility of stock price changes in connection with M & As creates opportunities for gains by individuals who may not fit the traditional definition of insiders. Rule 10b-5 is a general prohibition of fraud and deceit in the purchase or sale of the securities. Rule 14e-3 applies to insider tradings particularly in connection with tender offers. The Insider Trading Sanctions Act of 1984 provides for triple damage penalties in insider trading cases, as does the Racketeer Influenced And Corrupt Organizations Act of 1970 (RICO) which allows immediate seizure of assets. In United State in addition to federal regulation, number of States have enacted legislation to protect companies headquartered within their boundaries.[9]



**United Kingdom**

The UK has no statutory code dealing with takeovers. The London City Code, The Stock Exchange's Admission of Securities To Listing, the relevant provisions of Companies Act, 1985, and the Financial Services Act, 1986 are applicable.

**India**

In India, the business of mergers and takeovers till the 1970s was a low key affair. Discussions were generally conducted across the board and negotiated settlements reached. In the negotiated settlements shareholders other than controlling interests had no real say, though in the case of mergers they were required to vote for or against the mergers' resolution. Swaraj Paul's raid of DCM Ltd., and Escorts Ltd., constituted a watershed in the corporate history of India. Established industrialists who were not used to this form of attack were put into a tight corner. They successfully moulded the public into believing that a non-resident marauder with the help of the political powers gave absolutely no chance to an industrialist family. Swaraj Paul on the other hand claimed that the existing industialist lobby in the country were taking the shareholders in the country for a ride by manipulating the stock exchanges to maintain a very low market price for an otherwise sound company.

Thus, the complacent industrialists were shaken out of their slumber. More frightening was the prospect that any person with adequate financial resources can do just about the same to any other company. Companies which previously concentrated mainly on production and selling had to now devise ways and means of keeping shareholder happy. However, the result was that the non- controlling shareholders began to matter in a more real sense to the controlling interests. Things like earning per share, price- earnings ratio, market price of share were given attention to.

After Swaraj Paul, the Chhabria's takeover bids of Shaw Wallace and Gammon India and Goenka's bid over Premier Automobiles were some that made news. Chhabria's takeover of Shaw Wallace started almost unending court cases and considerable mud- slinging between the two contending parties. Further the issues relating to proxy wars, transfer of shares, and role of financial institutions were brought into focus. However, in this case financial institutions took a neutral stance, they neither supported Chhabria nor Acharya, but anyone with an elementary knowledge of democracy will understand that there is no such thing as a neutral stance. In abstaining to vote they are in fact voting for one of the contending parties. The role of financial institutions was again drawn into focus in the case of Ambani's takeover of Larsen and Toubro. Unit Trust of India, Life Insurance Corporation, and General Insurance Corporation sold about 7% of the shares of Larsen and

Toubro Ltd. to BOB Fiscal Services, a public sector organisation, which in turn transferred the shares to Trishna Investments and Leasing (a subsidiary of Reliance Industries Ltd.). Later on, amids the controversy that arose, Trishna Investments and Leasing sold the shares back to financial institutions.

In India, the sections 82, 108, 111, 250 and 372 of the Companies Act and Clauses 40 A and 40 B of the Stock Exchange Listing Agreement Form (which is similar in function to the London City Code, though much less effective) are applicable in the acquisition of shares. Further sections 19, 26 and 29 of FERA relate to the transfer of shares of non-resident shareholders. Section 30 A and 30 G of the MRTP Act pertain to transfer of shares relating to dominant undertakings as defined in the Act.. A new Act has been enacted to control fraudulent dealings of securities called[6] (Trial of Offences Relating to Transactions in Securities Act, 1992[7]).

In India, in almost all hostile takeovers bids, the best defensive measure is to refuse to transfer shares in the name of those making the bid. The old section 111 of the Companies Act, 1956 and the case laws on the subject gave absolute powers to the board of directors in this regard. The crucial part of section 111, sub-section 2 reads "If a company refuses (to transfer),..... (it shall) send notice of the refusal to the transferee and the transferor...."

The Sachar Committee considering the provisions on the transfer of shares held the view that 'Since shares are movable property, they ought to be freely transferable," and that the right to refuse transfer of shares should be hedged in with adequate safeguards. This shift in the absolute rights conferred earlier was incorporated in the Amendment Act, 1988. As the provision now stand, section 111 of the Companies Act, makes it obligatory for a company which refuses to transfer shares when presented for transfer, to state the reasons for such refusal. The aggrieved party has a right of appeal in the Company Law Board. Amongst other provisions of the Companies Act that deal with the transfer of shares are sections 82, 108, 250 and 372 of the Act. Section 82 states that shares are movable property, transferable in a manner provided by the articles of the company. Section 108 specifies that the transfer shall not be registered except on the production of a proper instrument. Section 250 empowers the Company Law Board to impose restrictions or prohibit the transfer of shares or debentures with certain investigations. Further sub-section 3 of section 250 states that if the Company Law Board is of opinion that where a transfer has taken place which may result in a change in the composition of the board of directors, which in the opinion of the company law board is prejudicial to public interest, they are empowered to rule that the voting rights in respect of those shares shall not be exercisable for a period not exceeding three years. Section 372, is strictly speaking, on inter-corporate investments and not on transfer of shares. However, the section imposes certain restrictions on inter-corporate investments and to that extent affect takeover decisions.

In the case of companies listed on the stock exchanges Section 22A of the Securities Contracts (Regulation) Act, 1956 says in sub-section (3),



"Notwithstanding anything contained in its articles or in section 82 or section 111 of the Companies Act, 1956, but subject to other provisions of this section, a company may refuse to register the transfer of any of its securities in the name of transferee on any one or more of the following grounds and on no other ground, namely:

(a) that the instrument of transfer is not proper or has not been duly stamped and executed or that the certificate relating to the security has not been delivered to the company or that any other requirement under the law relating to registration of such transfer has not been complied with;

(b) that the transfer of the security is in contravention of any law;

(c) that the transfer of the security is likely to result in such change in the composition of the Board of Directors as would be prejudicial to the interests of the company or to public interest;

(d) that the transfer of security is prohibited by any order of any court, tribunal or authority under law for the time being in force."

Further in sub-section 4, clause (b), it is specified if the refusal is under section 22(3) (a), the transferee and the transferor must be intimated about the requirements under law which have to be fulfilled for securing the registration of shares. Section 22 (4) (c) specifies that in any other case the company must make a reference to the Company Law Board, and forward copies of such reference to the transferor and transferee.

**Takeover Code of Conduct**

Clauses 40A and 40B of the Stock Exchange Listing Agreement Form, which is similar in function to the London City Code, though much less effective, lay down the rules in the case of takeover bids both hostile and by consent. These guidelines state that:

CLAUSE 40A

(a) When any person acquires 5% or more of the shares in a company the stock exchange must be notified within 2 days of such acquisition or such agreement for acquisition.

(b) when the holding of any person crosses 10% or more, a public offer to purchase shares must be made, provided that such person has been granted exemption by SEBI.

(c) any substantial movements in the price of the shares of the company will be notified to the stock exchange within 7 days by the company.

CLAUSE 40B

Clause 40B provides that whenever a takeover offer is made the following requirements shall be fulfilled:

1. Any person who has acquired 10% or more shares or who has secured the control of management of a company will make a public announcement of a take-over offer;

2. The offer shall be placed, in the first instance, before the board of directors of the offeree company and shall contain the following particulars:
   (a) detailed terms of offer,
   (b) identity of the offerer,
   (c) details of the offerer's existing holding in the offeree company;
   (d) all conditions to which the offer is subject, and
   (e) confirmation by the auditors of the offerer are sufficient to satisfy full acceptance of the offer.

(3) Further more particulars will be provided by the offerer company like:
   (a) financial information of the offerer company,
   (b) intention of the offerer company regarding continuation of the business of the offeree company,
   (c) intention of the offerer company regarding any major changes of the offeree company,
   (d) long-term commercial justification of the offerer company for the proposed offer, and
   (e) such other details as may be prescribed by SEBI.

(4) Dealings in any securities by the offerer or offeree company or their associates during an offer period, shall be notified to the stock exchange;

(5) The offerer company shall make an offer to the remaining members of the offeree company to purchase their shares at a price not lower than either the highest price during the immediate preceding six months or the negotiated price.

(6) The board of directors of the offeree company shall not, without the approval of the shareholders in general meeting:
   (a) issue any authorised but unissued shares,
   (b) issue any securities carrying rights of conversion into or subscription for shares, or
   (c) sell, dispose of or acquire or agree to sell, dispose of or acquire assets of a substantial amount.

SEBI is also actively formulating the guidelines for Takeovers and Tender offers.

### Control of Hostile Takeovers

The hostile tender offer made directly to a target's shareholders, with or without previous overtures to management, has become an increasingly frequent means of initiating a corporate combination. As a result, there has been considerable interest in devising defenses by actual or potential targets (which include virtually all the companies). Takeovers have resulted in number of terms being



used which are similar to terms used in combat war. Terms like raid, raiders, defense strategy, takeover tactics, shark-watchers, shark repellents, saturday night specials, scorched earth, poison pills, etc. are freely used.

In a hostile takeover the person attempting the takeover is called a *raider* and he conducts a *raid* on the company in which he seeks to acquire a controlling interest. The set of strategies by which he conduct the raid is called *takeover tactics* and the strategies by which a prey can attempt to ward of the predator are called *defense strategies.*

In India the usual defense strategy to ward of the takeover attempt is to refuse transfer of shares on the ground that it is against the interests of the company. The only effective way in which the raider can deal with such a defense is to show the incumbent management to be corrupt and to have violated existing laws. The management is then left with no moral authority to question the entry of the raider into the company unless the raider himself can be shown to be a criminal.

A wide variety of defense strategies are however possible. Where a predator is interested in the company because of certain assets, say tea estates at exotic locations, the prey can sell off those to a third party making the bid unattractive to the predator. Such a strategy is called *Crown Jewels.* A *Pac-man defense* is one where attack is accepted as the best form of defense. The prey attempts to gobble up the predator. In an impending takeover attempt, the prey can also take upon itself a huge burden of debt, which makes the bid unattractive to the predator. This tactics is called *poison pill.* A variation of poison pill is to issue convertible debt or convertible preference shares, which are convertible after the takeover succeds. This leads to a dilution of the equity and the predator has to then plan for a higher proportion to attain so as to gain control. In an extreme form the poison pill tactics is called the *scorched earth policy.* Sometimes it may be possible to deter a takeover bid by having suitable provisions in the articles of association, like for instance the transfer of shares. This method of defense is called a *shark repellent.* Another way of defense is *grey knight strategy.* This entails enlisting the service of a friendly company to purchase the shares of a predator thereby keeping him busy with defending his own company. A variation of this is called *White Knight strategy,* which entails a friendly bidder out-bidding the predator on the prey's shares.

### A. Financial Defensive Measures

Generally the factors that make a company vulnerable to takeover include, a low share price in relation to the replacement cost of assets or their potential earning power; a highly liquid balancesheet with large amounts of excess cash, a valuable securities portfolio, and significant unused debt; good cash flow relative to current share price; subsidiaries or properties which could be sold off without significantly impairing cash flow; relatively small shareholding under the control of incumbent management.

Thus, the combination of these factors can make a company an attractive investment opportunity. The company's assets act as collateral for borrowings, and the target's cash flow from operations and divestitures can be used to repay the loans.

1. A company fitting the foregoing description would do well to take at least some of the following steps:

1. Debt should be increased, with borrowed funds used to repurchase equity, thus concentrating management's percentage holdings while using up debt capacity;
2. Dividends on remaining shares should be increased;
3. Loan covenents can be structured to force acceleration of repayment in the event of takeover;
4. Securities portfolios should be liquidated and excess cash drawn down; continuing cash flow from operations should be invested in positive net present value projects or returned to shareholders. Some of the excess liquidity might be used to acquire other firms. Subsidiaries which can be eliminated without impairing cash flow should be divested, through spinoffs to avoid large sums of cash flowing in.
5. The profitability of all operations should be analyzed in depth to get at the true picture beneath such accounting devices as transfer pricing and overhead allocation; low profit operations should be divested. The true value of under valued assets should be realised by selling off or restructuring.

2. LEVERAGED RECAPITALIZATIONS

The leveraged recapitalization is a relatively new technique of financial restructuring. In it, outside shareholders receive a large one-time cash dividend and insiders (managers) and employee benefit plans receive new shares instead of a cash dividend. The cash dividend is financed mostly by newly borrowed funds. As a result, the firm's leverage is increased to an 'abnormally' high level and this would discourage takeover attempts financed mainly by borrowing against the company's own assets. The proportional equity ownership of management also significantly rises through recapitalization.

3. POISON PUTS

In United States, since 1986, some corporate bonds have provided their holders with poison put covenents as a protection from the risk of a takeover related credit deterioration of the issuer. This investor protection device, however, has often been viewed as an anti-takeover mechanism.[10] This view is based on the fact that the right to put is triggered by a change of control (by hostile bidder). The exercise price of the put is usually set at 100 or 101 percent of the bond's face amount. Exercise of the put after an unfriendly takeover can be very costly to the bidder even when it can easily finance the required funds.

**B. Anti - Takeover Amendments**

An increasingly used defense mechanism is anti-takeover amendments to a company's by-laws popularly called *shark repellents*. These amendments generally impose new conditions on the transfer of managerial control of the company through a merger, tender offer, or replacement of the board of directors. The major types of anti-takeover amendments are:



1. SUPERMAJORITY AMENDMENTS

These amendments require shareholder approval by at least two thirds vote and sometimes as much as 90 percent of the voting power of outstanding capital for all transactions involving change of control. However, usually, the supermajority provisions have a board-out clause which provides the board with the power to determine when and if the supermajority provisions will be in effect.

2. FAIR-PRICE AMENDMENTS

These are supermajority provisions with a board-out clause and an additional clause waiving the super-majority requirement if a fair price is paid for all purchased shares. The fair price is commonly defined as the highest price paid by the bidder during a specified period and is sometimes required to exceed an amount determined relative to accounting earnings or book value of the target. Thus, fair price amendments defend against the two-tier tender offers that are not approved by the target's board.

3. CLASSIFIED BOARDS

Another major type of antitakeover amendment provides for staggered, or classified, board of directors to delay effective transfer of control in a takeover. For example, a nine member board might be divided into three classes, with only three members standing for a election to a three-year term each year. Thus, a new majority shareholder would have to wait atleast two annual meetings to gain control of the board of directors. Effectiveness of cumulative voting is reduced under the classified board scheme because a greater shareholder vote is required to elect a single director.

**C. Poison Pill Defences**

A popular defense mechanism against hostile takeovers is the creation of securities called poison pills. These securities provide their holders with special rights exercisable only after some time (for example, ten days) following the occurrence of a triggering event such as a tender offer for control or the accumulation of a specific percentage of a target shares. These rights take several forms but all make it difficult or costly to acquire control of the target company. They economically 'poison' the would-be acquirer if swallowed. The main poison pills plans are:[11]

1. PREFERRED STOCK PLANS

In this plan, the company issues a dividend of convertible preferred shares to its shareholders. Holders of the preferred shares are entitled to one vote per share and to dividends somewhat higher than the amount of common dividends that would be received after conversion. The issuing company can redeem the preference shares only after a lengthy period such as 15 years. In the event that an outside party acquires a large block of the firm's shares, the holders of the preferred shares can exercise special rights. Firstly, the preferred shareholder other than the large block holder can require the company to redeem preferred shares for cash at the highest price the large block holder paid for the company's common or

preferred shares during the past year. Secondly, if the acquiring party merges with the company, the preferred shares can be converted into voting securities of the acquirer with a total market value not less than the redemption value in the first case. Thus, this plan deter coercive two-tier tender offers or to avoid dilution that can be effected by a majority shareholder.

2. FLIP-OVER RIGHTS PLANS

Under this plan, shareholders receive a common stock dividend in the form of rights to acquire the company's common or preferred stock at an exercise price well above the current market price, and if a merger occurs, the rights 'flip-over' to permit the holder to purchase the acquirer's shares at a substantial discount. For example, a firm whose share is selling at Rs 200, issues one right per share to purchase the shares at Rs 400, in the event of a merger, the rights 'flip-over' so that the rights can now be used to purchase Rs 600 worth of acquirer's stock for only Rs 400. Thus, the flip-over plan does not prevent an acquirer from obtaining a controlling interest in the target. However, mergers or transfers of assets which are the primary goals of most takeovers become prohibitively expensive unless the acquirer obtains most of the rights.

3. OWNERSHIP FLIP-IN PLANS

This provision may be included in the flip-over plan. This provision allows holders of rights to purchase target shares at a large discount if an acquirer accumulates target shares in excess of a threshold or 'kick-in' point (generally 25 to 50 percent). The acquirer's rights are void. This provision imposes losses on the acquirer and dilutes his or her identity.

4. BACK-END RIGHTS PLANS

Under these plans, shareholders receive a rights dividend. If an acquirer obtains shares of the target in excess of a limit, holders excluding the acquirer can exchange a right and a share of the stock for senior securities or cash equal in value to a back-end price set by the board of directors of the issuing (target) company. The back-end price is higher than the stock's market price and thus back-end plans set a minimum takeover price for the company. Back-end plans deter acquisition of a controlling interest. A conditional tender offer for less than the back-end price will not succeed because rights holders have an incentive to hold out for the higher back-end price.

### D. Targeted Share Repurchase and Standstill Agreements

In a repurchase, often called greenmail, a target firm repurchases through private negotiations a large block of its stock from an individual shareholder at a premium. The purpose of the premium buy-back is to end a hostile takeover threat by the greenmailer. The term greenmail connotes blackmail and both payers and receivers of greenmail have received negative publicity.[12] Often in connection with



targeted repurchases, a standstill agreement is written. A standstill agreement is a voluntary contract in which the stockholder who is bought out agrees not to make further investments in the target company during a specified period of time (for example, ten years). When a standstill agreement is made without a repurchase, the large block holder simply agrees not to increase his or her ownership, which presumably would put him or her in an effective control position.

### Conclusions

Supporters of greater regulation of corporate takeovers believe that takeovers are socially, economically, and financially detrimental. They are viewed as leading to forced liquidations or restructuring of viable companies by 'raiders' who reap considerable profit. The raiders are considered to be mere financiers and speculators who are not serious about the operation of the companies, and who are solely for quick profits.

On the other hand, the proponents of corporate takeovers state that hostile takeovers promote economic efficiency and create real value for both bidder's and target company's shareholders. They acknowledge that redeploying assets in restructured companies may cause some unemployment and community dislocations, but the assets do not disappear from the economy. The new investors have a strong economic incentive to put them to productive use.

The cold hard reality is, unfortunately, that there is little organized data available to affirm the synergy or efficiency hypothesis. Much evidence has been gathered on the effects of both friendly and hostile activity on share prices. But little knowledge has been gained, however, on the effects of hostile takeover activity on company's economic performance. Changes in such areas as production, sale, profits, and growth are all important aspects that need to be addressed. On balance, we seem to know less about hostile takeovers than is claimed by the seemingly certain proponents on each side of the debate.

To sum up, the controversy about takeovers generates fascinating - and contradictory - conclusions. In general, the shareholders of the target company usually benefit, especially in the short run, and supposedly because the entrenched management has not been advancing their interest sufficiently to retain their loyalty. However, the shareholders of the acquiring firm rarely benefit. It does imply that the takeover effort on the part of the acquiring management must reflect a lack of concern with the interests of their own shareholders.

