

FACULTY OF LAW DELHI UNIVERSITY

Delhi Law Review -- Volume XVI : 1994

Editor

Professor Tahir Mahmood

Dean, Faculty of Law & Head of the Department

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Contents

From the Dean's Desk v

Section I : Faculty & Its Programs

Tahir Mahmood

Delhi University Law Faculty :

A Brief Story of Its Seven Decades 1

Lakshmi Jambholkar & Tahir Mahmood

Professor V. C. Govindraj : Profile of A Retiring Colleague 12

K. Ponnuswami

Revision of the Curriculum of Law Courses in

Delhi University : Some Proposals 15

V.M. Tarkunde, Sardar Ali Khan & Others

Criminal-Law Administration and Human Rights in Modern India

[R. V. Kelkar Memorial Lecture 1993] 30

Section II : Students' Contributions

Puneet Singh Arora

Inequities of Laws on Dowry Deaths : A Critique 46

Ram Mohan Singh

Legislatures' Privilege to Prohibit Publication of

Their Proceedings and Freedom of Speech : A Critique 53

Darpan Wadhwa

An Autonomous Election Commission

Constitutional Perception 60

Amar Kumar Sundaram

Offence of Rape

Reflections on A Recent Supreme Court Decision 72

Prashanto Chandra Sen

Working of Water (Control and Prevention of Pollution)

Act 1974 : A Critique 76

citation : XVI DLR... (1994)

subscriptions

current : Rs. 150 ; \$ 20

back volumes : Rs.200 ; \$ 25

mailing address

Dean, Faculty of Law, Delhi University, Delhi-110007, India
phones: [91] (11) 7257483; 7257725/319 & 421

Section III : Other Contributions

Tahir Mahmood

The New Judicial Trend of Citing Works

of Living Authors: A Study in the Area of Family Laws 83

K. I. Vibhute

Transnational Commercial Activities of States

and Sovereign Immunity: An International Perspective 96

Sonia Balda & Dhiraj Sanghi

Software Protection under Intellectual Property

Regime: Is Fine-Tuning of Copyright Law Necessary? 106

C.M. Jariwala

Indian Environmental Law in 1992: A Critical Appraisal 121

Mohammad Shamim

Expediting Justice: How to Clear Backlog in the Courts 141

Virendra K. Ahuja

Space Activities and Environmental Pollution: A Critique 147

P. S. Sangal & S.K. Dixit

Problems in Transfer of Technology to Developing

Countries : Responses of International Law 158

Gurdip Singh

Missile Technology Control Regime

The Case of Adherence by India 176

P. C. Moharima

Ode on Code -- Crimes, Causes and Cure [poem] 190

Section IV : Bibliography & Index

bibliography

Books of Delhi University Law Faculty-Teachers 192

checklist

Research Work in Delhi University Law Faculty 1991-1994 198

index

Delhi Law Review: Volumes I to XVI [1972-1994] 203

From the Dean's Desk

With season's greetings and best wishes for a very happy new year I present to the readers Volume XVI:1994 of the *Delhi Law Review*. May we Indians live like Indians in this new year, and for good in the future, forgetting like a bad dream the bitter memories of what happened during 1992-93 on the communal front. I begin with the new year prayer—long live the Nation; long live our unity, integrity and unity in diversity.

In the readers' hands is the latest volume of the *Delhi Law Review*, edited by myself.

Thrice in the past I was appointed Editor of this prestigious journal—in 1978 by the then Dean late Professor D.K. Singh, in 1984 by Dean K. Ponnuswami, and then in 1992 by my immediate predecessor Professor P.S. Sangal. I had to give up the responsibility mid-way—in 1978 due to an unscheduled foreign visit, and in 1984 due to my pre-occupation with the headship of Law Centre II. In 1992, too, for unavoidable reasons I had to pass on the job to my colleague in the Journal Committee, Dr. Nomita Aggarwal. Last year's Volume [XV: 1993] was, again, stated to be edited by me, but responsibilities of the Dean's office compelled me to request, once again, Mrs. Aggarwal to continue. And she, of course, did a good job. This year the Volume has been fully planned and edited by myself, and I am indeed happy to have been able to render this service to the Faculty in the second year of my term as the Dean.

With the present Volume the journal enters the 23rd year of publication. It was launched and first published as an annual issue in 1972. Three annual issues were brought out till 1974 [Volumes I to III]. The second of these—Volume II: 1973—contained papers and proceedings of the 12th All India Law Teacher's Conference 1972, sponsored by our Faculty. From 1975 to 1982 we published combined issues for each two years—four in all for eight years [Volumes IV to XI].

In 1983 the journal stopped appearing, for unavoidable reasons, and was not published till 1989. After a gap of seven years it was revived in 1990. The 1990 Volume which, accurately, should have been numbered as Volume XIX, was inadvertently given No. XII. Since then three more annual volumes—one each for 1991, 1992 and 1993 [Volumes XIII to XVI]—have come out.

The seven-year gap—1983 to 1989—looks odd. With a view to filling this gap and clearing the arrears a special *Backlog Supplement*—representing all the missing volumes—is being included in the present Volume. In order to leave undisturbed the volume numbers allotted to the journal from 1990 onwards (Volumes XII to XVI), this *Backlog Supplement* is being numbered as Volume XI-A [1983-1989].

All Volumes of *Delhi Law Review* have been edited by devoted teachers of the Faculty. Given below is a chronological table showing the names of principal editors of the journal:

years	volume nos.	editors
1972	I	P.S.Sangal
1973	II	M.C.Jain Kagzi
1974	III	-do-
1975-1976	IV-V	K.Ponnuswami
1977-1978	VI-VII	-do-
1979-1980	VIII-IX	B.Sivaramayya
1981-1982	X-XI	K.Ponnuswami
1983-1989	XI-A	Tahir Mahmood
1990	XII	S.N.Singh
1991	XIII	-do-
1992	XIV	Nomita Aggarwal
1993	XV	-do-
1994	XVI	Tahir Mahmood

Until now the *Delhi Law Review* has put in print over 2600 pages containing articles, notes, comments, reports and reviews, etc., penned by dedicated Faculty teachers and students and eminent external contributors.

This year's Volume begins with "A Brief Story of Delhi University Law Faculty's Seventy Years," which I have personally prepared with great care and caution. Hope the readers will find the story interesting and informative.

Professor V.C. Govindraj, a towering personality of the Faculty who has served it for thirty five years, retired in November 1993. His profile, penned by Lakshmi Jambholkar and myself, appears in this Volume.