Thus, there is no need- or justification- to argue that all takeovers attempts are benign or that every effort to repulse them is laudable. Of course, some businesses and their shareholders clearly benefit from new management or even the threat of a change in management. As a general proposition, any defensive tactics adopted by the target should not be considered abusive, regardless of the extent to which it might deter takeovers. Defensive moves can only be abusive if management uses its discretionary power to promote its own interests over those of the shareholders.

The heart of a positive response to unsolicited takeover is not poison pills or shark repellents or government restraints on raiders. There is a third and often

neglected force, the company's own board of directors. Under law, all corporate power is exercised by or under the authority of the board. Directors really act as fiduciaries of the shareholders.[13] But the complaisant or rubber-stamp director has not totally vanished from the board room. Responding more fully to the desires of the owners of the business is the key to repelling takeover threats. If the board will not make the tough decisions that enhance the value of the company, the takeover artists will. Takeover mania is not a cause but a symptom of the unmet challenge. Directors are the heart of the critical third force in contests for corporate control. They need to bear in mind that the future of the company is in their hands - as long as they serve the desires of the shareholders.

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# The Changing Nature of Contract of Sale An Indian Perspective

**Eqbal Hussain***

The present era is a harbinger of ultra modern technological advances. The ancient simple techniques of Stone age have given way to highly sensitive and sophisticated modern machines. The law is an instrument to maintain social equilibrium in society, to establish peace, to administer justice and to settle disputes. The law changes according to change in social conditions and morality.

It was a natural commitment of nineteenth century laissez faire policy that few restrictions as possible should be placed upon freedom of contract.[1] But, today the position is seen in a very different light. Freedom of contract is a reasonable social ideal only to the extent that the equality of the bargaining power between contracting parties can be assumed, and no injury is done to the economic interests of the community at large. In the more complex, modern, social and industrial conditions of the Collectivist Society, it has ceased to have much idealistic attraction[2].

After India gained independence, in a series of cases, various High Courts in this country have been called upon to pronounce whether statutory transactions amount to sale so as to enable the State to levy sales tax against them and thereby augment its financial resources. Two views have been expressed in this respect - (a) that statutory transactions do not amount to sale and hence not exigible for sales tax, and (b) that statutory transactions amount to sale and hence sales tax is leviable against them.

In view of the recent decision in the case of *Coffee Board, Karnataka* v *Commissioner of Commercial Taxes, Karnataka*,[3] an appraisal of all the important cases has been made in the following pages where the definition of Contract of Sale[4] came up for interpretation before those Courts.

This paper makes a modest attempt to highlight the changes which nineteenth and twentieth Centuries have witnessed in the field of contract with special reference to the concept of contract of sale relating to goods.

In India, Section 4[5] of Sale of Goods Act, 1930 defines the Contract of Sale of goods. The essential object of the contract of sale is the transfer of property for a money price. There must be a transfer of property or an arrangement to transfer it from one party, the seller, to the other, buyer, in consideration of a money payment or a promise thereof by the buyer.

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### Statutory Transactions

When the essential goods are in short supply, various types of orders are issued under the Essential Commodities Act, 1955 with a view to making the goods available to the consumer at a fair price. Such orders sometimes provide that a person in need of an essential commodity must apply to the prescribed authority for a permit for obtaining the commodity. Those wanting to engage in the business of supplying the commodity are also required to possess a dealer's licence. The permit holder can obtain the supply of goods, to the extent of the quantity specified in the permit and from the named dealer only and at a controlled price. The dealer who is asked to supply the stated quantity to the particular permit-holder has no option but to supply the stated quantity of goods at the controlled price. These are known as statutory transactions.

### The Object of Marketing Boards

The control of marketing of farm produce for the economic benefit of producers and to bring about collective marketing of the produce is a recognised feature of Governments of several countries, particularly United State of America, Britain and Australia. The object was to prevent unhealthy competition between the producers, to secure the best price for the produce in the local market, to conserve for local consumption as much produce as was needed and to make available to surplus for export outside the States and also to foreign markets. The method adopted to achieve the object is to establish a marketing Board with power to control the price, to obtain possession of the produce and to pool it with a view to collective marketing. The legislation in this behalf is compendiously described as pooling legislation and this is based on the fundamental idea that the collectivistic economy is superior to individualistic economy. In India, there are different marketing Boards for different kinds of produce, such as sugar, dairy produce, wheat, lime fruits, apples and so on.

Now the question arises whether the goods supplied under Statutory directions where the prices are fixed by the Central order, amount to a contract of sale or not. A contract of sale is first and foremost a contract i.e., a consensual transaction based on agreement to buy and an agreement to sale.[6] But offer and acceptance need not always be in an elementary form. However, it has been the presumption that in case of Statutory transactions, whether, in law they amount to sale or not, would depend upon whether the liberty of contract in relation to the fundamentals of the transactions was completely excluded by the provisions of the Statute or not. These issues have been discussed by various High Courts and have received the consideration of the Supreme Court.

### Cases Study

In the case of *Coffee Board of Karnataka, Bangalore* v *Commissioner of Commercial Taxes, Karnataka*,[7] the Coffee Board contended that the compulsory delivery of Coffee under the Coffee Act, 1942, extinguishing all marketing rights



of the growers was 'compulsory acquisition' and not sale or purchase to attract levy of purchase tax. The appellant was only a trustee or agent of growers not exigible to purchase tax and that all export sales were 'in the course of export' immune from tax under Article 286 of the Constitution.

The Karnataka High Court has observed, which has recently been upheld by the Supreme Court, as follows:

> "An element of consensuality subsists even in compulsory sales governed by law and once there is an element of consensuality, however minimal that may be whether express or implied, that would be sale or purchase under Sale of Goods Act."

The Supreme Court reiterated the same and said in such transactions mutual assent is not totally absent as there is no time fixed for delivery of Coffee either to the Board or to the curer. These indicates the consensuality which is not totally absent in the transaction.

Moreover, in case of sale of coffee, all coffee which the Coffee Board obtains under the Act is put in a pool and gets mixed up with the other coffee. It is disposed off on behalf of the Coffee Board which pays only a proportionate price to the planter. Nevertheless, the planter does not actually sell coffee to the Coffee Board, even there is in reality a sale by operation of law as a result of which planter ceases to be the owner of the coffee the moment he has handed over his produce to the coffee Board. The fact that the price is received later does not make it any the less a sale.[8]

The first landmark decision in field of concept of sale under Statutory transaction is *New India Sugar Mills* v *Commissioner of Sales Tax*,[9] where a sugar factory in Bihar despatched sugar to State of Madras by the order of the Controller. This transaction was claimed to be a sale by the State of Bihar and the factory was levied Sales Tax.

The majority of the Court observed through Shah, J (as he then was) that the transaction did not amount to sale and was not liable to Sales Tax. To constitute a sale of goods, the property in the goods must be transferred from the seller to the buyer under a Contract of Sale which is a pre-requisite in a contract of sale. Despatches of Sugar under the directions of the Controller were not the result of any such contract of sale.

It was further said that there was no offer by the assessee to the State of Madras and no acceptance by the latter. the assessee, under the Central order, compelled to carryout the directions of the Controller and it had no volition in the matter. Intimation by the State of its requirement of Sugar to the Controller or communication of allotment order to the assesse did not amount to an offer. Nor did the mere compliance with despatch instructions issued by the Controller, which the assessee could not decline to carryout, amount to acceptance of an offer.

A strong dissenting opinion was expressed by Hidayatullah, J (as he then was) and said that

"Though consent is necessary for a sale, it may be expressed or implied, and it cannot be said that unless the offer and acceptance are in an elementary form there can not be sale".

Here, the Controller permitted the assessee to supply sugar of a stated quality and quantity to the State of Madras, thereafter, the two parties agreed to sell and purchase the sugar. So long as the parties trade under contracts at fixed price they must be deemed to have agreed to such a price, there was an implied contract with an implied offer and implied acceptance.

Both the majority and minority judgments under *New India Sugar Mills case* have been supported in successive years in different cases and two Schools of thought developed. One under the influence of laissez faire philosophy strictly adhered to the majority view in *Chhitter Mal Narain Das* v *Commissioner of Sales Tax*[10] and another conscious of the new changing trend followed the progressive approach in *India Steel and Wire Products Ltd.* v. *State of Madras.*[11]

## Consensual Arrangement

The first point which must be considered in an action on the sale is whether contract has in fact been finally agreed upon by the parties and the absence of an agreement as to the price may provide good evidence that the parties have not reached a concluded contract.[12]

Shah, J. (as he then was) observed in *Chhitter Mal's case*[13], that

"A sale predicates a conduct of sale of goods between persons competent to contract for a price paid or promised ; a transaction in which an obligation to supply goods is imposed and which does not involve an obligation to enter into a contract, cannot be called a "sale", even if the persons supplying goods is declared entitled to the value of goods".

In another case,[14] the Court was concerned with a transaction made under the Colliery Control Order, 1945. The Court held that the Control order super-imposed upon the agreement between the parties the rate fixed under the order and it could not therefore be said that mutual assent of the parties and voluntary character of the transactions were not affected. The Court reviewed its decision in *Chittermal Narain Das* v *Commissioner of Sales Tax, U.P.*[15]

In modern times the doctrine of laissez faire can have only a limited application. It does not mean that there is no freedom of contract. So long as mutual assent is not excluded in any dealing, in law, it is a contract. Due to change in political outlook and as a result of economic compulsion the freedom to contract is being confined gradually to narrower and narrower limits. Thus, the prospective buyer and intending seller is greatly reduced. The Company supplies goods at its convenience and it is open to the Company to agree with the customers as to the date on which the goods were to be supplied. The order booked are subject to the Company's terms of business and it is also open to the company to fix mode of payment and the time for payment of the price.[16]

However, the mounting plethora of cases with divergent views led the Supreme Court to constitute a larger bench, to set at rest the judicial controversy



regarding sale ; in *Vishnu Agencies* v *Commercial Tax Officer*[17], the majority of the Court speaking through Chandrachud, J. (as he then was) followed the dissenting opinion of Hidayatullah, J. in *New India Sugar Mills Case*[18] as being the true position in India. Justice Chandrachud observed -

"to determine whether there is any agreement or consensuality between the parties, we must have agreed to their conduct at or about the time when the goods changed hands. The primary fact is that the decision of trader to deal in an essential commodity is volitional. Such volition carries with it the willingness of trade in the commodity strictly on the terms of control order".

Moreover, the consumer too, who is under no legal compulsion acquires goods, decides as a matter of his volition to obtain it on the terms of permit or the order of allotment issued in his favour. That brings the two parties together, one of whom is willing to supply the essential commodity and the other to receive it. When the allottee presents his permit to the dealer, he signifies his willingness to obtain the commodity from the dealer on the terms stated in the permit. His conduct reflects his consent. When upon the presentation of the permit, the dealer acts upon it, he impliedly agrees to supply the commodity to the allottee. His conduct, too, reflects his consent. Thus, though both parties are bound to comply with the legal requirements governing the transaction, they agree as between themselves to enter into transaction as statutory form.[19]

## 'Sale' - not a compulsory acquisition

A law providing for acquisition of property must be for a public purpose.[20] Whether acquisition is for public purpose or not is a justiciable issue. However, to reach a definite conclusion a distinction between compulsory acquisition and sale is required. The former does not amount to a sale whereas the latter even if it circumscribed the area of free choice, does not take away the basic character or core of sale from the transaction.

Beg, C.J. (as he then was) observed in *Vishnu Agencies' case*[21] as follows:

"the deprivation of property for a compensation which may even be described as price does not amount to a sale where that is done to carry out an order so that the transaction is substantially a compulsory acquisition. On the other hand, a mere regulatory law, even if it circumscribes the area of free choice does not take away the basic character of sale from transaction".

The agreement despite considerable compulsive elements regulating or restricting the area of free choice, may still retain the basic character of transaction of sale.

## Conclusion

A perusal of the above cases envisage that absolute freedom of contract or unregulated operation of laws of supply and demand, which are apotheosis of the laissez faire doctrine demanded, led really to a shrinking of the area of freedom in the economic sphere, producing gross inequalities in bargaining powers and

recurrent crises. Therefore, a regulated or a socialistic economy seeks to regulate the play of forces operating on the economic freedom of all concerned, including employers and employees is preserved and to that the interest of consumers are also not sacrified by any exploitation of conditions in which there is scarcity of goods. The regulations restrictions of the area of choice cannot take away the legal character of the transaction which take place within the legal restricted field. Moreover, offer and acceptance need not always be in an elementary form, nor does the law of contract or of sale of goods require that consent to a contract must be express. Offer and acceptance can be spelt out from the conduct of the parties which cover not only their acts but omissions as well. The limitations imposed by the Control Orders on the normal right of the dealers and consumers to supply and obtain goods, the obligation imposed on the parties and the penalties prescribed by the orders do not militate against the position that eventually, the parties must be deemed to have completed the transaction under an agreement by which one party binds itself to supply the stated quantity of goods to the other at a price and then other party consents to accept the goods on the terms and conditions mentioned in the permit or order of allotment issued in its favour by the concerned authority.

## END NOTES

1. See Freidmann, *Law and Social Change in Contemporary Britain*, p.34
2. See Anson, 'Principles of English law of Contract' 21st Ed., p.5
3. AIR (1988) SC 1487 ; For detail see Infra Note 7
4. Section 4 of Sale of Goods Act, 1930.
5. Section 4(1) reads as follows :
   (1) A Contract of Sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. There may be a contract of sale between one part-owner and another.
   (2) A contract of sale may be absolute or conditional.
   (3) Whereunder a contract of sale, the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.
   (4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.
6. See Atiyah, P.S; *The Sale of Goods* (1975) p.18
7. AIR (1988) SC 1487
8. *State of Kerala* v *Bhavani Tea Produce Co. Ltd.* (1966) 2 SCR 92
9. AIR 1963 SC 1207 - In case under the Sugar and Sugar Products Control Order, 1946, the Consuming state intimated to the Sugar Controller of India about their sugar requirements. The factory owner sent statements of the stocks of sugar held by them. The Controller made allotments to various States and addressed orders to the factory owners directing them to supply Sugar to the States in question in accordance with the despatch instructions from the State government under such allotment orders the assessees, a sugar factory in Bihar despatched Sugar to the State of Madras. The State of Bihar treated these transactions as Sales and levied Sales Tax thereon, under Bihar Sales Tax Act, 1949. The assessee contended that despatches of sugar pursuant to the directions of the Controller did not amount to Sales and that no Sales tax was exigible on such transactions.
10. AIR (1970) SC 2000
11. AIR (1968) SC 479
12. Supra Note 6 at p. 18



13. Supra Note 10 - The appellants who are dealers in food grains supplied to the Regional Food Controller diverse quantities of wheat in compliance with the provisions of the U.P. Wheat Procurement (Levy) Order, 1959. The Sales Tax Officer levied tax on aggregate of the price of wheat by the appellants. It was held that the source of obligation of dealers to deliver the specific quantities of wheat and to pay for them is not in any contract but in the Statutory order. The order, it is true, makes no provision in respect of place and manner of supply of wheat and payment of the controlled price. It contains a bald injunction to supply wheat of specific quality day after day, and enacts that in default of compliance the dealer is liable to be punished it does not envisage any consensual arrangement.
14. *State of Rajasthan* v. *Karamchand Thapar*, AIR (1969) SC 343
15. Supra Note 10
16. Ibid
17. AIR (1978) SC 449 - where the provisions of the Cement Control Order 1948, issued under the West Bengal Cement Control Act, 1940 and the Andhra Pradesh procurement (levy) orders came up for consideration. The sole question before the Court was in the context of the Control Order issued by the Govt. of West Bengal for regulating the supply and distribution was a Contract of Sale ?
18. *Supra* Note 9
19. *Ibid.*
20. *The State of Karnataka* v *Ranganatha Reddy*, AIR (1978) SC 215
21. *Supra* Note 17

# Search and Seizure Under the Income Tax Act

GHANSHYAM SINGH*

## Introduction

Search and seizure were unknown to any legal system till the beginning of the eighteenth Century. Common law considered every man's house as his castle. However, the State, entrusted with the duty of maintaining social security and order, claimed, and it was realised in course of time, that protecting the privacy of the house of individuals to such an extent was prejudicial to the interests of the society. A limited power of search and seizure was, therefore, granted to the state authorities, which power was duly recognised by the courts of law.[1]

During the seventeenth and eighteenth Century, in England, Judges attached so much sanctity to the privacy of a man's home that they refused to recognise the power of search and seizure in the State. It was authoritatively stated that no one, for any reason, can intrude upon man's privacy. Lord Coke said in *Samayne's* case[2], "The house of every one is to him as his castle and fortress as well as for his defence against injury and voilence for this repose."

But gradually it came to be recognised that the power of search and seizure was a necessary power in the interest of community at large and without it the process of enforcement of law might suffer to the detriment of public interest and, therefore, subsequent legislation in England started conferring such power on the police and various other functionaries of the State from time to time. The old concept of everyman's home being his castle evaporated in air.

In India the general law relating to search and seizure was incorporated in the Code of Criminal Procedure 1898[3]. As search was a process exceedingly arbitrary in character, stringent statutory conditions were imposed on the exercise of this power.

Originally the Income-tax authorities under the Indian Income Tax Act, 1922 had no power of search and seizure. Section 37 of the said Act gave them only such powers as are normally exercised by Civil Courts under the Code of Criminal Procedure, such as powers of discovery and inspection, forcing attendance of witnesses, examining them on oath, compelling the commission, etc. In 1938, a Bill was moved in the Central Leglislature to amend the Income-tax Act so as to confer additional powers on authorities to enter

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business premises, seize books, etc. However, the Bill had to be dropped because of serious opposition to it.

After the IInd World War with a view to effectively taxing undisclosed profits said to have been made by the so called war-profiteers, the Government enacted Taxation on Income (Investigation Commission) Act, 1947 which gave vast powers to the authorities to deal with the cases of substantial evasion of tax. The Income-tax authorities were for the first time invested with certain powers of search and seizure with a view to assisting the Investigation Commission in the task of catching substantial tax evaders. Thereafter the Central Government appointed a Commission called the Taxation Enquiry Commission, and on its recommendations in 1956, Section 37 of the Income-tax Act of 1922 was recast, and powers of search and seizure were conferred on the I.T.O.'s. The said Act was declared *ultra-vires*, being in contravention of article 14 of the Constitution by the Highest Court of the land.[4]

The Supreme Court in recognition of these powers had said that the power of search and seizure is in any system of juris prudence an overriding Power of the state for the protection of social security and that power is necessarily regulated by law.[5] With the spread of conflict between the social interest and the individual interest to other economic activities the power of search and seizure was introduced in many other legislations.[6] Under the Income-tax Law the authorities had only such powers as are ordinarily possessed by the Civil Courts, namely, powers of discovery and inspection, attendance of witnesses, examining them on oath, issuing commissions and compelling the production of documents and books etc.[7]

However, the evil of tax evasion continued its process of sapping the health, vitality and growth of our country, more so in big cities like Bombay, Calcutta, Delhi and Madras. To tackle the problem of undisclosed income or investment commonly called 'black money', the Government constituted a committee in 1971, popularly known as the (Wanchoo Committee', to recommend, *inter alia*, concerete and effective measure to unearth black money and prevent its proliferation through further evasion. It was on the recommendation of this Committee that the Taxation Laws (Amendment) Act, 1975 was passed, which made far-reaching amendments in the law relating to search and seizure. It enlarged the powers of the Income-tax authorities with regard to search and seizure for which the department had been clamouring for since long for dealing with the cases of concealed books, documents, income and other articles.