Then there are in the Volume, as usual, articles, notes and case-comments, of external and internal contributors—teachers, researchers, students and others. The section containing students' contributions precedes that containing other contributors. This was well-deserved by those five brilliant student-authors of the year who have given us exceptionally good articles. Book-reviews, which had over the years become unduly disproportionate in bulk, have been dispensed with in this Volume.

The Volume ends with a beautiful 'Ode on Code' penned by one of our poet-colleagues--the genius called P.C. Moharana.

What did the *Delhi Law Review* [DLR], when launched in 1972, aim at—and what has it stood for all these years? Let us find the answer by sampling its editorials of the past:

"No law school, much less Delhi Law School, will be worth its name without a journal projecting the research work of the Faculty. The primary purpose of this Journal is to focus attention on the burning legal problems as perceived by a discriminating Faculty. Though we are not very ambitious in our plan, our aim is to develop into a first rate journal!"

—Dean K.B.Rohrigi: DLR, Vol. I: 1972

"The plans for making *Delhi Law Review* a premier law journal, at least for developing countries, are no doubt ambitious. But then one may recall the Biblical saying and ask: 'A man's reach must exceed his grasp, or else for what is the heaven meant?'"

—Dean Upendra Baxi: DLR, Vol. III: 1974

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

—Dean P.S.Sangal: DLR, Vol. XII: 1990

Has the *Delhi Law Review* achieved the goals which it set for itself?

Is it going on the right track? Let the readers decide.

A large number of our teachers and students—past and present—have written in the pages of the DLR since its launching in 1972. Many of our teachers have been writing in several other journals and have also authored and edited books of their own. A large number of students have

done with us Ph.D. research-work in important areas of study; while many have written Master's degree dissertations. All this, I strongly feel, needs a proper indexing in the DLR to enable its readers to form an opinion regarding our academic and research output. I have, therefore, got prepared:

- (i) a bibliography of books authored and edited by the Faculty teachers;
- (ii) lists of Ph.D. topics registered with us since July 1991 [those completed and registered till then were listed in DLR, Vol. XIII: 1991] and Master's degree dissertations registered/completed during the academic year 1992-93;
- (iii) an index of all the articles, etc, published in the DLR since 1972.

All these appear in the present volume of DLR in the section 'Bibliography and Index'. I hope it will be possible for the DLR to offer in some later volume a bibliography of Faculty teachers' articles published in other journals, as also a complete list of Master's degree dissertations so far submitted to us. Annual updating of the list of teachers' books and articles as also of topics of Ph.D. theses and LL.M./M.C.I. dissertations will, hopefully, be retained by my successors as a regular feature of the journal.

I have managed to obtain ISSN for our journal. It appears on the back page of this volume.

Readers are welcome to send us suggestions for further improvements of the journal and contributions for its next Volume [XVII:1995].

New Delhi
15 February 1994

Tahir Mahmood
Professor Tahir Mahmood
Dean, Faculty of Law, D.U.
Editor, *Delhi Law Review*: 1994

TAHIR MAHMOOD
Professor & Dean, Faculty of Law, Delhi University

Delhi University Law Faculty — A Brief Story of Its Seven Decades

I. Introduction

The Delhi University Act, which established and incorporated the University of Delhi, came in force on the first day of May 1922. The Act had given to the newly established University the power, inter alia, "to provide for instruction in such branches of learning as the University may think fit, and to make provision for research and for the advancement and dissemination of knowledge." In terms of this statutory provision the University established, in the third year of its life, the Faculty of Law with the Vice-Chancellor as its Dean. The Faculty started professional law classes in July 1924.

After the enforcement of the Delhi University (Amendment) Act 1943, many changes were made in the academic and administrative structure at the University.² Following this development, in 1944 came into existence a Department of Law with a full-time Professor as its Head. The Faculty of Law, established two decades earlier, remained a single-department Faculty.

Through a process of sub-departmental decentralization, started in 1969 and completed in 1975, the Faculty later grew into a multi-unit Department of its own kind. Today it is one Faculty, and one Department, enveloping three distinct units — Campus Law Centre, Law Centre I and Law Centre II — besides its postgraduate and research organization which remains central.

In 1994 the Faculty of Law completes seventy years of its life, while the Department of Law enters its golden-jubilee year. At the same time one of the constituent units of the Faculty — the Law Centre I established in 1969 — celebrates its silver jubilee.

On this occasion of three-fold importance for the Faculty I offer readers of the *Delhi Law Review* a brief sketch of the Faculty-cum-Department of Law and its constituents in a historical perspective.

II. Courses & Curriculum

Bachelor's in Law

In 1924 the Faculty had taken off with a two year postgraduate course

in law leading to the degree of Bachelor of Laws (LL.B.). The classes for the course were held in the mornings. Yet LL.B. could be combined with any other postgraduate course of the University.

In 1942 the Faculty started separate evening classes for the LL.B. course. These were taken advantage of mainly by those who wanted to obtain a law degree remaining otherwise busy during the day.

Following the creation of the Department of Law in 1944, LL.B. was elevated to a full-time course no more allowed to be combined with any other course. LL.B. classes, however, continued to be held both in the mornings and the evenings. From the very beginning LL.B. degree could be obtained by passing written examinations in all the prescribed courses.

Another Bachelor's degree course in law introduced in the Department, B.C.L. (Bachelor of Civil Law), was later abolished. An undergraduate course -- Certificate of Proficiency in Law -- also had a short-lived existence.

In 1966 LL.B. became a three-year course. At the same time the Faculty introduced the semester system, dividing three years of LL.B. course into six bi-annual semesters. For class-room teaching it introduced the case-method, to be combined with the old lecture-method.

At its inception in 1924 the LL.B. course consisted of instruction mainly in professional subjects like criminal law, civil and criminal procedure and evidence. During the course of time the curriculum has been greatly enlarged and improved upon. LL.B. students now study nineteen compulsory and eleven elective subjects -- the latter drawn from a wide variety of twenty-six options.³

Until 1990 admissions to the LL.B. course were made on the basis of marks obtained at the qualifying examination. In 1991 was introduced the system of an entrance-test for LL.B. admissions. The intake for the LL.B. course, which was 50 in 1924 and 300 in 1944, has now risen to well over 1500. The number of students taking the entrance-test has been rising and has now gone over five thousand.

Master's in Law

A two-year Master's degree course in law leading to LL.M. degree was started in the Faculty at about the time of the creation of the Department of Law in 1944. It was regarded as one of the most prestigious courses offered by the University, available only to those who could pursue it strictly as full-time students.

Later, for the benefit of those who wished to obtain LL.M. degree while remaining in some service or profession, the same course was made available also in a three-year scheme of study. The two schemes shared everything else except their duration.

When the semester system was introduced in the Faculty in 1966, two-year and three-year LL.M. programs were respectively divided into four and six bi-annual semesters. In either case the degree could be obtained by passing written examinations in each of the prescribed courses and writing a dissertation towards the end of the course.

Keeping in view the needs of foreign students aspiring to join our Master's course, the two-year LL.M. course was made available to them with facility to write research papers, in lieu of written examinations, in some chosen papers as approved by the Faculty. This was called M.C.L. -- Master of Comparative Law -- equivalent to, and governed otherwise by all rules and regulations meant for, the two-year LL.M. course.

In 1969 a three-year LL.B. degree had been made compulsory for admission to the LL.M. course. For the holders of the old two-year LL.B. degree wishing to join LL.M., a bridge course called 'Pre-LL.M.' was then introduced for a period of twenty years. It was abolished in the academic year 1988-89. The M.C.L. course remained available to those foreigners who had obtained a foreign law-degree entitling them to practise in courts.

Until 1989 admissions to LL.M. course were made on the basis of marks obtained at the LL.B. or equivalent examination. In 1990 the Faculty introduced an entrance-test for admission to LL.M. Foreigners seeking admission to the M.C.L. course were exempted from the entrance-test requirement.

Fifty years ago the LL.M. course consisted of an advanced study of some of the subjects taught at the LL.B. level along with subjects like Roman law and legal history. In the course of time the curriculum was gradually reformed. Today LL.M. and M.C.L. students study two compulsory courses and nine elective courses to be drawn from a list of thirty subjects -- national and international.⁴

LL.M. intake, which was 5 when the course was started fifty years ago, has now risen to 65. Over two hundred students from all over the country now take the entrance-test for admission to this course. On our M.C.L. rolls [annual intake: 10] there have been students from various countries of Africa, West Asia and South and South-East Asia.

Research degrees in law

When in 1944 the Faculty of Law became a proper Department of Studies under the University Statutes and Ordinances, attempts were made to develop research work in law leading to a doctoral degree. Ordinance VI-B provided regulations for the degree of Ph. D. in law and to administer them set up a Board of Research Studies in Law (BRSI.) to be chaired by the Dean *ex officio*.

In a period of about fifty years over forty-five persons—including a few foreign nationals—have obtained our Ph. D. degree. Scholars now on our Ph. D. rolls include those from Afghanistan, Iran, Syria, Jordan, Nepal and, of course, India. Research work completed, or in progress, covers various subjects falling in the domain of municipal, international and comparative laws.⁵ The Faculty now offers also a post-doctoral degree—Doctor of Civil Laws [D.C.L.]. Its availability is restricted to those who have obtained a Ph. D. from Delhi University or having Ph. D. from any other university, are on the staff of this university. This degree can be awarded on research work—independent and published.⁶

III. Faculty Units

For forty-five years since its inception the Faculty remained—both academically and administratively—a single unit. Until 1968 all its teaching and research activities—including the evening LL.B. classes started far back in 1942—were carried on under the same roof.

In 1969 a group of University and Faculty administrators designed a scheme to provide a separate venue for the evening LL.B. classes.⁷ So banished from the Faculty building on the North Campus of the University, these classes found a home first in the D.A.V. School building in the downtown Paharganj area. Later they were shifted to the N.P. School building in Mandir Marg hired for the purpose. Two years later additional LL.B. classes started, in the evenings, at another hired accommodation—the ARSD College building at Dhaura Kuan in South Delhi. Initially teachers were sent to or recruited for both these places by the Faculty which placed each of them under the administrative charge of a senior teacher functioning under the authority of the Dean.

In July 1971 the two establishments in Mandir Marg and Dhaura Kuan were christened as Evening Law Centres, No. I and No. II, respectively. Thus came into existence two separate out-campus units of the Faculty, later placed under the regular charge, with some autonomy, of a locally stationed Professor (or Reader)-in-Charge. Both the Centres, however, fully remained integral constituents of the Faculty for all purposes.

At the time provision was made for the holding of evening LL.B. classes at two different places away from the North Campus, morning LL.B. classes had remained housed in the Faculty's own building in Chhatra Marg, managed by the Dean along with postgraduate and research studies in law. The system remained in force till 1975.

In May 1975 for the first time the Dean of the Faculty was drawn, under the principle of rotation, from one of the two newly created Evening Law Centres. At this stage, what had remained of the LL.B. teaching and its management at the Faculty's own premises at the North Campus was

reorganized into a separate administrative unit called the Campus Law Centre, having its own Professor-in-Charge.

Exclusive charge then remained with the Dean only of the postgraduate and research studies in the Faculty. As regards the LL.B. course at the three different Centres, the Dean was now to share his authority and functions with the Professors (or Readers)-in-Charge of the three Centres.

It was gradually realized that the prefix "Evening" in the names of Law Centre I and Law Centre II was creating lot of misconceptions with all concerned regarding the nature of LL.B. course there—whereas it, in fact, was absolutely the same as that at the Campus Law Centre. In 1976, then, the prefix 'Evening' was dropped from the names of both the Centres, which now became Law Centre I and Law Centre II.

In 1978 Deanship of the Faculty reverted to the Campus Law Centre and remained with it for the next six years. During this period all the properties and material resources of the parent institution were wholly taken by the Campus Law Centre, to the total exclusion of the other two Centres of the Faculty. With the massive development of the Delhi University South Campus (DUSC) in and around Dhaura Kuan, it was reasonably expected that Law Centre II would have a respectable home on the sprawling DUSC lands. The hope has so far been belied. Over 22 years after its creation, Law Centre II has been able to secure only a foundation-stone on a small piece of land on DUSC premises. Till now it remains housed in the ARSD College building, facing year after year the landlordly temper and tantrums of the College management. Law Centre I, too, has been facing all the hazards of hired premises.

Despite the scholarly potential of their teaching facilities and the academic excellence of their students, Law Centres I and II remain awfully underdeveloped due to want of proper homes. Happily, the third Centre of the Faculty is in full enjoyment of all that the Faculty was able to achieve, in well over half a century, in terms of material facilities and comforts. The University will perhaps take another half a century to provide similar facilities to the other two Centres of the Faculty.

L.L.M., M.C.I., Ph. D. and D.C.L. have always been, and remain, Faculty programs managed in all aspects by the Dean. For these courses there is at present no separate administrative unit; no separate teaching staff and no exclusive facilities. All these have been managed by successive Deans since 1975 with the assistance and courtesies extended by the three Centres of the Faculty and their teaching staff. The Dean's office, of course, has its own administrative staff.