## Validity of Section 132

Since the time of inception of the power of search and seizure, the judiciary with its sacred independent posture has been asked to pronounce on the ambit and validity of these powers.

The general law relating to search and seizure as laid down in the Code of Criminal Procedure, 1898 was challenged as being violative of Articles 19(1)(f) and 20(3) of the Constitution.[8] Eight Judges of the Supreme Court unanimously held that a search by itself was not a restriction on the right to hold and enjoy

property. No doubt, a seizure or carrying away of property is a restriction on the possession and enjoyment of the property seized. This, however, is only temporary and for limited purpose of investigation. While discussing whether the power is violative of Article 20(3) which gives protection against self-incrimination, the Supreme Court said unambiguous terms that a power of search and seizure is in any system of jurisprudence an overriding power of the State for the protection of social security and that power is necessarily regulated by law.[9]

The Supreme Court, on competence of the Legislature to provide provisions for search and seizure in taxation laws, quoted with approval, in *Pooran Mal* v. *Director of Inspection*[10] its observations in *CCT* v. *Ramkishan Srikishan Jhaver*,[11] where it said — 'Now it has not been and cannot be disputed that the entries in the various lists of the Seventh Schedule must be given its widest possible interpretation. It is also not in doubt that while making a law under any entry in the Schedule it is competent to the Legislature to make all such incidental and ancillary provisions as may be necessary to effectuate the law; particularly it cannot be disputed that in case of a taxing statute, it is open to the legislature to enact provisions which will check evasion of tax. It is under this part to check evasion that provision for search and sizure is made in many taxing statues. It must therefore be held that the Legislature has power to provide for search and seizure in connection with taxation laws in order that evasion is checked."

Article 19 guarantees various freedoms each one of which is subject to reasonable restrictions and restriction is held to be reasonable if imposed in the interest of general public. Effective enforcement of law in a democracy is based on equitable between the rights of an individual and the welfare of the Society. The individual relinquishes a portion of his personal prerogratives through the legislative process in order that he and his fellow citizens may be free from criminal activities of others. Through this process the officer is authorized under appropriate circumstances, to invade personal privacy, to restrict personal liberty and to acquire disclosure of information. If the officer has unrestricted authority to ignore personal liberties, the product is a police state, if he is barred from any interference with private rights, the result is criminal anarchy. In order to avert these alternative perils and their intermediate graduations, it is the responsibility of the Judge and the law maker to establish rules for law enforcement which will give society maximum protection from the criminals with a minimum of interference with individual liberties.[12] Repelling the challenge to constitutional validity of search and seizure as being violative of Article 19(1) (f) and (g), the Supreme Court in *Pooran Mal's* case has said that:— "the impugned provisions are evidently directed against persons who are believed on good grounds to have illegally evaded the payment of tax on their income and property. Therefore, drastic measures to get at such income and property — with a view to recover Government dues would stand justified in themselves. When one has to consider the reasonableness of the restrictions, or curbs placed on the freedoms mentioned in Article 19(1)(f) and (g), one cannot possibly ignore how such evasions eat into vitals of the economic life of community."



As regards the violation of provisions of Articles 14 of the Constitution guaranteeing fundamental right of equality before law, the Supreme Court observed:

> "The provision for seizure is designed with object of getting at the income which has been concealed illegally by the assessee — there is no substance in the contention that two different procedures for assessment are adopted and, hence, there is a discrimination under Article 14."

The evidence and the material obtained as a result of search, even if search is illegal, can be used by the authorities against the person from whose custody it is seized and such user does not violate the fundamental right of privilege against self-incrimination guaranteed by Article 20(3) of the Constitution as search and seizure did not amount to compelled production of documents as held in *M.P. Sharma's*[13] case and *Pooran Mal's* case.[14]

The consistent view of the Courts in India is that the provisions regarding search and seizure fall under the incidental and ancillary provisions for effectuating substantive law. These provisions should be coupled with enough safeguards so that the powers may not be unduly or improperly exercised. The legislation must provide sufficient safeguard for their implementation. If the safeguards are generally on the lines adopted by the Cr. P.C. they would be regarded as adequate and render the temporary restriction imposed by search and seizure reasonable.

**Safeguards against Arbitrary Action**

No action taken under Section 132 of the Income-tax Act, 1961 for search and seizure can be said to be arbitrary if the action is taken in accordance with the provisions of law. The action may be struck down where search and seizure are conducted in violation of the provisions of Section 132, the rules made thereunder, *i.e.* Rules 112 to 112-D, and the provisions of the Cr. P.C. that have been made applicable to the searches and seizures under Income-tax law because these provisions contain a number of safeguards for the protection of taxpayer. The safeguards against arbitrary action provided by law as construed by various courts may be summed up as under:—

(a) The Commissioner of Income-Tax, 'a high official' in the heirarchy has been entrusted with the power to specifically authorize any I.T.O. to enter and search a place.

(b) The Commissioner is to authorize an officer specifically in each case and not generally.

(c) Such authorities will be on the examination of the reasons of the I.T.O. for his belief that any books of account, documents, unaccounted money, bullion, jewellery, etc. may be found.

(d) While authorising the I.T.O. the Premises which he has to enter and search have to be specified.

(e) The exercise of powers under Section 132 can only follow a reasonable belief entertained by the authorising officer that any of the three conditions under Sections 132 (1)(a)(b) and (c) exists.

(f) The authorising officer has to record his reasons before the authorization for the search and seizure is issued.

(g) The authorization is to be for the specific purposes as enumerated in Section 132(1) (i to v).

(h) The authorization cannot be in favour of any officer below the rank of an I.T.O.

(i) When money, jewellery, bullion, etc., are seized the I.T.O. has to make a summary enquiry with a view to determining how much of the seized amount will be retained by him to recover the estimate tax liability. The object of enquiry under Sub-section 5 of Section 132 is to reduce in convenience to the assessee as much as possible so that the remaining assets are returned within a reasonable time. The return of the seized documents or books of account is also guaranteed within a reasonable time.

(j) The person from whose custody the documents, etc. are seized is empowered to make copies, and take extracts therefrom.

(k) With the application of the provisions of the Cr. P.C. regarding search and seizure, so far as may be, to all searches and seizures under the Income-Tax Act further safeguards have been extended. Rule 112 provides for the actual search and seizure being made after observing normal decencies of behaviour. The search is to be conducted in the presence of the two or more respectable persons of the locality. The person in charge of the premises searched is to be immediately given a copy of the list of the articles seized. One copy of the list is forwarded to the authorizing officer. Provisions for the safe custody of the articles seized is also made in Rule 112.

**Admissibility of Evidence Collected through Illegal Searches**

Another important issue involved and often agitated is the validity and admissibility of the evidence collected through illegal means. In such cases it is argued that the documents or the evidence of other kinds discovered as a result of search and seizure, which was illegal, cannot be relied upon and should have no evidentiary value against the persons from whose possession it is recovered. It is said, that the search being illegal, the discoveries made as a result of it are also illegal and, therefore, have no evidenciary value and cannot be used against the persons from whose custody these are recovered. The Supreme Court relying on the provisions of the Indian Evidence Act has unambiguously laid down that so far as India is concerned, its law of evidence is modelled on the rules of evidence which prevailed in English Law, and the Courts in India and in the United Kingdom have constantly refused to exclude relevant evidence merely on the ground that it is obtained by illegal search or seizure.[15] In a case[16] where during an inspection made under the Kerala Agricultural Income-Tax Act, 1950, the figures contained in a book recovered from the premises of the assessee were used in the assessment. The Kerala High Court observed: "It is true that the Act does not authorise search and seizure. It is not, however, correct to say that the material gathered as a result of such search and seizure are inadmissible as evidence."[17] The India Evidence Act, 1871 permits relevancy as the only test of admissibility of evidence, it does not exclude relevant evidence on the ground that it was obtained under an ill egal search or seizure.



**Conclusion**

As per the figures regarding search and seizure for the last decade published by the Directorate of Inspection (Reasearch, Statistics and Public relations) Department of Income-tax, it is quite apparent that the number of searches conducted has been increasing and so the has value of assets seized during these raids.

The period during the second half of the last decade was termed as the 'Raid Raj' by industrialist Shri R. P. Goenka, then President of FICCI.

Irrespective of the fact, that raids met with varying degrees of success, the consequence for the first time, that even the most reputed captains of industry piloted ships which ran afoul of the laws of the land.

Among the first major raids that were to send shock waves through the industry was one on the Kirloskar group of companies on December 9, 1985, which was highly publicised, and the charge against them were FERA violations. The next to follow was on September 5, 1986. When nation's fifth largest industrial house, the Thapar group, also charged with FERA violations of Rs. 14 crores.

The other major cases of contravention of economic statutes detected by the directorate of enforcement, anti-evasion and revenue intelligence during the period 1985-86 and included,[18] (i) Brooke Bond, who were charged with under invoicing tea bag exports and were imposed a penalty of Rs. 1.5 lakhs; (ii) Bata India charged with claiming drawback duty under false representations totalling Rs. 98 lakhs and FERA violations; (iii) Orkays, charged with customs duty evasion of Rs. 1.5 crores by under-invoicing imports; (iv) Logic Systems Rs. 30 lakhs worth of electronic type — writers confiscated for misrepresenting them as sub-assemblies; (v) Hindustan Computers, were charged with evasion of central excise agreegating Rs. 58 laksh; (vi) Somany Pilkinton — charged with evasion of central excise aggregating Rs.85 lakhs; (vii) Golden Tobacco — carged with evasion of excise duty totalling Rs. 13 crores on cigarettes; (viii) Kothari Electronics — charged with evasion of customs duty of Rs. 1.54 crores by misdeclaring imports of electronics capacitors; (ix) National Tabacco — charged with evasion of central excise of at least Rs.75 crores on illegal sales of tobacco and over production, surreptitious sales of cigarettes; (x) Bakelite Rylam — charged with excise evasion of Rs. 1.15 crores on laminated products; (xi) Oswal Group — charged with not repatriating Rs. 50 lakhs from abroad which are export dues, and (xii) Roger Enterprises — charged with entering into agreements with foreign companies without RBI approval and retaining funds totalling Rs.4 crores abroad.

In an age when such sharp business practices were the order of the day, it did not seem so shocking that even the house of Tata, which had carefully built up a

lilywhite image, was caught with soiled hands. The two Tata firms owned a Hong Kong based hotel group, which in turn owned a dozen hotels globally, which resulted in FERA violations which the Tatas admitted and which they were arranging to repatriate.

The industrial houses had no other practicable recourse left but to apologise for their lapses and to pay up. The apologies did come in fast and furious; Brooke Bond, Thapar, Bata, Orkay, Mc.Dowells were only some of the groups that signed the papers.

The apology scheme was later codified by then Finance Minister into the amnesty from FERA scheme which sought to exempt the declarations from prosecution. Apart from offering an insurance against prosecution which is a strong incentive, the unspelt lure of the disclosure scheme lay in the chance of the offender escaping penalty which could be upto five times the amount evaded under FERA. Yet offenders never sought voluntary sanctuary under this scheme until the law caught up with them.

To deal with the problem, one must remove causes as well as the opportunities for such a state of affairs to have come into being. Raids to unearch black money must also take place, but the raids should be conducted with decency and not give the appearance of harassment or recourse to third degree measures. I am of the view, that no one, however humble, should be put to any harassment or indignity, prior to conviction by a competent authority.

The raids should be continued but they may be conducted keeping in view the above suggestion, as the raids in the last decade have proved very productive.

## END NOTES

1. *Elias* v. *Pasmore*, (1934) 2 K.B. 174.
2. (1604) 5 Coke's Report 91: 76 E.R. 194.
3. Secs. 51, 99, 100 and 165 of the Criminal Procedure Code, 1973.
4. *Suraj Mall Mohta* v. *A.V. Sishwanath Sastri* (1954) 26 ITR 1 and *V.G. Mutiah* v. *CIT* (1956) 29 ITR 390.
5. *M.P. Sharma* v. *Satish Chandra*, AIR (1954) SC 300.
6. e.g., the Central Excise and State Act, 1944; various (states) Sales Tax-Acts; Income Tax Act, 1961, Customs Act, 1962.
7. Sees. 37 (1) and (3) of the Income-Tax Act, 1961.
8. *M.P. Sharma* v. *Satish Chandra*, Supra note 5.
9. *Id.* at 306
10. (1974) 93 ITR 505.
11. (1967) 66 ITR 664.
12. Davis, on Federal Search and Seizures; See also B. Malik and S.C. Manchanda, Law Relating to Search and Seizure 84 (1976).
13. Supra note 8.
14. Supra note 10.
15. *Id.*
16. *Varghese and Ors* v. *CIT*, Kerala, 10.5 ITR 732(1976)
17. *ID* at 734
18. The illustrated Weekly of India, March 1-7-1987.

# Performers' Rights : A Critical Review

VIRENDRA KUMAR AHUJA*

Performers' are recognised by the society as vital links between literary, dramatic and musical works and the public. There is no doubt that performers spend sufficient skill and labour to merit copyright protection. Often the works come alive through the renderings of talented performers. The great musicians, singers, dancers, actors and other performing artistes delight the hearts and feast the eyes and ears of millions of people every day by their visual or acoustic presentation. Despite of all this the performers' position in law seems to be weak, as the copyright law does not recognise or protect the rights of performers'.

In the earlier period, one could find two reasons for the weakness of the performers' position in law. The first was social and historical. During the formative period of copyright the actors or strolling players were regarded as 'Vagrants' by the law. According to Adam Smith the players, buffoons, musicians, operasingers, opera-dancers and the like were classical examples of 'improductive labour'[1]. The second was historical and technological. Once again according to Smith, "The work of all of them perishes in the instant of its production".[2]

On the basis of the ephemeral nature of a performance one could justify denying copyright to performers'. But in the modern times both reasons cannot be supported. Today, star performers have gone to the top from the bottom in the society. With the advent of technology the fixaton of the performance in a tangible form has become possible. Despite this, the performers are yet to get their rights relating to their performance.

Till date there is no provision in the copyright law of India recognising or protecting the rights of performers in their performance, but now the Copyright (Second Amendment) Bill, 1992, seeks to extend protection to all performers by means of a special right to be known as the "Performer's right" in respect of the making of sound recordings or visual recordings of their live performances, and certain related acts.

### Why Performer's Protection Rights are Necessary ?

The copyright law recognises and protects the economic interests of the person creating an original literary, dramatic, musical or artistic work. The copyright protection was not required as long as literary, dramatic or musical works could not be multiplied or reproduced on a commercial scale. But now the development of modern technology has made the multiplication or reproduction of the work easy. The economic value of the work has increased greatly with the invention of

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sound recording, photography, radio and television. The law protects these economic interests by conferring on the author exclusive cinematograph, recording and broadcasting rights.

As far as the fixation of the performance is concerned, it was not possible till the first half of the last century as the technology had not developed by then to enable the live performance of a performer to be fixed. Due to this the performer was to repeat his performance again and again, as that was the only way to hear or see their performance.

But now the rapid development of modern technology has made it possible to fix a live performance whether the performance is on the stage or in the broadcasting studio, and use the recording for making more records for commercial use or for broadcasting by radio or television.[3] According to Stewart, "Once a performance is recorded it can be repeated in public without the necessity of engaging the performer whose performance has been recorded or indeed without the presence of any performer at all. Performers have thus lost countless employment opportunities."[4]. This is called as "technological unemployment" of performers.

The law has not shown concern to this technological unemployment in India. Thus, if someone records the performance of a performer without his consent,[5] reproduce it and sells the records, or performs them in public, the performer himself has no remedy against such a person. Once a performance is fixed in a record or in a cinematograph film. The record-producer or the film producer as the owner of the copyright is protected by being given exclusive rights regarding their records or the film. The performer has not been given a right to share of the royalties received by the record producer or film producer for public performance or broadcasting of records or films. In this way the performer is left out in the cold without any rights under the copyright Act.

**Conditions Prior to Copyright (Second Amendment) Bill, 1992**

In addition to original literary, dramatic, musical and artistic work copyright can subsist in translations of literary and dramatic works, as well as in compilations, selections, abridgements and other adaptations of literary and dramatic works, and in arrangements and transcriptions of musical works, even though they are not original in the sense that they are created for the first time, but are only derivative works.[6]

The copyright law of India does not confer any rights on the performer although he quite often performs an existing work and in that sense his performance is derivative in the same way as a translation or abridgement. Copyright can subsist in translations or abridgement, but not in the performance of a performer which may be a live performance over radio or television, or before the public, or a performance fixed in a cinematograph film, or a performance recorded in a sound record. When a sound-recording is made of the performance of a performer, the copyright law confers on the record-producer an independent copyright in the record. Similarly when the performer performs in a motion picture, the copyright



law confers on the film producer alone an independent copyright in the cinematograph film including the sound-track. If the performer performs over radio or television, than also he has no control over its use. The act confers "broadcast reproduction right" to protect the broadcasting authority. The only reason why the performance of a performer is not protected by the Copyright Act is that, it is not a "work" in which copyright subsists under Copyright Act. Sec. 2(y) of the Copyright Act provides that "work" means any of the following work namely:

(i) A literary, dramatic, musical or artistic work;

(ii) A cinematograph film; and

(iii) A record.

The performance of a performer does not come under any of the above categories. The act also does not confer anything like a "neighbouring" or "related" right on performers, as it does to the broadcasting authority.

The question whether copyright subsists in the performance of a performer was decided by the Bombay High Court in the negative in the case of *Fortune Film International v. Dev Anand.*[7] The facts of this case are as under:—

The film producers entered into a contract to engage the popular cine actor Dev Anand in their Hindi movie "Darling Darling" and to pay him an amount of Rs. 7 lakh as remuneration. Para 7 of the agreement which is most important states as under:—

> "The aforesaid amount shall be paid to you by procuring suitable annuity policies of LIC of India. That your work in our above picture on completion will belong to you absolutely *and the copyright therein shall vest in you* and we will not be entiled to exhibit the said picture until full payments are secured to you by way of annuity policies of LIC. It is, however agreed that upon the deliveries of the said annuity polices..., your copyright will automatically vest in us. We therefore, agree that until the said policies are delivered to you, we shall not release the said picture nor exhibit or distribute or exploit or part with any prints of the said picture to any party directly or indirectly for the purpose of exhibition, distribution and exploitation in the territories specified above."[8]

There was a provision in the agreement for relaxation in favour of the producers giving them a limited right to exhibit the picture in any of the named territories after making the payment as stipulated for that territory. The picture was released in three of the seven named territories.[9] The actor sought injunction to restrain the producers from releasing the picture in the other four named territories, as well as territories not named, until full payment was made to him. He claimed that the stipulation vested the copyright in the film in him and totally prohibited the producers from exhibiting the film anywhere until full payment was made to him. The court granted the injunction sought for by the actor to stop the film producers from releasing the film in those territories which were not named in the agreement but rejected the claim of the actor that the agreement vested in him the copyright in the film as a whole and held that it only purported to vest in him the copyright in his work, that is, his performance in the film.