IV. Builders, Reformers & Administrators

The founder of the Faculty was a noted jurist of his time, Sir Hari Singh Gour⁸—the first Vice-Chancellor of the University (1922-26). His early successors made their respective valuable contributions during their tenures—the most distinguished among them being Nawab Abdur Rahman (1930-34) and Sir Maurice Gwyer (1938-50).⁹ It was Sir Maurice who, in 1944, turned the Faculty—until then a centre of professional training—into an academic Department of Studies.

The Faculty owes its present academic system and curriculum, to a great extent, to two eminent judges of Independent India. The first of them was the former Supreme Court Chief Justice late P. B. Gajendragadkar who headed in 1963-64 a Faculty Reform Committee¹⁰. The other was a former Chief Justice of the Delhi High Court, late V. S. Deshpande, who in 1986 chaired the second Faculty Reform Committee.¹¹ Major recommendations of the two committees have given to the Faculty most of its present academic and administrative rules and regulations.

Under a Ford Foundation Grant a group of prominent Law Professors from the USA had visited the Faculty in 1967 and played an important role in its curriculum development program.¹² The University Grants Commission of the Government of India has always been extending help and assistance to the Faculty. In 1991 it sanctioned to the Faculty some new teaching and research positions, with an accompanying development grant, under its Special Assistance Program.

By initiating, proposing and implementing reforms suggested by the national and foreign experts and schemes sanctioned by funding agencies, successive Deans of the Faculty did make substantial contributions to its overall development.

Deans & Heads of the Department

Before 1944 Deanship of the Faculty was held on an honorary basis by eminent people having other major occupations. The first among them was Vice-Chancellor Hari Singh Gour, and the last an eminent lawyer of his time Ram Kishore.

The first full-time Dean of the Faculty and the first Head of the Department of Law was the late R. U. Singh of Lucknow. Doyen of legal education in India, he served the Faculty for about one year (1944-45) and put it on the academic track under the stewardship of Vice-Chancellor Sir Maurice Gwyer.

R. U. Singh was succeeded by S. S. Nigam, also from Lucknow. The second Dean, too, had a brief spell of about one year (1946-47).

During the year of Independence L. R. Sivasubramanian took over and

adorned the position of Dean and Head of the Department for thirteen long years. With Hafeez-ul-Rahman and Anandjee, then Law Deans of the other two central universities of the time—Aligarh and Benaras—Subramanian dominated the scene of legal education in India for over a decade. He retired in 1962. During his tenure, for a brief period M. P. Jain had acted as the Dean (1955-56).

In January 1963 M. Ramaswami took over as the Dean and Head of the Department. A noted expert on Indian and American constitutions and author of many renowned books, he remained in the position for a little over two years. On late M. Ramaswami's retirement in March 1965, constitutional-law expert P. K. Tripathi came from Allahabad to take the reins of the Faculty. Six years later the position was assumed by K. B. Rohatgi, specialist in corporate laws.

On K. B. Rohatgi's elevation to the position of Director of South Campus of the University in May 1975, Upendra Baxi—then Professor-in-Charge of Law Centre II—was appointed as the Dean and Head of the Department. He was the first occupant of the office to have been given a three-year tenure which he completed in 1978.

In 1978 another constitutional-law expert D. K. Singh took over the Dean's position. He remained in office till 1981 and was succeeded by P. K. Tripathi, who had a second three-year term till 1984.

In 1984 Law Centre II gave another Dean to the Faculty—K. Ponnuswami, specialist in the laws on intellectual and industrial property who had also been for a brief period a Director in the Monopolies and Restrictive Trade Practices Commission.

In 1986 on completing two years in office Ponnuswami went on a sabbatical and was succeeded by K. K. Nigam of Law Centre I. From him the position was taken over in June 1989 by P. S. Sangal—of the Campus Law Centre—specialist in corporate laws who later took interest also in environmental jurisprudence.

On 20 June 1992, nearly eighteen years after joining the Faculty, I took over as the fifteenth full-time Dean of the Faculty and Head of the Department of Law.

Campus Law Centre

The first Professor-in-Charge of the Campus Law Centre was Cambridge-educated Lovika Sarkar (1975-76). After her, till the introduction of the principle of three-year rotation in 1984, the position was held by D. K. Singh (1976-77), J. N. Saxena (1977-79), A. S. Bedi (1979-80) and P. S. Sangal (1980-84). After the introduction of rotation the office has been occupied for varying periods by J. N. Saxena (1984-85), N. R. M.

Menon (1985-87), B. Sivaramayya (1987-88), B. Errabbi (1988-89), Surinder K. Verma (1989-92) and Mata Din (*continuing*).

The first Professor-in-Charge of the Campus Law Centre, Lotika Sarkar, was offered Deanship of the Faculty which she had declined. Since its creation in 1975 the Centre has sent three Deans to the Faculty — D.K. Singh (1978-81), P.K. Tripathi (1981-84) and P.S. Sangal (1989-92).

Law Centre I

This Centre of the Faculty was at its beginning managed by late M.L. Shrimali. Among his successors were M.P. Jain, G.M. Sen and K.K. Nigam. When the principle of rotation was introduced in 1984, late P.G. Krishnan was appointed as the Professor-in-Charge (1984-86). In later years the position has been held by several colleagues including V.C. Govindraj, S.L. Bhalla, Gyan Chand, Hothi Prasad and S.S. Rathore (*continuing*).

Law Centre I has so far sent a single Dean to the Faculty — K.K. Nigam (1986-89).

Law Centre II

Law Centre II was first managed by A.S. Bedi (1971-72). Upendra Baxi took over as Professor-in-Charge in January 1973 and continued until May 1975. For one year before him and for over eight years later Baldev Kohli acted as the Reader-in-Charge. He also officiated for Baxi during his leave and, in all, managed the Centre for well over a decade.

When the principle of rotation was introduced in 1984, I took over as Professor-in-Charge and did a full three-year tenure (1984-87). I was succeeded by K. Ponnuswami (1987-89). Since 1989 the position has been held by A.K. Koul (1989-92), P.N. Singh (1992-93) and Balbir Singh (*continuing*).

Law Centre II has so far sent to the Faculty three Deans — Upendra Baxi (1975-78), K. Ponnuswami (1984-86) and myself (1992-95).

V. Teaching Staff

The Faculty had begun in 1924 with a handful of part-time teachers. While their number gradually increased, in the course of time a few full-time teachers were added. In later years, while the number of full-timers has been on a constant increase, that of part-timers has declined. At present the Faculty has over eighty posts in the cadres of professors, readers, lecturers in senior grade, lecturers and part-time lecturers.

Many stalwarts of the past are still alive in our memory. Who can, for instance, ever forget Professor Sivasubramanian¹³ or eminent ancient-laws specialist Dr. Hamid Ali?¹⁴ During the past about two decades the Faculty has lost quite a few eminent teachers. Among them M. Ramaswami¹⁵, M.L. Shrimali¹⁶, Shiv Dayal¹⁷ and G.M. Sen¹⁸, died after retiring from or

otherwise leaving the Faculty. Among those who were snatched away from us by the cruel hands of destiny while still in the service of the Faculty were D.K. Singh¹⁹, Kanwar Sheo Kumar²⁰, Ranganath V. Kelkar²¹ and P.G. Krishnan²². The Faculty will always remember all these former colleagues for their qualities of head and heart. Some of our former part-time colleagues, too, are no more — including M.I. Khawaja and C.L. Joseph. They are also still alive in our memory.

A large number of eminent colleagues have in the recent past retired from the Faculty. Till the end of 1992 their list included M.P. Jain, P.K. Tripathi, K.B. Rohatgi, Lotika Sarkar, J.N. Saxena, A.S. Bedi, M.C.J. Kagzi, S.K. Kuba, and O.P. Popli. During 1993 the group was joined by eminent family-lawyer B. Sivaramayya and international-law don V.C. Govindraj. A few others have, in recent years, parted company to take up academic assignments elsewhere — S.J. Hussain, N.R.M. Menon, I.S. Ishar, Umesh Kumar and K.K. Puri. Some of our former part-time colleagues, too, have left unforgettable memories with us. Who can ever forget Avadh Behari Rohatgi, S.B. Wad, S.K. Bisaria, Ragnubir Mahotra, P.S. Khera, N.K. Aggarwal and B.D. Kaushik? To all these former colleagues we wish many long years of active life.

A large number of our present and past colleagues studied law for higher degrees at North-American or British universities. Many obtained Ph.D. in law from our own Faculty. Before joining this Faculty some of us served other law faculties — Allahabad, Aligarh, Benaras, Gorakhpur, etc. — or the prestigious Indian Law Institute. Geographically, the Faculty has been drawing its teachers from all over the country — Delhi, U.P., Punjab, Kashmir, Bihar, Madhya Pradesh, Western India and South India. Pre-eminently cosmopolitan in its composition, the Faculty truly answers the description of a National Faculty.

Since the creation of the three Centres of the Faculty during 1969-75, each of its teachers has been administratively attached to one or another of the Centres. Though transfer from one to another Centre is not provided for generally, there have been prominent cases of inter-Centre movement.²³

VI. Contribution to Human Resources

Alumni of the Delhi Law Faculty have served the country as eminent judges, lawyers, arbitrators, civil servants, statesmen, teachers, educational administrators, legal researchers and in many other capacities. Those who are still serving do, we hope, realize that they owe a debt to their alma mater.

Teachers of the Faculty have made a rich contribution to human resources in and outside the country. The Faculty has provided quite a few judges to the Delhi and other High Courts; directors to two premier

institutions of legal research in the country—New Delhi's Indian Law Institute and Bangalore's National Law School—and to Delhi University's South Campus; a member to the Law Commission of India; vice-chancellors to the Universities of Surat and Delhi; and deans and heads to many law faculties and departments in the country. Some colleagues have been among the founders/initial builders of other law faculties including those at New Delhi's Jamia Millia Islamia and Hamdard University and the University of Kashmir in Srinagar. Others have taught at and built law faculties in foreign countries including Australasia, Nigeria, Tanzania, Uganda and Malaysia. Many other teachers of the Faculty, past and present, have held eminent supervisory, consultative and advisory positions in academic institutions and other organizations. Many have authored well-known books very well received in legal circles at home and abroad.²⁴

VII. Epilogue

This, in short, is the story of the Delhi University Law Faculty—of the seventy years of its existence. It is indeed a story of glorious achievements and outstanding performance.

A lot more, however, needs to be done. We are now going on against heavy odds. Concerted efforts are required to check the trends of deterioration that seem to be setting in.

Another Reform Committee has been constituted for the Faculty—headed by the renowned humanist judge of our time, O. Chinappa Reddy, formerly of the Supreme Court of India.²⁵ Publication of the Committee's report and its possible implementation are eagerly awaited.

Meanwhile we invite all the well-wishers of the Faculty, its past and present teachers, karamcharis and students, and call upon all the present officers and authorities of the University, to contribute their potential and lend their weight for the preservation of the glorious heritage of the Faculty— which now it imperatively needs—and for further enrichment of its traditions, which it indeed richly deserves.

References

1. Delhi University Act, 1922, sec. 4 (1).
2. Act XXIV of 1943.
3. A list of compulsory and elective subjects now prescribed/available appears in the Backlog Supplement 1983-89 incorporated in this volume of the *Delhi Law Review*, infra.
4. *Ibid.*
5. Lists of Ph.D. degrees awarded, theses submitted and research proposals registered, till the end of the academic year 1990-91 appeared in XIII *Delhi Law Review* (1991). Ph.D. subjects registered since then are listed in this Volume, infra.

6. A distinguished recipient of this degree was former ICI judge late Nagendra Singh (1963).
7. Among them was Vice-Chancellor Sarup Singh, Dean P. K. Tripathi and late M.L. Shrivasth.
8. Noted jurist of his time; author of well-known treatises on criminal law and Hindu law.
9. Both eminent jurists of their age and authors of well-known law books.
10. The report of this committee appears in the Backlog Supplement 1983-89, incorporated in the present volume of *Delhi Law Review*, infra.
11. *Ibid.*
12. Among them were A. Burney of Boston, A. Murphy and H. W. Jones of Columbia and J. Jackson of Michigan.
13. I met Professor Sivasubramanian in 1961 at Aligarh where I had joined the LL.M. course after completing my LL.B. at Lucknow. I still proudly remember Subramanian Sahab telling late Professor V.N. Shukla of Lucknow (also visiting Aligarh) that he had—"wronged" himself in "giving" me to Aligarh. He had also greatly inspired me for writing legal articles and encouraged me by accepting my first article for his journal— the *Vyavahar Nirnay*.
14. Dr. Hamid Ali's work on customary law in India was of great help to me in my early research work.
15. A tribute to M. Ramaswami appeared on his death [7 November 1976] in IV-V *Delhi Law Review* (1975-76)— which was also dedicated to him.
16. A tribute to M.L. Shrivasth appeared on his death [16 June 1977] in VI-VII *Delhi Law Review* (1977-78).
17. Professor Shiv Dayal had taught me and some other senior colleagues at Aligarh Law Faculty which he served for long years before moving to the Punjab University at Chandigarh. He joined Delhi Law Faculty in 1968 but did not stay for long. Recently he breathed his last in Punjab.
18. A specialist in contract and commercial laws. Sen had moved to Law Centre I. His book *Company Law: Cases and Materials* became very popular.
19. D.K. Singh went to Nigeria on a teaching assignment and breathed his last on that foreign land.
20. Sheo Kumar specialised in partnership law and despite a physical handicap remained all his life a dedicated teacher.
21. KeKar died on 18 November 1986. See my obituary for him in VI *Islamic and Comparative Law Review* 274 (1986). Since 1987 the Faculty has been holding memorial lectures on his death anniversary. Proceedings of the 1993 lecture appear in this Volume of *Delhi Law Review*, infra.
22. Krishnan Sahab had taught me for a few months at Lucknow University in 1958. See my obituary for him in VII *Islamic and Comparative Law Review* (1987). A festschrift for him—*Labour Law: Work and Development*, edited by Debi S. Saini—is being published shortly.
23. A Centre-wise list of the present Faculty teachers appears on cover-page III of this Volume of the *Delhi Law Review*.
24. A list of books written and edited by the Faculty teachers appears in this volume of the *Delhi Law Review*, infra.
25. Other members of the Committee are Soli Sorabji, D.N. Saraf, S.P. Sathie, R.C. Hingorani, B. Sivaramayya and myself (*ex officio*).