The producers preferred an appeal to the Division Bench against the order of a Single Judge. The main issue before the court was whether copyright subsists in the work of the cine actor under the Copyright Act.

It was contended on behalf of the producers that such a copyright was not recognised or protected by the Indian Copyright Act, 1957. It was argued that "work" meant a work tangible in nature. There could be a copyright in a motion picture or a cinematograph film, as also in the story, scenario or music (if written on sheets or if put on a sound track and not otherwise), which were all tangible, but not in the performance of an artiste. Therefore the agreement could not vest in the actor something which in the first place did not and could not exist under the Act. Accordingly, the actor could not restrain the producers from releasing the film in territories other than the seven named territories on the basis of his copyright either in the film or his performance therein.

On the other hand, it was argued on behalf of the cine artiste that the performance of an actor was covered by the definition of "artistic work" or "dramatic work" to be found in Section 2(c) and Section 2(b) of the Copyright Act, 1957. Alternatively the argument which was advanced was that a cinematograph film would include portions of the film and an artiste's work in the film must be regarded as a component or a part of the film which would be entitled to protection as falling within the definition of "work".[10]

Examining the provisions of the Act the bench proceeded to consider whether the performance of a cine-actor in a film is covered by the definition of "artistic work" or "dramatic work" or "cinematograph film" and thus protected as a "work" under the Act.

The performance given by an artiste in a cinematograph film cannot be equated with a painting, a sculpture, a drawing, an engraving or a photograph and is clearly not an "artistic work"[11] as comprehensively defined in the Act. The court rejected the contention it was dramatic work within the definition of "dramatic work" in sec. 2(C)[12] and held that it was an inclusive definition and expressly excludes a cinematograph film by the closing words of Clause (h) of Sec. 2. The court held further that the words "or otherwise" found in the definition of "dramatic work" are there only to provide for the modern means of recording, such as a tape-recorder or a dictaphone and similar instruments. The court also rejected the argument that there could be one owner of the copyright in a cinematograph film as a whole and different owners of the copyright in portions thereof consisting of the performers who have collectively played roles in the motion picture. Thus, the Copyright Act, 1957 does not provide a roof over the performer's head.

**The Copyright (Second Amendment) Bill, 1992**

The Copyright (Second Amendment) Bill, 1992 (hereinafter called as Bill) seeks to make a dramatic change in the existing copyright law. One of the objects of this Bill is to extend protection to all performers by means of a special right, to be known as the "performer's right", in respect of the making of sound recordings



or visual recordings of their live performances, and of certain related acts.[13] The performer's right will be in conformity with the requirements of the Rome Convention for the Protection of Performance, Producers of Phonograms and Broadcasting Organisation 1961 to which we shall advert later.

The "performer's right" includes the right to make a sound recording or visual recording of a performance and some consequential right in respect of copies of sound recordings and visual recordings, which are sought to be provided in a manner not conflicting unduly with the copyright in a sound recording or cinematograph film or with the broadcast reproduction right.[14]

The definition of "performance" is purported to be changed by the Bill. The new definition of "performance" under sec. 2(q) reads as under:—

> "Performance", in relation to performer's right, means any visual or acoustic presentation made live by one or more performers."[15]

For the first time the Bill seeks to insert a definition of "performer" under sec. 2(qq) which reads as under :—

> "Performer" includes an actor, singer, musician, dancer, acrobat, jugglar, snake charmer, a person delivering a lecture or any other person who makes a performance.

The Bill seeks to substitute three new sections for section 38 and section 39 which deals with the "performer's right". Sec. 38 exclusively deals with the "performer's right".

Clause 1 of sec. 38 confers "performer's right". It reads as under :—

> "Where any performer appears or engages in any performance, he shall have a special right to be known as the "performer's right" in relation to such performance".

Clause 2 deals with the term of performer's right. It provides that the performer's right shall subsist until twenty-five years from the beginning of the calender year next following the year in which the performance is made.

Clause 3 deals with "infringement" of the performer's right. It states that:—

> "During the continuance of a performer's right in relation to any performance, any person who, without the consent of the performer, does any of the following acts in respect of the performance or any substantial part thereof, namely:—
>
> (a) makes a sound recording or visual recording of the performance; or
>
> (b) reproduces a sound recording or visual recording of the performance, which sound recording or visual recording was —
>
> (i) made without the performer's consent; or
>
> (ii) made for purposes different from those for which the performer gave his consent; or
>
> (iii) made for purposes different from those referred to in Section 39 from a sound recording or visual recording which was made in accordance with Sec. 39; or

(c) broadcasts the performance except where the broadcast is made from a sound recording or visual recording other than one made in accordance with Sec. 39, or is a re-broadcast which did not infringe the performer's right; or

(d) communicates the performance to the public otherwise than by broadcast, except where such communication to the public is made from a sound recording or a visual recording or a broadcast,

shall subject to the provisions of Sec. 39, be deemed to have infringed the performer's right".

Clause 4 is an exceptional clause and is based upon Article 19 of the Rome Convention 1961, which provides that once a performer has consented to the incorporation of his performance in a cinematograph film, the provisions of above mentioned sub- sections shall have no further application to such performance.

Sec. 39 of the Bill deals with acts which do not constitute infringment of performer's right as well as broadcast reproduction right. Section 39 reads as under:—

"No broadcast reproduction right or performer's right shall be deemed to be infringed by :—

(a) the making of any sound recording or visual recording for the private use of the person making such recording, or society for purposes of bona fide teaching or research; or

(b) the use, consistent with fair dealing, of excerpts of a performance or of a broadcast in the reporting of current events or for bona fide review, teaching or research; or

(c) such other acts, with any necessary adaptation and modifications, which do not constitute infringement of copyright under Sec. 52."

The first two conditions are self-explanatory while the third one is very wide as it includes all such other acts which do not constitute infringement of copyright under sec. 52. It means one would have to see sec. 52 in order to check whether a particular act constitutes the infrigement of performer's right.

Sec. 39A of the Bill deals with other provisions which are applicable to broadcast reproduction right and performer's right. Sec. 39 A reads as under:-

"Sections 18, 19, 30, 53, 55, 58, 64, 65 & 66 shall, with any necessary adaptations and modifications, apply in relation to the broadcast reproduction right in any broadcast and the performer's right in any performance as they apply in relation to copyright in a work".

According to sec. 38 of the Copyright Act, 1957 as it now stand the above mentioned sections were applicable in concern with broadcast reproduction right only, but now their applicability is sought to be extended to performer's right as well. A new proviso has been substituted in sec. 39A of the Bill which states that where copyright or performer's right subsists in respect of any work or performance that has been broadcast, no license to reproduce such broadcast shall take effect



without the consent of the owner of rights or performer, as the case may be, or both of them.

In sum, the bill is intended to fulfil the much awaited requirement for protection of performer's rights by conferring a related right in respect thereof.

**The Comparative and International Picture of Performers' Right**

The performer's rights have gained recognition in domestic laws of several countries[16] as well in international law. But the method or extent of protection is not identical. The copyright statute of the Federal Republic of Germany was the first to protect performers by giving them rights.

**United Kingdom**

The Copyright, Designs and Patent Act of 1988 attempts to improve the situation of performers by providing them statutory civil rights of action. The new rights which are described as 'rights in performances' are not limited just to the performers themselves but they are extended to those also who have recording-rights in relation to performances. The rights in performances are not copyright subject-matter but are 'related rights'.

According to Sec. 181 of the 1988 Act, a performance qualifies if either it is given by a qualifying individual or takes place in a qualifying country. Performers' rights can be infringed in three ways if his consent has not been taken:—

(a) by making a recording of, or transmitting live, a qualifying performance;

(b) by exploiting a recording by using it to show or play in public a qualifying performance or to broadcast or include in a cable programme service such a performance;

(c) by importing, possessing or dealing with an illicit recording of a qualifying performance.[17]

Making a recording for one's own private and domestic use is not an infringement. The period of protection of rights in relation to a performance will be 50 years from the end of the calender year in which the performance takes place.[18]

In addition to the remedies of damages and injunction, which are available as a consequence of infringement being regarded as a breach of statutory duty, a person having rights in a performance may seek an order for delivery up of illicit recordings. A court may order the destruction or forfeiture of a recording delivered up or seized under the above provisions taking account of the adequacy of the other remedies available for the infringement.[19]

It is also an offence to infringe performers' rights. Sec. 198 of the Act creates a range of offences which are broadly similar to those now applicable in respect of commercial dealing with infringing copies of copyright works. The main changes from previous Act's provisions are that the penalties have been stiffened and brought into line with the penalties for copyright offences, and possession and importation of illicit recording are included for the first time.[20]

In sum, the value of the performance right according to Act is that it is available even where the performer is not the copy right owner or where the work being performed is not in copyright.

### The Rome Convention of 1961

In International Law the first move towards performer's protection right was made in 1928 by the Rome Revision conference of the Berne convention. The conference refused to grant a copyright to performers but suggested that members of the Berne convention should consider the possibility of measures intended to safeguard the rights of performers.[21] The Brussels Revision conference of 1948 also did not progress beyond reiterating that recommendation and performers' protection had to await the 1961 Rome Convention. The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations was adopted in 1961.[22] Choosing the 'Lowest Common denominator' of the differing national legislations as there were some fundamental differences of approach between legislations.[23]

Art. 3(a) of the Rome Convention defines 'performers' as actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works.

According to Article 7 of the Rome convention the protection provided for performers by this convention shall include the possibility of preventing:—

(a) the broadcasting and the communication to the public, without their consent, of their performance, except where the performance used in the broadcasting or the public communication is itself already a broadcast performence or is made from a fixation.

(b) the fixation, without their consent, of their unfixed performance;

(c) the reproduction of an unauthorised fixation, or the reproduction of an authorised, or statutorily permitted, fixation for purposes different from those for which the performers gave their consent or from those for which the statute permits reproduction.

Article 19 of the Rome Convention provides that once a performer has consented to the incorporation of his performance in a visual or audio-visual fixation, Article 7 shall have no further application. Where the performance is fixed with the consent of the performer, thereafter the reproduction right belongs to the copyright owner in the fixation (*viz.*, the record-producer, film-producer or broadcasting organisation) and not to performer.[24]

### Conclusion

In India, the performers' rights have been ignored completely. The performance of a performer has not been recognised as an intellectual creation. As a result, it has not been protected under the existing copyright law. In *Indian Performing Right Society, Ltd. v. Eastern India Motion Picture Association,*[25]



Justice Krishna Iyer observed that apart from the music composer, the singer must be conferred a right.

The Rome Convention came into existance in 1961 and shown the minimum that should be done for performers. But since India has not acceded to the Rome Convention, it did not provide any protection to the performers.

For the very first time, India is now going to protect its performers by conferring 'Performer's right' on them. The Copyright (Second Amendment) Bill, 1992 has already been introduced in the Lok Sabha on 16 July, 1992. It is yet to get approval of Parliament. This Bill is in conformity with the Rome Convention. The time is ripe when we should not only introduce provisions of protection of performer's right in our copyright law, but also obtain international protection for them by assuming our international obligation by acceding to the Rome Convention.

## END NOTES

1. Adam Smith quoted in Stephen Stewart, (*Landon, Butterworth & Co. (Publishers)* Ltd.) 1983, p-181.
2. *Id.*, at 181-2.
3. Krishnaswami Ponnuswami, "Performers' Rights and the Copyright Law", *Indian Bar Review*, p. 612.
4. *Supra* note 1 at 184.
5. In 1980, a programme of popular Pakistani Gazal singer Ghulam Ali was organised in Jaipur by his fans on the understanding that the songs would not be taped. But someone recorded the programme without the authorisation and soon a set of three cassettes began to be sold in the market, See., *The Statesman*, September, 4, 1980.
6. Pannuswami, *supra* note 3 at 609.
7. AIR 1979 Bom. 17.
8. *Id.* at 19.
9. The seven named territories were (i) Delhi/U.P., (ii) Bengal, (iii) Nizam, (iv) Mysore, (v) C.P. C.I., (vi) Tamil Nadu, (vii) Andhra Pradesh. These did not include Punjab, Bombay and overseas territories. The Picture was released in (i) Delhi/U.P. (ii) Mysore and (iii) C.P.C.I.
10. *Supra* note 7 at 21.
11. According to Sec. 2(c) of the Copyright Act, 1957, 'Artistic work' means —
    (i) a painting, a sculpture, a drawing (including a diagram, map, chart or plan), an engraving or a photograph, whether or not any such work possesses artistic quality;
    (ii) an architectural work of art; and
    (iii) any other work of artistic craftsmanship.
12. According to Sec. 2(h) "dramatic work" includes any piece for recitation, choreographic work or entertainment in dumb show, the scenic arrangement for acting form of which is fixed in writing or otherwise but does not include a cinematograph film.
13. The Copyright (Second Amendment) Bill, 1992, p. 19.
14. *Id.* at 25.
15. The existing definition of "performance" in Sec. 2(q) of Copyright Act, 1957 reads as under:—
    "performance" includes any mode of visual or acoustic presentation, including any such presentation by the exhibition of a cinematograph film, or by means of (broadcast), or by the use of a record, or by any other means and, in relation to a lecture, includes the delivery of such lecture.
16. See. *supra* note 1 at 182-84.
17. Originally, the Dramatic and Musical Performers' Protection Act, 1925 was looking after the performers protection, which was later modified by the U.K. Copyright Act, 1956. These were

repeated and re-enacted by the Dramatic and Musical Performers Act, 1958. This Act was amended by the Performers' Protection Act, 1963 in order to give effect to the Rome Convention 1961. It was again amended by the Performers' Protection Act, 1972 to increase the fines and introduce the punishment of imprisonment. Now the Copyright, Designs and Patents Act, 1988 has come into existence. Part -II of this Act deals with the 'rights in performance'.

18. Gerald Dworkin and Richard D. Taylor, *Copyright, Designs and Patents Act, 1988*, (London, Blackstone Press Ltd.: 1989), p-130.
19. Sec. 191 of Copyright, Designs and Patents Act, 1988.
20. *Supra* note 18 at 136.
21. *Id.* at 136
22. *Supra* note 1 at 177.
23. For the text of Rome Convention, 1961, see *Supra* note 1 at p. 679.
24. *Id.*, at 185.
25. *Supra* note 3 at 616.
26. AIR 1977 SC 1443.

# India's Educational Scenario

CHITTARANJAN HATI*

## "From Fundamental Right to Education to Fundamental Right to Education Till Fourteen Years Only"

Justice Kuldip Singh and Justice R. M. Sahay of the Supreme Court of India delivered their historical judgement in *Miss Mohini Jain V. State of Karnataka*[1] recently in July 1992, declaring capitation fee and commercialisation of education unconstitutional.

The subject-matter of the case is that, the Karnataka Educational Institutions (Prohibition of Capitation Fee) Act 1984 purporting to regulate the tuition fee to be charged by the Private Medical Colleges in the State. Under Section 5(1) of the Act, the Karnataka government issued a notification dated June 5, 1989, fixing the tuition fee, other fees and deposits to be charged from the students by the Private Medical Colleges in the State. Under the notification the candidates admitted against "Government Seat" are to pay Rs. 2000/- per year as tuition fee. The Karnataka Students other than those admitted against Government Seats are to be charged tuition fee not exceeding Rs. 250000/- per annum. The third category is the "Indian Students from outside Karnataka" from whom tuition fee not exceeding Rs. 60000/- per annum is permitted to be charged.

The petitioner, a nineteen year old girl from Meerut was informed by the Management of Sri Siddhartha Medical College, Agalokote, Tumkur in the State of Karnataka that she could be admitted to the M.B.B.S. Course and she was asked to deposit Rs. 60,000/- as the tuition fee for the first year and furnish a bank guarantee in respect of the fee for the remaining years of the M.B.B.S. Course, which she alleged amount to four and a half lakh.

The issues before the Court were (1) is there a right to education guaranteed to the people of India under the Constitution ? If so, does the concept of capitation fee infract the same? (2) Whether the charging of capitation fee in consideration of admissions to Medical institutions is arbitrary, unfair, unjust and as such violates the equality clause contained in Article 14 of the Constitution ? (3) Whether the impugnal notification permits the Private Medical Colleges to charge capitation fee in the guise of regulating fees under the Act ? (4) Whether the notification

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is violative of the provisions of the Act which in specific term prohibit the charging of capitation fee by any educational institution in the State of Karnataka ?

In order to appreciate the first issue, it is necessary to refer Preamble of the Constitution of India and Article 21, 38, 39(a)(f), 41 & 45 of the Constitution. The Preamble promises to secure social justice and economic justice for the citizens of India. The Preamble further assures the dignity of the individual. The dignity of Man is invisible. It is the duty of the State to respect and protect the same. It is primarily the education which brings forth the dignity of a man. An individual cannot be assured of human dignity unless his personality is developed and the only way to do that is to educate him.

Article 21 Says "No person shall be deprived of his life or personal liberty except according to procedure established by law". The Supreme Court in *Sunil Batra case*,[2] *F. C. Mullin case*,[3] *Kharak Singh case*,[4], *Bandhua Mukti Morcha*[5] *case* and some other cases acknowledged that the right to life includes the right to live with human dignity and all that goes along with it, namely the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow humanbeings and also the right to carry on such functions and activities as constitute the bare minimum expression of the human-self.

The right to life enshrined in Article 21 cannot be restricted to mere animal existence. It means something much more than just physical survival. Every limb or faculty through which life is enjoyed is thus protected by Article 21 and a fortiorari this would include the faculties of thinking and feeling. However every kind of deprivation that is hit by Article 21, whether permanent or temporary must be in accordance with procedure established by law. The Court thus held that Article 21 derives its life and breath from Directive Principles of State Policy. American Court while interpreting right to life said that the fundamental right to life which is the most precious human right and which forms the ark of all other rights must therefore be interpreted in a broad and expensive spirit.

Article 38 says the State shall strive to promote the welfare of the people by securing and protecting social order having social, economic and political justice and to minimise inequalities in income and to eliminate inequalities. Article 39 says the State to direct its policy towards securing (a) that the citizen, men, women equally, have the right to an adequate means of livelihood. (b) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth. Article 41 says, the State to make effective provision for securing the right to work, to education and to public assistance in certain cases. Article 45 make provision for free and compulsory education for all children under 14 years of age. Article 46 says about promotion of educational and economic interests of the weaker sections of the society. These



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In *Mohini Jain case*[6] Judgement, it has been rightly pointed out that 'right to education' as such, has not been guaranteed as fundamental right under Part III of the Constitution but it becomes clear that the Constitution made it obligatory for the State to provide education for its citizens. The Directive Principles which are fundamental in the governance of the country cannot be isolated from the fun-

damental rights guaranteed under Part III of the Constitution. These Principles have to be read into the Fundamental Rights. Both are supplementary to each other. The State is under a Constitutional mandate to create conditions in which the fundamental rights guaranteed to the individual could be enjoyed by all.

The highest Court in the case held 'Right to life' is the compendious expression for all these rights which the Court must enforce because they are basic to the dignified enjoyment of life. It extends to the full range of conduct which the individual is free to pursue. The right to life under Article 21 and the dignity of an individual cannot be assured, unless it is accompanied by the right to education. Thus right to education flows directly from right to life.

The Court further held fundamental rights including the right to freedom of speech and expression and other rights under Article 19, cannot be appreciated and fully enjoyed unless a citizen is educated and is conscious of his individualistic dignity. The Court therefore held right to education is concomitant to the fundamental rights enshrined under Part III of the Constitution. The State is under a Constitutional mandate to provide educational institutions at all levels for the benefit of the citizens or to enable the citizens to enjoy the 'right to education'. The State may discharge its obligation through State-owned or State recognised educational institutions. When the State government grants recognition to the private educational institutions it creates an agency to fulfil its obligation under the Constitution. The students are given admission to the educational institutions, whether State-owned or State-recognised in recognition of their 'right to education' under the Constitution. The demand for Medical education led to opening of new Private Colleges. The Karnataka State has permitted the opening of several new Medical Colleges under various private bodies and organisations. These institutions are charging capitation fee as a consideration for selling education. It is true that commercialisation of education is contrary to the Constitutional scheme and is wholly abhorent to the Indian culture and heritage. The Court therefore held charging capitation fee in consideration of admission to educational institutions, is a patent denial of a citizen rights to education under Constitution.

To the second issue, the Court held, State action or inaction which defeats the Constitutional Mandate is *per se* arbitrary and can not be sustained. Capitation fee makes the availability of education beyond the reach of the poor. The State action in permitting capitation fee to be charged by State- recognised educational institutions is wholly arbitrary and as such violative of Article 14 of the Constitution. The capitation fee brings to the fore a clear class bias. It enables the rich to take admission where as the poor has to withdraw due to financial inability. Meritorious poor student can not get admission because he has no money whereas the rich can purchase admission. Such a treatment is patently unreasonable, unfair and unjust. There is, therefore no escape from the conclusion that charging of capitation fee in consideration of admission to educational institutions is wholly arbitrary and as such infracts Article 14 of the Constitution and the Court rejected plea of reasonable classification by the defendants.

To appreciate the 3rd issue it is necessary to discuss the relevant provisions of Karnataka Educational Institutions (Prohibition of Capitation Fee) Act 1984 namely Section 2(b)(e), 3, 4, 5 and notification of June 5, 1989. Section 2(b) 'Capitatic fee' means any amount by whatever name called, paid or collected directly c indirectly in excess of the fee prescribed under Section 5, but does not include th deposit specified under the provisio to Section 3. Section 2(e) 'Government Sea means such number of Seats in such educational institution or class or classes c such institutions in the State as the government may from time to time specify fc being filled up by it in such manner as may be prescribed by the government fror time to time without the requirement of payment of capitation fee or cash deposi Section 3 of the Act prohibits the collection of Capitation fee by any educationa institution or by any person who is in charge of or is responsible for the Manage ment of such institutions. Section 4 of the Act deals with regulation of admissio to educational institutions subject to such rules made by the government. Sectio 5 of the Act authorises the government to regulate the tuition fee by way of a notification.



The Karnataka government issued a notification under Sec. 5(1) of the Act anc according to the said notification the candidates admitted against "Governmen Seat are to pay Rs. 2000/- per year as tuition fee. The Karnataka students (othe than those admitted against Government Seats) are to be charged tuition fee no exceeding Rs. 25,000/- per annum. The third category is of Indian Students from outside Karnataka from whom tuition fee not exceeding Rs. 60,000/- per annum is permitted to be charged. The question of our determination is whether Rs. 60000/- per annum can be considered as tuition fee or capitation fee.

The said notification fixes Rs. 2000/- per annum as tuition fee for candidates admitted to the Seats in government Medical Colleges and for the candidates admitted against Government Seat. The Seat other than the "Government Seat" which are to be filled from outside Karnataka, the Management has been given free hand where the criteria of Merit is not available and those who can afford to pay rs. 60,000/- per annum are considered at the discretion of the Management. The Court therefore held that whatever name one may give to this type of extraction of money in the name of Medical education it is nothing but the Capitation fee and as such cannot be sustained and is liable to be struck down. The Court rejected the contention of the Management of Private Colleges that as cost of the Five Year, M.B.B.S. Course cost 5 lakh per student and as 40% student given admission as against 'Government Seat' with nominal charge of Rs. 2000/- per annum, the Management is justified in collecting required tuition fee from the students not belonging to 'Government Seat' category. The Court rather held that no more trade on education be allowed as it is against the spirit of the Constitution.

The answer to the last issue, follows from earlier discussions. Since it had been held that what is provided in para 1(d) and 1(c) of the impugned notification dated June 5, 1989, is capitation fee and not tuition fee and it has been held that the notification is beyond the scope of the Act, rather goes contrary to Section 3 of the Act and as such has to be set aside. It was declared that it is not permissible in law or any educational institution to charge capitation fee as a consideration for admission to the said institution.

The *Mohini Jain case*[7] Judgement had far reaching consequences. It denies completely commercialisation of education, which is a cancerous growth of the

Indian educational system. The Court held the concept of "teaching shop" was contrary to the Constitution of India. It was the testing time for all the teaching shop running country wide in the name of technical institutions and Public Schools. However the writ petitions filed by the peoples running Medical/engineering colleges in the state of Tamil Nadu, Andhra Pradesh, Karnataka, Maharashtra challenging validity of Mohini Jain judgement, decided by the Supreme Court in *Unnikrishan J. P. and others etc. VS. State of Andhra Pradesh and others etc.*[8] modified the previous decision of the court.

Analysing the importance of education the court cited few lines from 'Neethishatakam' by 'Bhartruhari' 1st century B.C.:

Education is a special manifestation of man
Education is treasure which can be preserved without
the fear of loss, secure material pleasure,
happiness and fame.
Education is the teacher of the teacher
Education is the God incarnate
Education secure honours at the hands of the state not money.

Also an old Sanskrit adage states "That is education which leads to liberation" - liberation from ignorance liberation from prejudices, liberation from superstition, which blind the vision of the truth.

The same court in *Bandhua Mukti Morcha*,[9] held that the right to life does not mean only animal existence. Article 21 must be construed in the light of the Directive principles of state policy and thus right to live with human dignity enshrined in Article 21. The court also discussed *Kharak Singh case*,[10] *R.C. Cooper case*,[11] *Kesavananda Bharati case*[12] where the court interpreted Article 21 as a shield against deprivation of life or personal liberty. Significantly the court in *Bandhua Mukti Morcha*[13] held that the right to life guaranteed by Article 21 does take in 'educational facilities'. In *D.S. Nakara case*[14] a constitution bench explained the significance of the addition of the expression 'Socialist' in the preamble "During formative years.... Socialism aim at providing all opportunities for pursuing the educational activity."

In *Oliver Brown VS. Board of Education of Topeka*,[15] it was observed "Today education is perhaps the most important function of the State and local governments... It is required in the performance of our most basic public responsibilities even service in the armed forces. It is very foundation of good citizenship. It is a principal instrument in awakening the child to cultural values in preparing him for later professional training and in helping him to adjust to his environment."

In *Wisconsin VS. Yoder*[16], the court recognised that "providing public schools ranks at the very apex of the function of a State."

Realising the importance of education the Government of India promulgated New Education Policy in 1986 in order to fulfil the promise of Article 45 to achieve free and compulsory education till the age of 14 years. Fourteen State governments and four union territories have enacted legislation to make education compulsory.



This has to be concluded that the right to free education upto the age of 14 years is a fundamental right of the citizen of India. The court in this *case*[17] held that it would not be correct to contend that Mohini Jain was wrong in so far as it declared that "the right to education flows directly from right to life". So far as to the question, whether the citizen of this country can demand that the State provide adequate number of medical colleges, engineering colleges and other educational institutions to satisfy all their edueational needs, it was held that "Mohini Jain seems to say yes, with respect we cannot agree with such a broad proposition." Thus the court held citizen of India has fundamental right to free education till 14 years and not for medical, engineering and other higher education.

Respecting this fundamental right to education the State can perform this obligation through State schools and by permitting, recognising and aiding voluntary non-governmental organisations. This does not mean that unaided private schools cannot continue. They can, indeed, to have a role to play. They meet the demand of that segment of population who may not wish to have their children educated in State-run schools. They have necessarily to charge fees from the students.

As the government is spending 3% of the GNP on education, which is second budgeted expenditure after defence, the State is in no position to devote more resources. So it is not possible to do without private educational institution. In 1986, New Education Policy States "in the interest of maintaining the standards and for several other valid reasons, the commercialisation of technical and professional education will be curbed. An alternative system will be devised to involve private and voluntary efforts in this section of education in conformity with accepted norms and goal." Thus it is observed that in reality private educational institutions are necessary in the present day context.

Private educational institution may be aided as well as unaided. Aid given by the government may be cent per cent or partial. So far as aided institutions are concerned, it is evident that they have to abide by all rules and regulations as may be framed by the government and or recognising/affiliating authorities in the matter of recruitment of teachers and staffs, syllabus, standard of teaching and so on. In particular in the matter of admission of students, they have to follow the rule of merit and subject to any reservations made under Article 15. They shall not be titled to charge any fee higher than what is charged in governmental institutions for similar courses.

So far as un-aided institutions are concerned it is obvious that they cannot be compelled to charge the same fee as is charged in governmental institutions, for the reason that they have to meet the cost of imparting education from their own resources and the main source, apart from donation/charities, if any, can only be fees collected from the students. Here the concept of 'Self-Financing' educational institutions and 'Cost Based' educational institutions come in.

Thus the court laid down that a person or a body of person has a right to establish an educational institution, but this right is not absolute one, and is subject to such law as may be made by the State in the interest of general public. However

the court rightly made it clear that the right to establish an educational institution does not carry with it the right to recognition/affiliation.

The court further held that, while granting recognition or affiliation it is obligatory upon the authority in the interest of the general public, to insist upon such conditions as are appropriate to ensure not only education or requisite standard but also fairness and equal treatment in the matter of admission of students. Since the recognising/affiliating authority is the 'state', it is under an obligation to impose such conditions as part of its duty enjoined upon it by Article 14 of the Constitution. So no govt. authority or University is justified or is entitled to grant recognition/affiliation without imposing such conditions. The State cannot claim immunity from the obligation arising from Article 14 and 15 of the Constitution.

As per validity of Section 3(A) of the Andhra Pradesh Education Institution (Regulation of admission and prohibition of capitation fee) Act. 1983, which the full bench of Andhra Pradesh High Court has struck down as being violative of Article 14 and also on the ground of repugnancy with Section 12(A) of the U.G.C. Act. 1956, the Supreme Court in this case held that the State legislature had no power to say that a private educational institution will be entitled to admit students of its choice irrespective of merit. So the section is liable to fail for Article 14. It is not necessary to go into the question of repugnancy of Section 12(A) of the U.G.C. Act.

Coming to the logical analysis and comparison of the two cases namely *Mohini Jain case*[18] and *Unnikrishnan case*.[19] The Mohini Jain Judgement was pre-mature child of the court. It failed to determine as to which extent the right to education is included in fundamental right. It had wrongly explained higher education, technical education are within the boundary of Article 21 of the Constitution. The judgement is far ahead of time, may be in future higher education will be one of the fundamental rights.

The same court in Unnikrishnan case has rightly decided that primary education upto 14 years of age is fundamental right of every citizen and children. Higher education and technical education cannot be fundamental right of the citizen. The court further allowed private educational institutions to function and can charge higher fee than that of government run institutions, however, subject to restriction under Article 14 of the Constitution of India. In this case the court provided practical sollution to the present state of affairs prevalent in the country.

When Mohini Jain case decided any higher charge of fee than government run institutions was nothing but capitation fee and so void, the same court in Unnikrishnan case allowed 'Self- Financing' educational institutions and 'Cost Based' educational institutions.

Looking at present economic crisis the Mohini Jain judgement seems unpractiable. However its greatness lies in the fact that it declared 'Right to education' as fundamental right. No doubt right to education throughout one's life - period cannot be fundamental right and right to have technical and higher education can not be fundamental to human life, so cannot be a fundamental right. In this respect Unnikrishnan case judgement is more accurate.



Yet at least in one point Mohini Jain judgement is logically correct, that the denial of poor meritorious students to get technical education, as they cannot pay higher tution fee charged by private educational institutions, is nothing but discrimination, on the ground of poverty and violated the principle of equality enshrined in Article 14 of the constitution. But this logic is ignored by the court in Unnikrishnan case. With respect I want to conclude that the later judgement is logically incorrect on this point atleast.

## END NOTES

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2. Sunil Batra V. Delhi Administration, A.I.R. 1978 S.C. 1675.
3. Francis Coralie Mullin V. The Administration, Union Territory of Delhi A.I.R., 1981, SC, 746.
4. Kharak Singh V. State of U.P., AIR 1963 SC 1295.
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6. Op. cit, J. T., 1992 (4), SC, 292.
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10. Kharak Singh V. Union of India, 1964, (1), SCR, 332
11. R. C. Cooper V. Union of India, 1970, (3), SCR, 530
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16. 3 L. Ed., 2d 15
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# Environmental Pollution: A Legal Overview

SEEMA MONGA*

## Introductory

In an increasingly small world, the problem of environmental pollution is global and concerns all countries irrespective of their size, level of development or ideology. Informed public is already agitated over the polluting effect of the Gulf War and collectively united in its common concern and apprehension about acid rain, greenhouse effect, depletion of the ozone layer, toxic effect on the seas and even on the atmosphere.

The major environmental concerns of India today are air pollution resulting from industrial development, water pollution from industrial and domestic effluent, soil erosion, deforestation, desertification and loss of wild life because of imprudent and unplanned use of land and resources, and ugly landscape, urban sprawl, and city slums resulting from a burgeoning population. However protection of the environment presents a challenge to the nation's desire to industrialize faster to be self sufficient in food and to be capable of fulfilling certain basic needs of the growing population. This challenge is manifested in policy pronouncements of the Government of India. Consequently India's environmental plight "compounded to seemingly unmanageable proportions by poverty, squalor and ignorance" shows why environmental problems must be treated as an integral part of the development strategy in this case, tackling poverty, unemployment, disease and ignorance, simultaneously." These concerns are reflected in the National Planning process, constitutional provisions, and the administrative machinery set up to accommodate development policies that focus on environmental conservation.

In India bolstered by recent legislative, administrative and judicial initiatives environmental regulation bristles with new and interesting features. Until the mid-eighties the regulating system was relatively dull. In control and enforcement techniques there was little to distinguish this field from the general body of law. All this has been transformed in part due to the spate of fresh legislation passed after the Bhopal Gas leak Disaster of December 1984. The new laws and rules are impressive in their range. They cover hitherto unregulated fields such as noise, vehicular emissions, hazardous waste, hazardous micro-organisms and the transportation of toxic chemicals. Stringent penalties introduced in the earlier pollution control laws, specifically the water and air Acts, have raised the cost of

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non compliance to deterrent levels[2]. But the environmental pollution still seems to be on the rise. Poor implementation of rules and regulations is one of the major and clearly identifiable causes.

## Statutory Provisions

For a better appreciation of the legal setting it is neccessary to first consider the basic relevant constitutional and legislative provisions. The 42nd Amendment introduced Articles 48-A (Under the Directive Principles of State Policy) and Article 51-A into the Constitution. *Article 48-A* states: "The state shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country".

*Article 51-A* - 'Fundamental Duties'

It shall be the duty of every citizen of India —

(g) 'To protect and improve the natural environment including forests, lakes, rivers, and wild life and to have compassion for living creatures'.

The incorporation of protection of environment as an obligation of the state in the Directive Principles and the mandate in Article 51-A to the citizens of India as part of the Fundamental Duties are indications of the constitutional recognition of importance of environment–both the flora and the fauna on human life.

The environmental legislative powers are available under all the 3 Lists[3], namely the Union List, the State List and the concurrent List, of the Constitution. The Central Government has also been conferred with sweeping powers under *Article 253*. It provides:

> "Notwithstanding anything in the foregoing provisions of this chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention, with any other country or countries or any decision made at any International conference association or other body."

Taking advantage of this Article the Parliament has passed the Air (Prevention and Control of Pollution) Act, 1981 as well as the Environment (Protection) Act, 1986. The Preamble of both these legislations categorically states that they seek to implement the "decision" taken at the UN (United Nations) Conference on the Human Environment held in Stockholm 1972[4]. Some of the principles of this landmark conference state:

1. Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality which permits a life of dignity and well being and bears a solemn responsibility to protect and improve the environment for present and future generations. (Principle 1).
2. The natural resources of the earth including the air, water, land, flora and fauna and especially representative samples of natural ecosystems must be safeguarded for the benefit of present and future generations through careful planning or management as appropriate. (Principle 2).

3. The capacity of the earth to produce vital renewable resources must be maintained and wherever practicable restored or improved. (Principle 3)
4. The discharge of toxic substances or of other substances and the release of heat, in such quantities or concentrations as to exceed the capacity of the environment to render them harmless, must be halted in order to ensure that serious or irreversible damage is not inflicted upon ecosystems. (The just struggle of the people of all countries against pollution should be supported.) (Principle 6)
5. Scientific research and development in the context of environmental problems, both national and multinational must be promoted in all countries, especially the developing countries. In this connection, the free flow of up to date scientific information and experience must be supported and assisted, to facilitate the solution of environmental problems; environmental technologies should be made available to developing countries on terms which would encourage their wide dissemination without constituting an economic burden on the developing countries. (Principle 20)

The preamble of the AIR (PREVENTION AND CONTROL OF POLLUTION) ACT, 1981 is as follows:

An act to provide for the prevention, control & abatement of air pollution for the establishment with a view to carrying out the aforesaid purposes of Boards, for conferring on and assigning to such boards, powers and functions relating thereto and for matters connected therewith.

WHEREAS decisions were taken at the United Nations Conference on the Human Environment held in Stockholm in June, 1972, in which India participated to take appropriate steps for the preservation of the natural resources of the earth which, among other things, include the preservation of the quality of air and control of air pollution:

AND WHAREAS, it is considered necessary to implement the decisions aforesaid insofar as they relate to the preservation of the quality of air and control of air pollution:

BE it enacted by Parliament in the Thirty Second Year of the Republic of India as follows:

The preamble of the Environment (Protection) Act, 1986 is as follows:

An Act to provide for the protection and improvement of environment and for matters connected therewith:

WHEREAS decisions were taken at the United Nations Conference on the Human Environment held at Stockholm in June, 1972, in which India participated, to take appropriate steps for the protection and improvement of human environment:

AND WHEREAS it is considered necessary further to implement the decisions aforesaid in so far as they relate to the protection and improvement of environment and the prevention of hazards to human beings, other living creatures, plants and property:

Be it enacted by Parliament in the Thirty-Seventh Year of the Republic of India as follows:



## JUDICIAL ACTIVISM

The Indian Courts have embraced judicial activism in developing environmental jurisprudence. The right to pollution free environment is treated as a fundamental right. The concept of standing has been expanded so as to tailor environmental cases to fit into the framework of public interest litigation.

In *Ratlam Municipality vs Vardhi Chand*[5] the Supreme Court has recognised the importance of pollution free environment and gave it the status of a human right.

The Supreme Court in *Rural Litigation and Entitlement Kendra, Dehradun* vs. *State of Uttar Pradesh*[6] ordered for the closure of all but eight limestone quarries in the Doon valley which had adversely affected the perennial water springs. The result of this order would be that lots of limestone quarries would be thrown out of business, but according to the Court it is a price that has to be paid for protecting and safeguarding the right of people to live in a healthy environment, under Article 21 of the Constitution of India.