Professor V.C. Govindraj : Profile of A Retiring Colleague

I. LAKSHMI JAMBHOLKAR
Reader in Law, Delhi University

As we bid adieu to our esteemed colleague Professor V.C. Govindraj on his retirement, my thoughts go back by three decades when I had the first opportunity to meet this distinguished intellectual. He had started teaching much before I joined the Faculty and had already endeared himself to the students and colleagues. I was fascinated by his wide-ranging academic interests which spanned the law of nations and the vast realm of constitutional law. His dedication to research was awe-inspiring. Nothing seemed to matter -- neither food nor sleep -- when Professor Govindraj was concentrating on a research paper or drafting a chapter in a book.

It is amazing that this enthusiasm has not waned with passing years, nor has the energy flagged. Professor Govindraj continues to work with tireless zeal and can put many a young scholar to sit up. He has been a regular participant in national and international seminars and symposia where he has made substantial contributions. He has always believed that work is its own reward.

Many recognitions and accolades came his way in a long and distinguished career. He was awarded, at different times, the congressional fellowship of the American Political Science Association, graduate fellowships by the law schools of the Universities of California and Cornell, and the Fulbright fellowship. What is remarkable is that he did not avail any of these. While many of us find the lure of travel abroad irresistible, our distinguished colleague was never tempted by opportunities of foreign travels. The foreign visits which he actually undertook involved very meaningful contributions to the academic world. He did serve as a Ford Foundation Visiting Scholar and a Fellow at the Columbia University.

At home Professor Govindraj has been honoured with visiting professorships at the National Law School of Bangalore, the Indian Academy of International Law and Diplomacy at New Delhi, and the capital's Jawaharlal Nehru University.

In 1959 he had participated in the discussion that led to the founding of the Indian Society of International Law--now a prestigious research institution of Asia. During 1972-74 he was invited by the Asian-African Legal Consultative Committee for the position of Assistant Director of Research (Public International Law). All these assignments enabled many more students to benefit from his profound intellect and derive inspiration from his exemplary conduct. His students at Delhi University and elsewhere, I am sure, shall for long cherish memories of the days spent with him. One can only envy Professor Govindraj's gift as a stimulating teacher and a considerate research supervisor.

Professor Govindraj's illustrious academic career did not confine to imparting knowledge to the student community alone. He has been a prolific author -- his contributions encompassing public international law, private international law and constitutional law. Law of the sea, treaty laws, international institutions, human rights, etc. have been among the topics that he included in his research activities. In the area of conflict of laws he concentrated on Indian case-law. I had the opportunity to enrich myself by his in-depth knowledge of this subject when we both were engaged in team-teaching at the Indian Academy of International Law in early seventies. Presently the learned Professor is engaged in a study of late Nagendra Singh's contribution to international law through his judgments and opinions. Besides, he is also working on a monograph on human rights.

In conclusion, I hope that following the Indian tradition of ancient sages, Professor Govindraj shall not really retire but continue to guide and inspire us all.

Appendix

Major Research Papers of V.C. Govindraj

1. "A Juridical Analysis of Domestic Application of International Human Rights Norms as Interpreted and Applied in the United States, Great Britain and India", *Working Paper*, Columbia University (New York, 1990)
2. "Law, Human Rights and Socio-Economic Justice : An Indian Experiment" in *International Law in Transition* [Essays in Memory of Judge Nagendra Singh] 291-308 (1992)
3. "Land-Locked States and the Law of the Sea," in *New Horizons of International Law and Developing Countries*, 377-87 (N.M. Tripathi, Bombay 1983)
4. "Geographically Disadvantaged States and the Law of the Sea" in R.P. Anand (ed), *Law of the Sea: Caracas and Beyond*, 253-62 (Radiant Publishers, 1978)
5. "River Pollution in International Law", *Annual Proceedings of the International Law Association* (1974)

6. "Law of the Sea: Rights of Land-Locked States, Marine Pollution and Succession of States in Relation of Treaties", *Report: Asian-African Legal Consultative Committee* (New Delhi 1974)
7. "Land-Locked States : Their Rights of Transit and Access to the Sea and to the Resources of the Sea-Bed", *XIV Indian Journal of International Law* (1973-1974)
8. "Foreign Torts in Conflicts Cases - A Plea for a Viable Social Environmental Theory: The English Double Actionability Doctrine", *Columbia Journal of Transnational Law*, (Columbia University, New York 1970)
9. "Foreign Arbitral Awards and Foreign Judgments Based upon Such Awards", *International and Comparative Law Quarterly* (London 1964)
10. "The Law of International Institutions", *II Indian Journal of International Law* (1961-62)

II. TAHIR MAHMOOD

Dean, Faculty of Law, Delhi University

V.C Govindraj has retired. A major luminary of our Faculty, he has given it thirty-five long years of academic excellence, intellectual exuberance and warm friendliness.

Others might have watched Govindraj as a devoted law-teacher and a dedicated researcher. I have seen him, closely indeed, as a gentleman par excellence. Innocence of a child, credulity of a teen-ager, naivety of a teetotaler, and the ingenuous disposition of a saint -- combine all this; and this is Govindraj. A gentleman through and through, a friend of friends -- and of foes -- an admirer of admirers and critics alike -- Govindraj is a class in himself. He can laugh with others, even when they are laughing at him, smile at others' bitterness and ignore acrimonious talk with a pleasing dignity. Incapable of having any grudge against any one, Govindraj can only give -- give from heart -- and share; all that he has, and with all and sundry.