In *M.C. Mehta* vs. *Union of India*[7], the famous *Shri Ram Gas Leak* case, the Supreme Court has made the most valuable suggestions in the area of protection and promotion of environment. It suggests setting up a high powered puthority by Government of India in Central Board for overseeing functioning of hazardous industries with a view to ensuring that there are no deficiences or defects in the design, structure or quality of their plant and machinery, setting up of environmental courts on the regional basis etc. But the problem is that the effect of permanently closing down the hazardous industries or caustic chlorine plant as in the above case would mean throwing thousands of workmen out of employment and that closure would lead to the removal of their means of livelihood & sustenance. The Court does not provide for any rehabiliation of the displaced workmen. Instead a National Policy for location of chemical and other industry in areas where population is scarce and there is little hazard or risk to the community could be evolved as a viable solution.

In *Chhetriya Pardushan Mukti Sanghand Samiti* vs. *State of U.P.*[8], the Supreme Court has again affirmed that every citizen has a fundamental right to have the enjoyment of quality of life and living as contemplated by Article 21 of the Constitution. Anything which endangers or impairs by conduct of anybody either in violation or in derogation of laws that quality of life and living by the people is entitled to be taken recourse of Article 32 of the Constitution.

The Environment (Protection) Act, 1986 even though is comprehensive and contains most stringent mechanisms to control environmental pollution, but Sec-

tion 24 (2) of the Act dilutes the sanctions of the Act by providing that when an act or omission constitutes an offence punishable under this Act and under any other Act, the offender found guilty of such offence shall be liable to be punished under the other Act and not under this Act. This provision therefore weakens the rigorous punitive machinery of the Act. Section 19 of the Act also weakens the implementation machinery. It bars individual complaints to the Court unless the complainant gives sixty days notice to the Central Government or the authority or authorised officers.

Section 5 of the Environment (Protection) Act, 1986 empowers the Central Government to direct the closure of the industry, but does not take into account the hardships to labour as a result of closure of the industrial units. An important question bedevils the effectiveness of judicial orders pertaining to the closure of industries which are the worst polluters; courts here are confronted with the prospect of depriving workers of job opportunities and exposing them and the community to grave hazard if such industrial operations are allowed to continue.[9] Therefore there is an apparent contradiction in the legal code and legal procedure and the Indian legal setting is still not sufficiently equipped to deal with the complex problems and the repurcussions of simplistic solutions to these problems.

Not only are the Court rulings unsatisfactory in their tackling of these problems, it is also important to study the problems that arise out of these rulings at the level of implementation. The issue of actual implementation has two facets, viz., (a) judicial interpretation by reference to different cases before Court of law (b) enforcement. A general feeling about environmental law is that it is not adequate in content and is ineffective. In fact its poor implementation is a major cause for concern.

In *M.C. Mehta* vs. *Union of India*[10] it was observed that some of the relevant rules which could contribute to making yet the control effective to reduce pollution due to increase in number of vehicles in Delhi were not brought in force. Success of every move would depend on the scale and frequency and the manner in which it is carried on.

Taking the *Ganga Pollution* case[11], which has become a milestone in the annals of judicial history seeking to prevent the industries and the municipal bodies situated along the banks of the Ganga from polluting her water, in *Mehta-I*[12] (tanneries) the Court ruled in the action against the tannaries and in Mehta- II[13] (Municipalities) the Court ruled in the action against municipalities and other government entities.

In *Mehta-II* the Supreme Court on the performance of Central and State Boards which have been assigned with the task of enforcement of relevant statutes in India was constrained to observe: "It is unfortunate that although the Parliament and State Legislature have enacted the aforesaid laws imposing duties on the Central and State Boards and the municipalities for prevention and control of pollution of water, many of those provisions have just remained on paper without any adequate action being taken pursuant there to".[13A]



Even when the provisions are translated into action actual implementation falls far short of the adequate level. A case in point is the Ganga Action Plan. The pace of work in this case is very slow. For example the figures for actual expenditure incurred by Ganga Authority, for 1987-88 and 1988-89 also revealed difference between projected estimates and the provision made in the budget.

The very fact that the pollution in Ganga has greatly increased in the past several years, is a sad reflection of the tardy performance of the enforcement machinery. As also observed in *Mehta-III*[14], the Court's earlier order which directed the tanneries to at least instal Primary Treatment Plants were not complied with. In fact they are continuing to discharge the industrial effluent without treating the same.

In a recent judgment[15], also the Supreme Court directing to stop operation of stone crushers in Delhi were constrained to record that Delhi Development Authority, Municipal Corporation of Delhi, Central Pollution Control Board, and Delhi Pollution Control Committee have been wholly remiss in the performance of their statutory duties and have failed to protect the environment and control air pollution in Delhi. Utter disregard to environment has placed Delhi in an unenviable position of being the world's third grubbiest, most polluted and unhealthy city as per study conducted by World Health Organisation.

The enforcement of pollution control laws in India has thus evidently remained sporadic and uncertain. In this respect the structural difficulties, and the loopholes hampering the deterrent value of the statute itself need to be taken care of. However, the strategy approach and coordination in the enforcement machinery also need to be reviewed, with the long term perspective.

The environmental jurisprudence of India crystallizes the need for environmental Tribunals, as the existing civil courts lack in environmental expertise and dispense delayed justice. To assist the environmental Tribunals in the dispensation of environmental justice, Ecological Sciences Research Group should be established, consisting of independent and professionally competent experts in different branches of science and technology.[16]

Some other steps which could be taken to improve the present situation could be a preparation and implementation of a detailed environmental conservation programme, controlling the growth of industries in vicinity of major cities, setting up of treatment facilities by industries, replanting and afforestation, and allocation of a percentage of investment in all major projects for environmental conservation.

An "Industrial Disaster Fund" could be established to further avoid the delays of the dispensation of Environmental justice. The industries possessing the potential to pollute and the government should make contributions to the Fund, which would help providing interim compensation and relief to the victims of the pollution.[17] The existing research and educational institutions, Universities, must create special environmental fellowships and introduce educational courses and training programmes in environment. Law should be enacted, which imposes heavy taxes on various kinds of dangerous emissions.

To face this mammoth challenge, the legal, institutional and policy problems being faced within the enforcement of environmental legislation in India, must be resolved. This places an onerous responsibility on the shoulders of the environmental policy makers in India.

The masses as a whole have to be made more environment savy, implementation at the grassroot can only be carried out with their active cooperation and assistance. Only then can the urgency of enforcement of legal actions be clearly appreciated. There has to be a perceptible shift from environment being an exclusively policy maker's problem to it being a public/mass problem. The low level of awareness in the Indian people is probably a major cause of the ineffectiveness of the legal procedure.

## END NOTES

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3. They are as follows: List I (Union List)– Entry 52, 53, 54, 55 and 57; List II (State List) - Entry 6, 14, 17, 18, 21, 24 and 25; List III (Concurrent List)- Entry 17A, 17B and 20.
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14. *M.C. Mehta* vs. *Union of India*, 1991 Supp. 1 SC 181.
15. *M.C. Mehta* vs. *Union of India*, Order dated Aug. 5, 1992.
16. Singh, Gurdeep, *Global Environmental Change and International Law* (1991).
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# Tortious Liability In Sport - An Analysis of Intimidatory Fast Bowling in Cricket

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The traditional approach to tortious liability in sport is that since the participant in the sport has consented, expressly or by implication, to the risks inherent in the sport, an injury sustained by him in the lawful conduct of the sport does not give him a cause of action against the offender who caused his injury.

This consent is expressed in the doctrine of *volenti non fit injuria*-no act is actionable as a tort at the suit of any person who has expressly or impliedly assented to it. It is assumed that a player knows about the risks inherent in the game and that when he undertakes to participate in the game, he undertakes to weather these risks.

In the context of the present article, the following questions arise :

1. What is the extent of a player's consent?
2. If an injury sustained by a player is beyond the extent of his consent, does he have a cause of action against the offender?
3. If the player has a cause of action against the offender, what considerations will determine the measure of damages which the offender is liable to pay?

These questions are examined in the context of the new three-year experimental law on intimidatory bowling laid down by the International Cricket Conference (I.C.C.) in July, 1991. The law states:

> **Law 42.8 :** The Bowling of Fast Short-Pitched Balls.
> (Including one day Limited Overs Matches)
> A bowler shall be limited to one fast short pitched ball per over per batsman.

The law defines a short pitched ball as one which passes over or would have passed over the shoulder of the batsman. The law also lays down guidelines to the umpires when such bowling is being engaged in.

This essay is not concerned with the merits and demerits of this law. While some believe that the fast short pitched ball (popularly known in cricket parlance as the bouncer) is an integral part of a quick bowler's armoury, others feel that the violence of the delivery mars the subtlety of the game. This article steers clear of such normative issues and examines an objective question in the context of the new law.

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If a batsman is injured by the second or subsequent bouncer to him in an over, does he have a cause of action in tort against the bowler and the opposing team? Assuming that he does, can the bowler invoke the defence of *volenti non fit injuria*?

**The extent of a batsman's consent**

The batsman is presumed to consent to all the weapons in a bowler's armoury, except those which are expressly forbidden by the laws of cricket, such as the fast, full pitched delivery (popularly called the beamer). In the case of the bouncer, the distinction is blurred. The law permits the bowling of a bouncer, but it restricts the bowler to one bouncer per over per batsman.

Clearly, if in the course of an over the batsman is bowled a bouncer, he is presumed to have consented to the risks it poses since that bouncer is legal. However, once the bouncer is bowled, subsequent bouncers to the same batsman in the same over become illegal, since they directly contravene the new law. Is the batsman presumed to consent to these 'illegal' deliveries as well?

Winfield gave the following example[1] : In a boxing match, the plaintiff may have inadvertently committed a breach of the rules and this may have provoked the defendant to retaliate with a deliberate foul blow. To an action for this assault, the defendant cannot plead *volenti non fit injuria*, for such a blow is not a lawful incident in boxing. Nor can it be doubted that the plaintiff can recover at least nominal damages for the assault. The reason why the boxer can succeed in the present case is not that his consent is vitiated by the foul blow, but that it never extended to such a blow in the first place. A boxer may consent to accidental fouls, but not to deliberate ones.

Since a bouncer other than the first one in an over contravenes Law 42.8, it may be considered a foul. However, is it a deliberate foul? Harold Larwood (the spearhead of the England attack in the 1932-33 'Bodyline' series for the Ashes) expounds his creed in his autobiography :

> "When he drops a few short, the fast bowler puts the dynamite into cricket. Everybody knows it is a ball intended to intimidate, to unsettle, to test the batsman's combination of skill and nerve..... I never bowled to injure a man in my life. Frighten them, intimidate them, yes."[2]

Clearly, the intention behind a bouncer may not be (in fact, is generally not) to injure the batsman, but it certainly aims to intimidate and to unsettle him. This, combined with the expertise needed to bowl such a ball, renders the actual bowling of such a ball a deliberate act on the part of the bowler.

Thus if we go by the principles set out by Winfield, the batsman is presumed not to have consented to a bouncer other than the first one in an over since such a bouncer may be construed as a 'deliberate foul'.

Having established that a bouncer other than the first one in an over falls beyond the extent of the batsman's consent, we now examine whether the batsman can initiate a suit for damages in the event of injury by such a bouncer. We rely on case law for an answer.



**The cause of action**

It was held in *Reid v. Mitchell*[3] that a person engaged in playing a lawful game takes on himself the risks incidental to being a player and has no remedy by action for injuries received in the course of the game unless they are caused by some unfair act or foul play.

American jurisprudence concurs. In *McNeil v. Mullin*[4] and in *McCue v. Klein*[5] it was held that if an intentional act which causes injury goes beyond what is ordinarily admissible in a lawful sport of the kind being participated in, an assault and battery is committed for which recovery may be had.

An unlawful bouncer may be regarded as an unfair act as far as the laws of the game[6] are concerned. It is clearly not admissible in the conduct of the game, since the law expressly forbids it. Thus, if we go by *Reid v. Mitchell*[7], *McNeil v. Mullin*[8] and *McCue v. Klein*[9], the batsman has a remedy by action for injuries caused by such a bouncer.

We arrive at the same conclusion by adopting a slightly different approach. In *Rootes v. Shelton*[10], it was held :

> "Participants in competitive sport owe a duty of care to each other to take all reasonable care having regard to the particular circumstances in which they are placed. If one participant injures another, he will be liable in negligence for damages at the suit of the injured participant if it is shown that he failed to exercise the degree of care appropriate in the circumstances or that he acted in a manner to which the injured participant cannot be expected to have consented."

A bowler owes a duty to the batsman. As Lord Atkins says in the celebrated case of *Donoghue v. Stevenson*[11], "You must take reasonable care to avoid acts or omissions which you can reasonably see would be likely to injure your neighbour. Who then in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act...." Clearly, the batsman is closely and directly affected by the acts of the bowler. The bowler, on his part, can reasonably foresee that a fast bouncer is likely to injure the batsman. It may be ducked, or even hooked for six, but the fact remains that a 5.5 oz. projectile delivered dangerously at great speed is eminently capable of causing injury.

By this reasoning, even the first bouncer constitutes a breach of duty on the part of the bowler. It is, however, authorised by law[12]. By virtue of *Rootes v. Shelton*[13] and the neighbour principle in *Donoghue v. Stevenson*[14], the bowling of subsequent bouncers constitutes the following:

(i) the bowler's failure to exercise the degree of care appropriate and consequently, a breach of duty to the batsman;

(ii) the bowler's acting in a manner to which the batsman cannot be expected to have consented;

(iii) the bowler's failure to see the natural and probable consequences of his act (though the bowler's intention was in all probability only to intimidate and to unsettle, he should have foreseen the probable injury).

Conclusions (i) - (iii) clearly give the batsman, if injured, a cause of action against the bowler and the opposing team, on grounds of negligence. They, in turn, cannot plead *volenti non fit injuria* since the batsman's consent does not extend to the second and subsequent bouncers.

**The determination of liabilit**

Although a cause of action exists and the defence of *volenti non fit injuria* cannot be pleaded, the court's awarding of damages to the batsman will depend on several considerations. The authorities in this matter seem to be *Rootes v. Shelton*[15] and a very recent case, *Condon v. Basi*.[16]

In the latter, during a football match, the defendant's foul play resulted in the plaintiff breaking his leg. In a suit for damages, the defendant was held liable on the finding that he was guilty of "serious and dangerous foul play which showed a reckless disregard for the plaintiff's safety and which fell far below the standards which might be expected of anyone pursuing the game."

The judgment in this case[17] quoted and reiterated Kitto, J's comments in *Rootes v. Shelton*[18]:

> "...it must always be a question of fact, what exoneration from a duty of care otherwise incumbent upon the defendant was implied by the act of the plaintiff joining the activity...The conclusion to be reached must necessarily depend, according to the concepts of the common law, upon the reasonableness in relation to the special circumstances, of the conduct which caused the plaintiff's injury. That does not necessarily mean the compliance of that conduct with the rules, conventions or customs...The tribunal of fact may think that in the situation in which the plaintiff's injury was caused, a participant might do what the defendant did and still not be acting unreasonably, even though he infringed the 'rules of the game'. Non compliance with such rules, conventions and customs is necessarily one consideration to be attended to upon the question of reasonableness; but it is only one, and it may be of much or little or even no weight in the circumstances."

Thus, the mere infringement of the rules of the game, while it may give the batsman a cause of action, will not necessarily hold the bowler liable for damages. The test which the court has applied is one of 'reasonableness'; the mere infringement of the cricket law may not render the bowler 'unreasonable'.

For instance, with the score at 180 for no loss, the bowler may bowl a barrage of bouncers to the well-settled opening batsman. While the batsman may have a cause of action if he is injured by one (but not the first of an over) of these bouncers, the Court may take a lenient view to the bowler's conduct and rule that since the bowler was bowling bouncers to a competent, well-settled batsman to stem the root (for the fielding side), his conduct cannot be termed 'unreasonable'. The Court may, in such a case, award only nominal damages.

On the other hand, if the batsman injured is a tailender who is known to be a 'turkey' with the bat, the Court may come down heavily on the bowler. Further,



sustained spells of short pitched bowling (such as Larwood's in 1932-33 or Michael Holding's at the Sabina Park, Kingston in 1976 when he sent six Indian batsmen to hospital) may, in the event of injury, attract heavy damages.

Further, there may arise instances when the ball rears because of the uneven state of the pitch and injures the batsman. The bowler in such a case cannot be held liable because he could not have reasonably foreseen that the ball would hit a crack or a clump of grass on the pitch and thereby rise to injure the batsman. In such a case, the Court may call on the opinion of the umpires and the services of the television replay.

**Conclusion**

The batsman consents to the risks inherent in the game. However, when the bowling of more than one bouncer per over per batsman is expressly forbidden by the new I.C.C. law, it is a safe presumption that these subsequent bouncers are, by law, excluded from the 'inherent risks' of the game. Thus, the batsman cannot be presumed to have consented to such bouncers.

Secondly, the bowling of such bouncers evidences the bowler's lack of care and his failure to reasonably foresee the possibility of injury. Thus, if the batsman is struck by such a bouncer he has a cause of action on grounds of negligence and since such a bouncer is beyond the extent of the batsman's consent, the bowler (and his team) cannot plead the defence of *volenti non fit injuria*.

However, the Courts' assessment of damages will not be based solely on the infringement of the law, the breach of duty and the nature of the injury. The Court will take into consideration several other factors in order to assess the 'reasonableness' of the bowler's act. This assessment will determine the extent of the bowler's liability and the amount of damages that will be awarded to the injured batsman.

While this essay has examined tortious liability in sport with respect to intimidatory fast bowling in cricket, the principles enunciated in the essay and in the judgments cited therein are applicable in instances of injury in other sports and games as well. The authorities on the matter are limited, probably owing to the fact that sportsmen rarely take such cases to court.

While it is hoped that sportsmanship will prevent litigation in such matters, with the increasing commercialization of sport, we cannot be too sure. Liability in sport is a grey area in the law of torts and the law pertaining to the subject needs further development.

## END NOTES

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6. Law 42. 8, I.C.C. Laws of Cricket.
7. *Supra* note 3.
8. *Supra* note 4.
9. *Supra* note 5.
10. (1968) A.L.R. 33.
11. (1932) A.C. 562.
12. *Supra* note 6.
13. *Supra* note 10.
14. *Supra* note 11.
15. *Supra* note 10.
16. (1985) 2 All. E.R. 453 (CA).
17. *Id.* at 454
18. *Supra* note 10.

# Case Comments

MANIKA JAIN*

Comments on:
1990(2) SCALE 836
SUBHASH SHARMA — Petitioner

VS

UNION OF INDIA

AND

1991(2) SCALE 150
K. VEERASWAMI — Appellant

VS

UNION OF INDIA & ORS. — Respondents

The Indian Constitution is not strictly fedral on the lines of American model and though no express mention is made in it of vesting the judiciary with the judicial power as is found in its American counterpart, a division of the three main functions of government is recognised in the Constitution. Further, Indian Constitution clearly envisages separatiaon of judiciary from the executive.[1] Though the Constitution does not recognise strict separatiaon of powers among the three organs of the government, yet it is not the intention that the power of the judiciary should be passed to or to be shared by the Executive or the Legislature or *vice versa*.[2] The apex Court emphasised on the principle of separation of powers in the *Ragging Case*[3] and held that no writ or direction can be issued to the Legislature or the Government to initiate any legislation. To legislate is a function strictly under the domain of the legislature and judiciary has no power to direct the former to do so.