An international lawyer of international repute, Govindraj did master his subject. He taught, researched into, and wrote on, all branches of the discipline. Yet he never claimed expertise even in its elements. A student all his life, he is still ready to learn.

Retirement from D.U. Law Faculty, I am sure, has no meaning for him. Govindraj will remain Govindraj, as long as he lives. May he live long -- I pray. May the Almighty give him many years of active life.

K. PONNUSWAMI
Professor of Law, Delhi University

Revision of the Curriculum of Law Courses in Delhi University — Some Proposals

Editorial Note

Three years ago, as convenor of a committee on re-organization of LL.B. and LL.M. curriculum constituted by the Delhi University Law Faculty, Professor K.Ponnuswami had made some significant proposals. These were circulated for comments to all teachers of the Faculty and others. Some critics felt that the proposals had ignored the recommendations for the revision of law courses curriculum made by the UGC Curriculum Development Centre (CDC). In a detailed document prepared in March 1991 the author strongly refuted the criticism.

While the CDC Report is available in print, Professor Ponnuswami's proposals have so far remained in D.U. Law Faculty's files. Although these were meant basically for this Faculty, the author offered them to the Indian law schools in general for their consideration. The same are being published here in full [after necessary editing], along with what the author had to say in the his document on the comparative view of his proposals and the recommendations in the CDC Report. The latter indeed offers a thought-provoking critique of the law courses curriculum recommended by the CDC.

Rejoinders to the author's proposals and submissions will be gratefully acknowledged and considered for a possible publication in the next issue of the *Delhi Law Review*.

—Tahir Mahmood

I. Proposed LL.B. Curriculum

<i>1st term</i>		<i>2nd term</i>	
101	Introduction to Indian Legal System	201	Civil Procedure
102	General Principles of Contract	202	Commercial Transactions & Consumer Protection
103	Family Law-I	203	Family Law-II
104	Criminal Law-I	204	Criminal Law-II
105	Law of Torts	205	Public International Law-I
<i>3rd term</i>		<i>4th term</i>	
301	Constitutional Law-I	401	Constitutional law -II
302	Law of Evidence	402	Criminal Procedure
303	Business Associations	403	Labour Law
304	Public International Law-II	404	Taxation Laws
305	Property Law-I	405	Property Laws-II (including rent control, etc.)
<i>5th term</i>		<i>6th term</i>	
501	Administrative Law	601	Professional Ethics, Moot Courts, Clinical Legal Education, Practical Training, Supreme Court Rules & Minor Acts
502	Jurisprudence - I	602	Jurisprudence - II
503	Laws of Limitation & Arbitration	603	Pleading & Conveyancing
504	(i) Public Control of Business	604	(i) Negotiable Instruments & Banking (ii) Interpretation of Statutes & Legislative Drafting
505	(ii) Intellectual Property (iii) International Trade (iv) Criminology (v) Law and Poverty (vi) Comparative Law (vii) Military Law (viii) Environmental Law	605	(iii) Private International Law (iv) Election Law (v) Laws of Carriage & Motor Vehicles (vi) International Institutions (vii) Insolvency

Explanatory notes :

1. Each course in 1st, 2nd, 3rd and 4th terms will be compulsory and should be taught in four periods each week.
2. Break up of courses 103-104, 203-204, 205-304, 301-401, 305-405 and 502-602 is to be worked out -- as, e.g., in the Delhi University LL.B. syllabi.
3. Each course in 5th and 6th terms should be taught in three periods each week.
4. Of the elective courses in 5th and 6th terms no Centre should offer more than five courses.

II. Proposed LL.M. Curriculum

(a) compulsory courses

1st term	Comparative Jurisprudence
2nd term	Legal and Social Science Research Methods
3rd term	Law and Society
4th term	Research Paper

(b) elective courses

One course in each term out of the four courses belonging to each of the following 13 Groups :

- I. Constitutional & Administrative Laws
- II. Criminal Law
- III. Family Law & Personal Laws
- IV. International Law
- V. Corporate Law
- VI. Commercial Law
- VII. Taxation Law
- VIII. Labour Law
- IX. Laws of Intellectual Property
- X. Comparative Law
- XI. International Business Law
- XII. Tort Law
- XIII. Law on Fiduciary Relations

groups	1st term	2nd term
I	Federalism & Judicial Review	Civil Liberties
II	Theories of Crime & Punishment	Comparative Criminal Procedure
III	Marriage & Divorce in Conflict of Laws	Hindu & Islamic Jurisprudence
IV	Treaties	Laws of the Sea, Air & Space
V	Corporate Management	Corporate Finance & Securities Regulations
VI	Banking & Negotiable Instruments	Insurance and Maritime Laws
VII	Personal Income-Tax	Wealth Tax, Gift Tax, Succession Duty, Estate Duty & Expenditure Tax
VIII	Labour-Management Relations	Wages and Monetary Benefits
IX	Copyrights Law	Patents & Designs
X	Comparative Law	Roman Law, Civil Law Systems, Roman Dutch Law
XI	International Economic Institutions	International Trade & Transfer of Technology
XII	Foundations of Tortious Liability	Governmental Torts & Vicarious Liability
XIII	General Principles of Equity	Law of Trusts
groups	3rd. term	4th term
I	Administrative Discretion	Techniques of Judicial Control
II	Social and Economic Offences	Juvenile Delinquency
III	Religious and charitable endowments	Laws of Succession

groups	3rd. term	4th term
IV	International Institutions	International Organizations & Human Rights
V	Public Control of Corporate Business	Social Responsibilities of Corporate Enterprises
VI	Insolvency & Secured Transactions	Carriage Laws
VII	Excise, Customs & Sales Tax	Corporate Taxation
VIII	Social Security	ILO, etc.
IX	Trade Marks	International Protection of IP Rights
X	Russian & Chinese Legal Systems	Private International Laws
XI	International Investments & Transnational Corporations	International Monetary Laws
XII	Defamation & Free Speech, Strict Liability Torts	Negligence & Motor Vehicle Accidents
XIII	Specific Relief	Fiduciary Relationships

Explanatory notes :

1. In each of the four terms a student will study one compulsory course (dissertation in 4th term) and three elective courses.
2. In 2nd, 3rd and 4th terms one must opt for the course belonging to the Group from which one has opted the elective subject in the 1st term.
3. Each course should be taught in four periods each week.
4. For LL.M. 3-year course break-up of the courses will have to be worked out.