Inspite of these reiterations once in a while, it is no hidden fact that judiciary and legislature has often indulged in a slinging match of usurping the power from each other's domain. Judiciary has also tried to interfere in the functions hitherto totally under the jurisdiction of the executive, by having the last word, whereas the executive wherever possible has tried to marginalise the judiciary in its own way. The merits of separation of power cannot be underestimated most of us would agree that empowering one organ of the State at the cost of others leads to power excesses

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and related distortions in the structure of the State. Therefore, a harmonious relationship of checks and balances should be maintained.

There has been a trend in the recent past whereby the Supreme Court has been trying to concentrate more and more powers not only in itself but in Chief Justice of India. Such powers were never intended to be given to the sole individual, the Chief Justice of India, by our Constitution. In the following paragraphs, I am going to discuss this trend in the light of two recent cases - *Veeraswami's case*[4] and *Subhash Sharma's case*.[5]

There are a few provisions in the Constitution which give a special position to the Chief Justice of India in purely administrative matters like appointment[6] of Supreme Court & High Court Judges & transfer[7] of High Court Judges. These provisions make it mandatory upon the executive i.e. the President of India to consult the CJI in case of appointment of any Judge, other than the CJI himself to the Supreme Court or to any of the High Courts in India and also in the case of transfer of any Judge from one High Court to the other. Though, CJI is the mandatory authority to be consulted but he is not the sole authority to be consulted in the case of appointment of the said judges.[8] Art. 124 of the Constitution clearly lays down that in case of appointment of a Supreme Court judge, the President may consult such other judges of the Supreme Court and the High Courts as he may deem necessary. Whereas *Art. 217* of the Constitution lays down that every judge of a High Court shall be appointed after consultation, apart from CJI, with the Governor of the concerned state and with the Chief Justice of the High Court as well in the case of appointment of a Judge other than the Chief Justice.

In *Union of India* V. *Sankalchand H. Sheth*[9], the transfer of a Gujrat High Court Judge was challenged on the ground that it did not comply with the provisions[10] of the Constitution i.e. the transfer was without the consultation with the Chief Justice of India. Although before the pronouncement of the decision, a settlement was reached between the contesting parties, nevertheless, the Court gave its decision in view of the importance of the issue involved. The Court held that the independence of the judiciary was an essential and vital ingridient of our legal system and the threat of transfer of the whims and caprices of the executive constitutes a major inroad in the independence. Therefore, transfer of judges can only be made in public interest and not without the consultation with the Chief Justice of India. Further, it was held that consultation does not mean concurrence; but certainly it means that there must be due deliberation between the Chief Justice and the President on full and identical facts.

The decision in *Sankalchand Sheth* was followed in the *Judges' transfer case*[11] by a larger bench. The power of executive to transfer High Court Judges was upheld on the ground of national interest and it brought about uniformity in the standard of various High Courts and promoted national integration by thwarting any parochial considerations taking roots in the judiciary. Further, the Court reiterated that 'consultation' with the Chief Justice of India need not mean concurrence. But a recent case *Subhas Sharma*[12] consisting of a smaller Bench doubted *S. P. Gupta* and called for its re-consideration by a bench of 9 judges. *Subhas Sharma* examined



two questions namely (1) the position of Chief Justice of India with respect to primary & (2) Justiciability of fixation of Judge Strength. Here, we are primarily concerned with the first question. The Court dis-agreed with *Sankalchand*[13] and *S. P. Gupta*[14] and argued in favour of strengthening the position of Chief Justice of India. It is true and cannot be disputed that for proper and impartial functioning of the judiciary, the maintenance of its strength and independence is essential. Also, true is the fact that judiciary should not be cowed down by the fact that the executive holds unparalleled power in the appointment and transfer of judges. Therefore, it has been rightly emphasised that the consultation with the Chief Justice of India must be effective consultation and not merely a formality to be complied with. But in *Subhash Sharma*, the Court in its anxiety to give primacy to the position of CJI went a little too further and tried to empower the Chief Justice of India with more powers than envisaged in our Constitution.

In *Sankalchand Seth*, the Court had held that in case, while appointing a High Court Judge, there was difference of opinion among the Governor, the Chief Justice of High Court and the Chief Justice of India; all three must be given equal weightage, but in *Subhash Sharma's case*, the Court opined that the opinion of the Chief Justice of India should be given precedence over the opinion of the Chief Justice of High Court. Now, a clear reading of Art. *217* does not warrant such hierarchy of procedure.

Further, *Subhash Sharma's Court* said that the right of the Executive to initiate appointment should be limited to suggesting names to the Chief Justice of High Courts or to the Chief Justice of India. It said[15] that the appointment of judges is not an executive act. The Constitutional values cannot be whittled down by calling the appointment of judges as an executive act. The appointment is rather a result of collective, constitutional process. It is, perhaps, inappropriate to refer to any 'power' or 'right' to appoint judges. It is essentially a discharge of a constitutional trust of which certain constitutional functionaries are collectively repositories ..... The word "consultation" is used in the constitutional provision in recognition of the status of the high constitutional dignatory who formally expresses the result of the institutional process leading to the appointment of judges. .... Then again, even if there is difference of opinion between the Chief Justice of a High Court and the Chief Justice of India - the opinion of the C J I should have the preponderant role. I am of the view that the primacy of the CJI in the process of selection would improve the quality of selection." The provisions[16] regarding appointment of judges clearly states that it is an executive function though to be executed as far as the choice of the appointee is concerned, in consultation with the C.J.I. and such other judges as the executive may deem necessary in case of supreme Court appointments and in consultation with the C J I and C J of High Court and the Governor in case of High Court appointments. By Calling it a non-executive act and giving primacy to the C J I in appointment is empowering the Chief Justice of India indirectly with the executive function hitherto in the domain of the President. This un-necessary consolidation of the position of the C J I is not only at the cost of the Executive but also at the cost of other members of judiciary. The present framework of Constitution envisages only selection of Judges as a collective act

where involvement of C J I is a must, but does enpower C J I to appoint the Judges. This further acquisition of power is not feasible within the existing framework of the Constitution and can only be done by amending it which is a legislative act. Thus, judiciary cannot and should not do anything indirectly what it cannot do directly. The Court further opined that the recommendation finalised by the Chief Justice of India, unless for any particular reason and unconnected with the mere change of the Chief Justice or the Chief Minister justifying the same should not be re- opened and if in a given case the Union of India is of the view that the matter requires to be looked into again, a reference should be made to the Chief Justice of India and there can be a fresh look at the matter only if the CJI permits such a review of the case."

*Subhash Sharma's* is not the lone case in recent judicial pronouncements which strengthen the judiciary, particularly CJI not only at the cost of other organs of the government but also at the cost of other members of the apex court. Similar trend is discernible in other cases[17] as well. Here I will limit my discussion *to Veeraswami's case.*[18]

In *Veeraswami*, a case under the Prevention of Corruption Act, 1947, was registered by the C B I against the appellant, who was the then Chief Justice of Madras High Court. It was alleged that during the tennureship as a Judge and Chief Justice of Madras High Court, the appellant had acquired assets disproportionate to the known sources of income. The appellant had already retired by the time a final report was filed against him before the special Judge, Madras. The appellant contended that the Act[19] does not apply to him as the High Court and Supreme Court judiciary is beyond the purview of the said Act and hence his prosecution was illegal.

The Supreme Court (per Shetty J. & Venkatachaliah J., as he then was) held[20] that :-

> "The Act is not basically defective in its application to judiciary. All that is required is to lay down certain guidelines test so that the Act may not be mis used. This court being the ultimate guardian of rights of people and independence of the judiciary will not deny itself the oppurtunity to lay down such guidelines. It is accordingly directed that no criminal case shall be registered under Section 154, Cr. P.C. against a Judge of a High Court, Chief Justice of High Court or Judge of the Supreme Court unless the Chief Justice of India is consulted in the matter. Due regard must be given by the government to the opinion expressed by the Chief Justice of India. If the CJI the is of opinion that it is not a fit case for proceeding under the Act, the case should not be registered. If the CJI himself is the person against whom the allegations of criminal mis-conduct are received the government shall consult any other Judge or Judges of the Supreme Court. There shall be similar consultation at the stage of examining the question of granting sanction for prosecution and it shall be necessary and appropriate that the question of sanction be guided by and in accordance with the advice of the Chief Justice of India. It is necessary that the CJI is not kept out of the picture of any criminal case contemplated against a Judge. He would be in a better position to give his opinion in the case and consultation with the CJI would be of immense assistance to the government in coming to the right conclusion."



The Court here per majority (Ray, Shetty and Venkatachaliah J.J.) held that a criminal case against the Judge must be registered and decision regarding grant of sanction for prosecution of the judges must be taken by the President not only in consultation with the CJI, but *must be in accordance* with the advice rendered by CJI meaning what the Court is trying to say indirectly is that the CJI is the sole and the final authority to decide whether a criminal case should be proceeded against a Judge, other than himself, even before the prosecution is launched. Even if the apex Court was actually so concerned about the protection of judiciary from the unnessary interference of the executive, it did not have the power to give directions on these lines under the existing framework of the Constitution.

Sharma & Verma, J.J. rightly dissented on this issue and as per Sharma J.[21] :-

> "Taking into consideration the independence of the judiciary as envisaged by the Constitution, a binding direction that the Chief Justice of India will have to be consulted in the matter and steps would have to be taken in accordance with his advice cannot be issued by the Supreme Court on the basis of the provisions of the Constitution and the Act. The Governor of the State and the Chief Justice of High Court are as much involved in the matter of appointment of a Judge of the High Court as the Chief Justice of India ..... The approval of CJI can be introduced as a condition for prosecution only by the Parliament and not by the Supreme Court."

To sum up, it is evident that the Supreme Court is bestowing more and more powers in the Chief Justice of India at the cost of the Executive and the Legislature which does not fit into the existing scheme and the provisions of the Constitution. If the present trend continues, the Court is making not only itself powerful[22] but in future will also create an adjudicatory hierarchy within the Supreme Court itself.

## END NOTES

1. See A.rt 50 of the Constitution.
2. *See A.K. Roy V. Union of India (1982) 1 SCC 271.*
3. State of H.P. V. Parent of Student (1985) 3 SCC 169.
4. *K. Veeraswami* V. *U.O.I.* 1991(2)SCALE 150 (1991) 3SCC 655.
5. *Subhash Sharma V. U.O.I.* 1990(2) SCALE 836.
6. See Arts. *124 & 217.*
7. See Art. 222.
8. *Supra* note 6.
9. (1977) 4 SCC 193.
10. *Supra* note 7.
11. *S.P. Gupta* V. *Union of India* AIR 1982 SC 149.
12. *Supra note 5.*
13. *Supra* note 11.
14. *Supra* note 9.
15. *Supra* note 11.

16. *Supra* note 5 at page 847.
17. *Supra* note 6.
18. Supra note 4. Also see sub-Committee on Judicial Accountability V. Union of India (1991) 4 SCC 699.
19. Supra note 4.
20. Prevention of Corruption Act 1947.
21. (1991) 3 SCC 655 at 662.
22. 1991(2) SCALE 150 at 182.
23. See *Ramaswamy Case* (1991) 4 SCC 699.

# BOOK REVIEWS

**MAYNE'S HINDU LAW AND USAGE (13th Edition)** By Justice Alladi Kuppuswami, Bharat Law House, New Delhi, pp. 139 & 1288 Rs. 380/-

In his preface to the tenth edition of *Mayne's Hindu Law and Usage* Late S. Srinivasa Iyengar, an acknowledged authority on Hindu Law, stated:

> 'Mayne on Hindu Law and Usage' became, from its first edition, a classic, and from its Third, nearly one of the "sources" of Hindu Law: and two or, as they go in the legal world, three generations of lawyers have been brought up on it.

The partial codification of Hindu Law in the years 1955-56 and the far reaching changes introduced by it pose formidable problems in editing Mayne. A synthesis of classical Hindu Law and modern Hindu Law requires extraordinary editorial skills in addition to deep scholarship. Therefore one can understand the "considerable trepidation" with which the present editor undertook the arduous task of editing Mayne.

The present edition extends to thirty chapters stretching to a total of 1227 pages. The new enactments of 1955-56 which brought about far-reaching changes in Hindu Law, viz., The Hindu Marriage Act, 1955, the Hindu Adoptions and Maintenance Act, 1956, The Hindu Succession Act, 1956 and the Hindu Minority and Guardianship Act, 1956, have been dealt with in separate chapters. The work deals with such varied topics pertaining to Hindu Law such as the Nature and Origin of Hindu Law (Chap. 1) the Early Law of Property (Chap. 11) Benami Transactions (Chap. 29), Marumakattayam and Aliyasantana Law (Chap. 30). Of the eleven Appendices nine are enactments legislated over a period extending from 1850 A.D. to 1937 and also contains materials dealing with *Samskaras in Smrithis* and *order in obsequies*. Thus the book is unsurpassed in the wealth of material on Hindu Law.

Turning to the distinguishing features of Alladi Kuppuswami's edition, chapter Four dealing with "The Constitution and the Hindu Law" examines the constitutional validity of some of the statutory provisions and customary laws governing the Hindus. Regretably other text-writers do not pay attention to these aspects. Alladi Kuppuswami on the other hand adverts to these aspects. But perhaps owing to the habit of judicial caution he refrains from touching upon features of traditional and statutory Hindu Law which are regarded as violative of Fundamental rights but which have not come up for decision before the courts. For example, the Andhra Pradesh Assembly and later the Tamil Nadu Assembly in their preambles to the Hindu Succession Amendment Acts stated that the Mitakshara right by birth is contrary to the Fundamental right of equality before the law.

Similarly the validity of Section 6 of the Hindu Minority and Guardianship Act, 1956 gives precedence to father over mother in the matter of guardianship of a child is questioned. It is hoped that the learned editor will cast away his reticence and give fuller treatment to these and other like issues.

In the matter of treatment of traditional Hindu Law and the partial codification affected in 1955-56, the learned editor of Mulla preferred to treat them separately, that is to say, the commentary on the four enactments is given separately at the end. The learned editor of Mayne, on the other hand deals with the position under the existing statutory law immediately after the chapter dealing with the topic under the old law. For instance, the statutory provisions dealing with adoption under the Hindu Adoptions and Maintenance Act, 1956 have been dealt with after the chapter on adoption. This in the present writer's view is to be preferred as it reflects the changing conceptions viewed in the scale of time.

The reviewer is of the view that the account pertaining to custom should incorporate the scholarly researches of Dr. Kane (reproduced in Volume III of the *History of Dharmaśāstra* chapters 32 and 33) and particularly the distinction between custom and usage and the views of Jaimini and other earlier smriti writers as to when a custom is deemed to be binding. As these two lectures were delivered in 1944, it would appear that many of the former editors did not have the opportunity to notice them.

Among the notable features of Kuppuswami's edition is that all recent legislations affecting Hindu Law and its administration have been incorporated, *e.g.* the Self-Respect Marriages Act, 1967 the Benami Transactions (Prohibition) Act, 1988, the Family Courts Act, 1984, the State Amendments to the Hindu Succession Act, 1956 in Andhra Pradesh and Tamil Nadu.

This is the only work existing now that deals satisfactorily with the developments in the Hindu Law in the southern states.

To enhance the All-India character of the work and to promote its utility, the following suggestions may be kept in mind when bringing out the next edition of the work:

1. A section or chapter should be devoted to the aspects of Hindu law applicable in the North-Eastern states; and
2. A chapter should be devoted to Hindu law applicable in Goa and Pondicherry.

In one direction the present edition has fallen short of the high standards set by the earlier editions of Mayne, *viz.*, proof reading. One comes across wrong and misleading spellings of cases, e.g. *Babu Rao* for *Bhau Rao* (p. 177 pn. 1)., *Ranga Bai* for *Rangu Bai* (p.968 para 4). *Administrator-General* v. *Anandachari* has been cited as 19 Mad. 466 instead of 9 Mad. 466 (p. 66 fn. 6). The obvious printing mistake in the Latin maxim has been left uncorrected at page 137. At page 222 para 3 there is some mix-up. The facts of *Dastane* v. *Dastane* do not involve any issue



of adultery but only of cruelty. But the statement in the para suggests that the case is one pertaining to adultery. At page 229 the Indianism "cousin sister" has crept in. At page 413 the year of Hindu Succession Act has been given as 1950. It is also disconcerting that prelims like preface and table of cases have been numbered in Arabic numerals instead of the Roman numerals.

But all in all, the learned editor of the thirteenth edition of Mayne has succeeded in resurrecting its pristine position. The effort of the editor reflects the thoroughness and efficiency of Mylapore lawyers of yester-years. The statement in the blurb that "the book is a must for the Bench Bar and anyone else having anything to do with Hindu Law" is fully justified.

B. Sivaramaya*

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**PUBLIC LAW IN INDIA AND BRITAIN** By Sir William Wade, N.M. Tripathi, Pvt. Ltd., Bombay, pp. XV + 114, Price 90/-

*Public Law in India and Britain* by Sir William Wade, an acute legal thinker and internationally accredited scholar of public law, is an invaluable gift to the Indian legal community interested in comparative study of constitutional and administrative law. This monograph is the outcome of Nambyar Memorial Lectures for 1992 delivered by Professor Wade on the initiative of Professor N.R. Madhav Menon. Professor Menon deserve both commendation and congratulation for bringing out these lectures in the form of a book.

The themes chosen by Professor Wade for his four lectures are of seminal importance for the contemporary Indian discourse on public law issues involving the basic structure theory, the doctrine of judicial review, the problem of independence of judiciary and the role of legal profession.

In the first lecture entitled, "Constitution-Bedrock or Quicksand"? Professor Wade describes the constitutions as subject to the law of flux. Britain knows very little about constitutional changes by judicial manipulation, in contrast with Indian and the United States where it has been undertaken on a grand scale and in fascinating ways. The Indian Supreme Court according to him has altered the status of fundamental rights proclaimed by the Constitution, at one time holding them to be outside the amending power and at another time within such power but subject to the basic structure theory. That the constitution of a country rests more on quicksand than on a bedrock is exemplified by the Indian doctrine of basic structure. Professor Wade thinks that at present "while most of the basic structure remain hidden in the breasts of the judges, and also clearly hidden in the future, the

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quicksand is clearly gaining ground at the expense of the bedrock." (p.3). Acknowledging the Indian basic structure doctrine as a novel doctrine ranking as an outstanding feat of judicial statesmanship, Professor Wade wonders if this doctrine can usefully be employed to achieve a degree of constitutional stability. The defect of this doctrine, according to him, is that it is judge-made, leaving wide discretion to the judges to say what they believe to be basic law of the land. He therefore advocates the designation of "basic structure and framework through a series of specific amendments by reformulating Article 368 with the assent of half of the states". (p.13) If the structure is really so basic it ought to be set out clearly and comprehensively in black and white, he says.

Sir William regrets that the Indian Supreme Court has treated some of the most solemn words of the Constitution with scant respect particularly those relating to fundamental right to equality, right to freedom of speech, freedom of assembly and freedom of occupation. *Kesavananda* and *Waman Rao*, according to him, leaves these rights at mercy of any legislation which effects redistribution of property or prevent undue concentration of wealth. Such a construction "inverts the constitutional plan by setting directive principles above fundamental rights". (p.18)

Can parliament bind its successors ? British Parliament knows no limits on its power except one limitation that it cannot bind its successors. Professor Wade, however, dispels this belief by giving some recent examples where Parliament has attempted to bind its successors. In contrast, the Indian Judges have hardly faced the consequence of a legislature attempting to bind its successors. The author supports the view of Justice Khanna in *Kesavananda that*;

"No generation has a monopoly of wisdom nor has it the right to place fetters on future generation to mould the machinery of government". (p.9)

In India the numerous constitutional amendments have tended to loosen the fetters rather than to impose them.

Lectures two and three are devoted to an extensive comparative analysis of the doctrine of judicial review and the new dimensions of this doctrine in India and England. Professor Wade appreciates that judicial review in India stands on a firm bedrock which has been identified by the Supreme Court as one of the basic features of the Indian Constitution. He maintains that as a result of the famous case of *Anisminic* decided in 1968, Britain has also been able to give the doctrine of judicial review a place of pride. In this case the House of Lords outrightly disobeyed an Act of Parliament containing a clause ousting judicial review. The philosophy underlying this case, is, comparable to the Indian Supreme Court's approach in viewing judicial review as a basic feature of the Indian Constitution. The author's comparative treatment of new dimensions of judicial review doctrine, distinction between review and appeal, compensation jurisprudence and relaxed requirement of standing deserves high commendation.



Professor Wade has very high praise for the Indian doctrine of resonableness which has been promoted to a constitutional status by imaginative interpretation of Article 14. He hopes that in future the Court will apply the test of reasonableness not only to administrative action but also to legislative decisions. He is of the view that the doctrine of natural justice as developed in *Maneka Gandhi* is accorded a higher place in India than it is in Britain.

Commenting on Public Interest Litigation Professor Wade tells us that this concept is recognised in Britain too but the British Courts have not developed novel procedure as in India. In Britain there is a clear division between social work and advice on the one hand and the administration of justice, on the other. Social activists and other agencies can help prisoners, immigrants and various other disadvantaged groups through official legal aid machinery or through voluntary action but not through the courts.

In the concluding lecture the author critically reviews the Indian Constitutional policy and judicial responses to relating to independence of judiciary. The book ends with a narration of the recent developments in the British legal profession.

Parmanand Singh*

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**AN INTRODUCTION TO LEGISLATIVE DRAFTING** by P.M. Bakshi (4th Ed. 1992). N.M. Tripathi Pvt. Ltd., Bombay, pp. xii + 160 Price : Rs. 90/-

Legislative drafting is both a science and an art. It is a science because there is predictability about the results to be secured by applying certain rules. It is an art, as it deals with the manner apply the rules in the precise manner to achieve those results. It is, however, an applied art, with an end to attain and an effect to produce. Nemography (*i.e.*, the art of writing laws) is an art and like any other art, it cannot be practised by one who has not developed the requisite skill. This invariably requires mastery over the language and the ability to communicate. Precision and accuracy in the use of language are acquired by experience. The need to communicate laws to members of society is entirely a practical one, and it is very aptly highlighted by Lord Rodcliffe when he stated, "What willing allegiance can a man owe to a canon of obligation which is not even conceived in such form as to be understood?"[1] Thus the manner of expression has a vital significance. And although experience and practice count, there is ample room for guidance on and improvement of legislative drafting. However, in spite of attaining sufficient maturity in these aspects, the drafting techniques have a long way to go

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before they satisfy all those who have a right to be satisfied with the state of written laws.

In drafting legislation there are no clear-cut right ways and wrong-ways but there may be ways which are clearly wrong. Like all skills and crafts, drafting legislation cannot be learned completely from a book. Still, there are occasions when books may be of some help. A book may instruct and guide, but a drafts man needs much more — experience in knowledge of the law, maturity of judgment, an interest in and a feeling for language, practice, criticism etc. Books may help in attaining perfection in drafting and may incorporate the techniques which the draftsman should keep in mind while doing his job, but the mastery over these techniques he gains only through practice. There is also a widely held view that a legislative draftsman is born and not made, with the result that a draftsman generally finds himself in a cesspool of drafting with little or no help. In such a context, a book incorporating the drafting techniques, would be of some help. The book under review aims to serve as a guide and does not claim to provide a perfect draftsman, but only a step towards attaining that perfection.[2]

The book has thirty-one chapters in addition to index. It discusses each aspect which matters in drafting with precision and great clarity. Before starting on his venture, the author provides the list of do's and don't's which a draftsman should take into account. The book also tells about the process through which a bill has to undergo before it becomes an Act of Parliament (Ch. 19A) and without stopping there, it enlists the procedure through which an Act reaches to the public (Ch. 19B enforcement and publication). In Chapter 22, it delineates the rules of composition for legislative drafting, such as sentence construction, choice of words, style, arrangement of the sections etc. and highlight the importance of punctuation by according it a separate treatment (Ch. 22A). It deals very concisely with subordinate legislation (Ch. 14). Separate chapters have been incorporated on model clauses and skelton bills (Chapters 23 and 24). At the end, with a view to provide some training to the aspiring draftsmen, some exercises are given (Chapter 25).

The work, however, is very preliminary and has left many areas unattended or discussed cursorily. The importance of language, though well-recognised by the author (pp. 68-69, 114- 115), does not really gets the prominence as it otherwise has in drafting. Moreover, the importance has been further lessened by treating it in a passim manner. Similarly, the drafting of fiscal or penal statutes do not find any mention. Such statutes need to fit into the accepted principles and policies of the country in these vital areas. Special considerations relating the extra- territoriality of the offence, constitution and sanction accompanying the crime, retrospective operation of the provisions, exemption clauses have to be kept in mind in framing these statutes. Many of the chapters run into one or two pages only e.g. chapters 13, 16, 17, 18, 19, 19B, 20, 21 and 22. In fact, the matters discussed



thereunder don't require separate treatment at all. This also reflects the insignificance given to topics such as delegation of legislative power, protection clauses and finality clauses etc.

In sum, the book cannot be considered as a reference of authoritative text on legislative drafting and is not comparable to other works on the subject, such as *Thorton's Legislative Drafting*. However, coming from an Indian author, on a technical subject like legislative drafting, the book is an appreciable work. The book is running in its fourth edition, which itself shows its popularity with the class of people for whom it is meant, *i.e.*, the aspiring draftsmen. It can be recommended as a handbook to a student of legislative drafting.

S.K. VERMA*

## END NOTES

1. Lord Radcliffe, "Some Reflections on Law and Lawyers" 10 Camb. L.J. 361 at 368, cf. in G. C. Thorton's *Legislative Drafting* (2nd ed. 1979) p. vii.
2. Preface to the First edition, p. xi.

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**AMENDING POWER UNDER THE CONSTITUTION OF INDIA — A POLITICO-LEGAL STUDY,** By Sunder Raman, Eastern Law House, Calcutta & New Delhi 1990; pp. (11) + 358, price Rs. 200.00

Nobody at the commencement of the Constitution had ever speculated, much less conceived or expected, that so plain, simple and noncontroversial looking provision as Article 368 would lead to litigation from its very first application and would become a debatable issue for ever. At times it has created serious constitutional crisis. The creation or resolution of the crises has sometimes made unprecedented demands on the time and resources of the Supreme Court, Parliament and the executive and has seriously engaged the constitutional pundits, other intelligentsia and publicists. It has also drawn the attention of the courts and constitutional lawyers beyond our national boundaries. Though at the moment the debate on Article 368 is not as heated as it was from late sixties until the beginning of eighties, it has not died out and would live so long as the constitution survives. Comparisons may not be exact or appropriate but this debate may be likened to the one on judicial review in the United States which would continue to attract participation from different disciplinies in an unbroken chain.

It is this debate which Dr. Sunder Raman, an accomplished political scientist with strong legal credentials, has joined with a mission. The mission unmistakably is to demolish the thesis that the constitutional amendments are subject to judicial review.[1] One may or may not agree with him but he has presented his point of view very convincingly and in a highly readable work. The work reflects his erudition, deep understanding of the legal and other related issues, exceptional quality of critical analysis, sound articulation and a very systematic presentation.

In the introductory part of his work the author traverses a large territory encompassing the birth and growth of constitutionalism in the West from the time of ancient Greeks and its expansion in the East including the developing societies. The main theme of this long discription is the demonstration of close relationship between the social change and the constitutional institutions and principles. Since social change is an inevitable phenomenon, the constitutional institutions and principles must also change. In modern democracies the legislature represents the people and acts as the agent of such change and its authority to bring about that change must remain unrestricted.[2]

Giving an overview of the amending process generally he opines that there should be no limitations on the power of amendment of a constitution because such limitations turn the constitution into an end while it is and must be only a means to an end. After examining different forms of amending processes under the constitution of India, he concludes :

> An amendment procedure must be difficult enough to prevent its use as a part of the regular legislative process, and yet it should be easy enough to reflect the major long-range shift in public opinion. It is highly gratifying that the procedure for amendment of the Constitution of India is a judicious blend of rigidity and flexibility: it is in tune with a liberal-democratic set-up and provides for Parliament's unfettered right to make amendments to the Constitution.[3]



While he does not dispute judicial review of legislation, in his view "Judicial review of constitutional amendments is not generally permissible except on procedural grounds or to prevent the violation of the express limitations mentioned in the Constitution itself."[4]

From the relevant constitutional provisions and the judicial pronouncements he concludes that the Constitution of India envisages very limited judicial review of legislation while the judicial review of amendment is a non-question.[5]

In this background he sets to critically examines the *Golak Nath*[6], *Kesavananda*[7], *Election*[8] and *Minerva*[9] decisions successively. His critique is very comprehensive and includes full background, facts, arguments on both sides, every opinion of the Court and his own well supported and anticulated arguments on every issue. He finds no justification for the implied limitations on the power of amendment created by the Court in *Kresavananda*. He is opposed even to express limitations which at one time were proposed but could not be introduced because of inadequate support in the Rajya Sabha. He is quite unhappy that *Minerva*, whose ratio has been doubted in *Sanjeev Coke*[10], has resurrected *Kesavananda* "because Palkhivala, a very effective and articulated counsel, surcharged the court room by appealing to the emotions of judges and they fell a prey to institutional bias"[11].

In support of his opposition to any limitations on the amending power, the author goes into the concept of social justice and its need and incorporations in the constitution which the Constitution of India amply reflects in its original form and has strengthened through various amendments. It is the failure of the judiciary to appreciate this dynamics of social justice reflected in the Constitution which has compelled Parliament to amend the Constitution from time to time. Over and above this if "the judiciary starts invalidating the amendments by questioning the right of the legislative to amend the Constitution, it clearly oversteps its authority and sets out on a suicidal path".[12]

Discussing the extent of amending power under Article 368 after the 24th and 42nd amendments and also the major changes introduced in the Constitution by the latter, the only limitations on that power which he admits are that "*the procedure laid down under Article 368 must be followed and the amendment of the Constitution should not create vacuum*".[13] Subject to the condition that maximum support of the people must be obtained and the "basic features" should not be changed too often, he advocates periodical revision of the Constitution.[14] He laments that the 42nd amendment did not fully utilise the opportunity for a more thorough revision of the Constitution and stopped at a patchwork.[15] In sum, the author believes that in the modern democratic world people's will reigns supreme and operates through Parliament. It must prevail even against a written constitution if exercised in the form of an amendment according to a set procedure and without creating a vacuum. Only in this approach lies the progress and prosperity. The limitatiaons innovated by the Supreme Court of India on the amending power are inconsistent with that model and reality and are, therefore, disastrous. Sooner they are removed better it is for the country and its future.

Of course, the author's argument holds a great truth and must be given due consideration and respect. But at the same time, as he would also admit, constitutional democracy cannot be equated with majority rule. As the author himself notes,

today most of the constitutions limit the majority rule and many of them also put complete ban on certain amendments. They do so, notwithstanding the powerful arguments to the contrary some of which have been very ably pursued by the author. This is a natural consequence of the refinements in constitutional democracy introduced in the course of experience gained from its working. Of course, our Constitution does not and did not provide any express limits on amending power, but it is a long established view that there are inherent and inbuilt limitations of that power.[16] The author himself admits that the amending power does not include the power to create vacuum. What creates and what does not create vacuum may be less indeterminable than the basic structure but that proves that any and everything cannot be done in the name of amendment. At the ideological plane it may be true that initially certain sections of the society challenged only certain kinds of amendments in the hope of gaining some advantage from the limitations on the power of amendment. But in none of the cases in which such limitations were recognised or applied they could make any immediate gains. Nor has such recognition or application hampered any desirable constitutional amendments. Thus what has been gained in the process is greater respectability and sanctity for the Constitution and elimination of the possibility of introducing certain kinds of amendments such as the 39th amendment. Much of the apprehensions of uncertainty expressed by the author have also been removed by the Court in its ruling on the 52nd amendment that if free and fair participation has been ensured in the amending process the Court would not go into its merits though of course it would expect even wider participation by a liberal reading of the requirement of states' participation in such process.[17] With this emphasis on procedural rather than substantive requirements, hopefully the gap in the author's and the Court's approach would narrow down and there would be greater appreciation of the Court's ability to check the misuse of amending power and of Parliament's role in guiding the destiny of the nation through suitable amendments.

These remakrs, however, in no way undermine the remarkably high quality of the author's work for which he deserves every appreciation. He has maticulously avoided any pedastrian and repetitious remarks or arguments and has hardly left out anything worth saying on the subject. Thus every word of his work is worth reading. As the work is highly readable and concerns a very vital issue for our society, it must be read with profit and pleasure by everyone immediately or remotely connected with that issue or having an interest in it.

MAHENDRA P. SINGH*

## END NOTES

1. p. (8)
2. p. 30
3. p. 60
4. p. 76
5. p. 90
6. Golak Nath v. state of Punjab, AIR 1967 SC 1643
7. Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461

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8. Indira Nehru Gandhi v. Raj Narain, AIR 1975 SC 2299
9. Minerva Mills Ltd. v. Union of India, AIR 1980 SC 1789
10. Sanjeev Coke Mfg. Co. v. Bharat Coking Coal Ltd., AIR 1983 SC 239
11. p. 209
12. p. 247
13. p. 282. Emphasis in the original.
14. p. 283. Note the author's admission of "basic features"
15. p. 269
16. See D. Conrad, Limitation of Amendment Procedures and the Constituent Power, XV-XVI *Indian Year Book of Int'l, Affairs*, 347-430 (1970) and "Constituent Power, Amendment and Basic Structure of the Constitution : A Critical Reconsideration", 6-7, *Delhi Law Review*, 1 (1978-79)
17. Kihoto Holohan v. Zachillhu, 1992 Supp (2) SCC 651

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**LEARNING THE LAW** By Glanville Williams, Q.C. LL. B. F. BA, Universal Book Traders.

On the Study of Laws, this book aims to help those who have decided to Law whether in University or as a professional qualification. It also aims to be a guide, philosopher and friend to the readers at early stage of his legal studies. Sir R. North 'On the Study of the Laws' has rightly remarked *"A man has but one youth, and considering the Consequences of employing that well, he has reason to think himself very rich, for that some, all the wealth in the world will not purchase another."*

Law is the comment of society and an essential medium of chang in understanding social Values. The book shares the views of Anon. *"He that knows and knows not that he knows is asleep wake him"*. Of course this little Angel in your hand would certainly wake you up. As there is a great deal of information and advise to help you to gain the maximum advantage from the book.

The book not only introduces problem but also describes their redressal. Law students will find the book useful in understanding the Law and to prepare for the examinatiaon and new contents would find helpful advice on the opportunity available both with in the legal program and outside it.

The book is devided into 14 sections. First section **'Division of the Law'** is subdevided into Crimes and civil wrongs, Courts with civil jurisdiction, the classification of civil wrong, Courts with criminal jurisdiction, Other Courts, the titles of cases, Substantive and adjectival law and Further reading. Second section **'Common Law and Equity'** deals with the Common Law, Equity, Common Law as made by the judges. Third section **'Mechanism of scholarship'** further explains the lay out of the Law Library, Law reports, How to find a reference, Statutes, Statutory Instruments and periodicals. Section four deals with **'Methods of Study'** and refers to Gay, Fables II who said *"Learning by study must be won, 'T was ne'er*

*entailed from son to son"*. It also tells about textbooks, casebooks, lectures and classes and the study of history: Fifth sections tells about **'Technical terms'** with Dictionaries, Pronounciation and legal abbreviation. Section six of this mini encyclopedia equips the readers about **Case Law technique** and further reflects the importance of Ratio dicidendi and orbiter dictum, distinguishing obeter dicta, how much of a case to remember, divergent opinion, the names of the Cases, the hierarchy of authority, circumstances effecting the weight of a decision, judicial law making, introducting cases into answers, the succint way of stating cases, etc. Section seven **'Interpretation of statutes'** tells about the context rule, interpretation, the light policy, fringe meaning, the literal rule, interpretations to avoid absurdity: the golden rule, the miserable rule and also discusses certain presumptions.

Eighth section **Working out problems** tells about facts stated in the problems are conclusive or not, Omitted acts, Two points of techniques, Rules and authorities, Doubt, Problems on statutes, Relevancy, Questions devided into parts, The overleaping of subjects, The answering of Problems in criminal Law and torts. Section nine **'Answering Book work Questions'** is further devided to explain about subdevided questions, Relevancy, Getting at the point, criticism, the use of forensic mannerism, the arrangement and wording of the answer, handwriting and orthography. Section ten tells you **points to be considered in the examination room** such as first read examination paper, then choose the question and it tells about the pressure of time and self contradiction.

On Examinations it is quoted on page 155 of this book *"Examinations are formidable even to the best prepared; for the greatest fool may ask more than the wisest man can answer"* - C.C. Colton Lacon. Section Eleven tells of **Moots and mock trials** and rightly quotes in the words of Lewis carroll in Alice in the wonderland *'In my youth' said his father,' I took to the Law, and argued each case with my wife, And the muscular strength which It gave to my jaw, Has lasted the rest on my life'* Section twelve equips, the reader with **Tools of Legal research** and further tells about looking up practical points, cases judicially considered, statutes, statutory instruments and research proper. Section thirteen **'From learning to Earning'** takes the reader to the important aspect of earning and explains how to practice at the bar, the bar as stepping stone, solicitors, Lawyers in the civil service, Local government, The general category of the civil service, Business Management, Teaching, Accountancy, The social services, Applying for jobs and some other general matters relating to earnings. Section fourteen which is the last and closing sections gives the reader an idea about Drama, Fiction, Biographies, Trial Essays, Humour, History, the constitution, Jurisprudence, logic philosophy and economics, Criminology and Penology. Again in the sequence of quotations here is the worth mentioning quote by Scoti Guy Mannering *"A lawyer without history or literature is a Mechanic, a mere working meason; if he possesses some knowledge of these, he may venture to call himself an architect."*



Since 1945 of the first edition of this book eleven editions have come out and it has placed itself deep into the heart of the profession and this 1993 Indian reprint which is even less than one third of the Price of orginal edition will get a warm welcome by the Indian teachers and students, not only in the legal profession but also in other disciplines and will be essential reading for any one embarking on the study of Laws or on a course that includes element of Law.

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