III. Advanced Diploma in Law

Any candidate with an LL.B. degree in first or high second division may enrol for Advanced Diploma Course in any Group offered in the LL.M. programme and attend the courses in that Group along with the LL.M. students. If successful in all the papers of the Group, he will be awarded a Diploma stating that he has completed the courses prescribed for that Group. This will be in the nature of a programme in continuing legal education.

IV. Proposals Compared with CDC Report

Criticism has been voiced that these proposals completely overlook the creative labour embodied in the Report of the UGC's Curriculum Development Centre (CDC) which provides a detailed blueprint of strategies to renovate undergraduate and postgraduate legal education. This note answers that criticism.**

The five tables appended to this note will show that there is a great measure of compatibility and concurrence between the two. In fact the basic assumptions underlying the two are identical. These will be elaborated later. It must, however, be admitted that there are differences in the details. It is convenient to state first why these differences exist.

Unlike the CDC, we are not in the happy position of making proposals on a clean slate uninhibited by limiting factors.

First, there is an existing system in operation for a quarter of a century in the Delhi Law Faculty. Dropping any of the existing courses will meet with resistance from those teachers who have been teaching them for years. A very strong case will have to be made if a course is to be dropped. For example, the CDC Report omits tax laws altogether in the LL.B. curriculum and they do not figure either as core or even as elective subjects. Will this be acceptable to us?

Secondly, we teach (or purport to teach) by the case-method at the LL.B. level which already provides the teacher with the opportunity to innovate and be creative. The CDC Report will undoubtedly help the teacher in doing so. The proposals, therefore, do not deal with the course content. Thirdly, as envisaged by the CDC Report the 3-year LL.M. course will have to be phased out; and the LL.B. (Hons) course cannot be started in LC-I and LC-II. Teachers of those Centres are unlikely to welcome these recommendations. In our Faculty we function (or wish to function) democratically and changes can be made only if there is consensus. There are also forces of status quo and of inertia which in the past have frustrated attempts to introduce changes. One has to rock the boat carefully, if one wants to reach ashore safely and not capsize and sink mid-stream. My proposals take note of these practical considerations.

* The criticism was made, mainly, by Professor Upendra Baxi, Vice-Chancellor, who was one of the authors of the CDC Report on Law. It was conveyed to the author in a letter, No. VC/91/1677, dated 24 February 1991.

** The note was sent by the author to the Vice-Chancellor with a letter on 25 March 1991.

We cannot also forget that LC-I and LC-II function without buildings of their own and without proper libraries. Any proposal for change in curriculum has to take into account :

- (i) availability of class-rooms,
- (ii) problems of time-table making,
- (iii) availability of teachers for teaching the new courses, and
- (iv) time available in a semester to teach the courses.

The University has adopted the 5-day week, ostensibly for saving energy. That leaves us with 5x4 periods per week. If in a semester we get 10 weeks for teaching, we should consider ourselves lucky. Apart from various kinds of agitations which recur with unfailing regularity every year, LC-I and LC-II have to contend with failure of electricity from time to time. I, therefore, felt that time would be best utilised if we have only compulsory courses in the first and second years of LL.B. To make teaching more intensive than at present, I have suggested that we teach these compulsory courses of the first and second LL.B. in four periods per week per course. That means that all the available twenty periods in a week will be needed for the five core courses and there will be no possibility of elective courses being made available. In the third year of LL.B. I have cut-down class-room instruction to three periods per week per course (on the assumption that at the level of maturity the student can learn faster and in less time). As three courses are core courses in the fifth and sixth terms, we cannot accommodate more than 5 elective courses in all in those two terms, and even this will require that classes will have to be held on Saturdays for the third year LL.B. class.

The CDC itself was fully aware of the practical difficulties and came to the pragmatic conclusion that no radical changes were possible at this stage of legal education in the country. I have, in addition, taken into account the circumstances and difficulties peculiar to our Faculty. Within those constraints I have tried to adhere to the CDC Report with which I am broadly in agreement. I wish the UGC had assured us of additional teaching positions which will be needed to implement the recommendations of the CDC. If experience is any guide, the UGC has usually shown no enthusiasm to augmenting resources when it comes to legal education. I decided that my proposals for reorganisation of courses must be tailored to the resources presently available to us.

So much about the general environment in which the task of reorganisation of the courses in being undertaken. Now let us look at the specifics.

Table I

This table lists, comparatively, the core LL.B. courses recommended by the CDC and those suggested by me in my proposal. The two are more or less identical, except in two respects:

- (i) Administrative law, Torts and Elements of Indian Legal System are 2-semester courses in the CDC scheme -- they are single-semester courses in my scheme, just as they are now in our Faculty. I could not expand them into 2-semester courses, as I felt that Business Associations, Taxation, Labour Law and Commercial Transactions (including Consumer Protection) deserve to be made core courses in the modern-day context. Labour Law and Corporate Law appear as elective courses (of 2-semester duration) in the CDC Scheme and Taxation does not find a place, even as an elective course.

- (ii) The CDC report recommends two 2-semester courses in Power, Procedure and Justice. I felt that we are not yet ready to make this innovation as these courses would continue to be taught by part-time colleagues. I decided that the status quo might be maintained in respect of procedural subjects now taught by part-time teachers, except that Criminal Procedure must be made into a full, compulsory course.

Table II

This table sets out, comparatively, LL.B. elective courses recommended by the CDC and suggested in my proposals. Adopting the CDC list in entirety would mean dropping 7 elective courses now taught in the Faculty (e.g., International Trade, Military Law, Insolvency, etc.). This would be unacceptable to teachers who have been teaching those subjects for several years in the three Centres. Also on merit I could not find justification for dropping them. Nor is it practicable to retain them in addition to the elective papers recommended by the CDC. As I felt that the courses presently taught must be retained, I could not find room for new courses like Law and Rural Development, Urbanisation and the Law, and

Law, Science and Technology. Secured Transactions, recommended by the CDC, can be included in the course content of our present courses in Insolvency and TPA (e.g., mortgages, charges). I feel that courses like Law, Science and Technology could be provided for in our LL.M. programme, as and when Faculty resources permit it.

I have not suggested the introduction of an Honours course in LL.B., as recommended by the CDC, for the present. The CDC recommendation will not permit starting LL.B (Hons.) in LC-I and LC II. As the three Centres have been functioning all these years on an ideology of "parity"-- of which Professor Baxi was a strong champion at least as long as he was heading LC-II -- starting LL.B. (Hons.) only in CLC may not be acceptable to the teachers of the other two Centres. I did not want to provoke a controversy on this issue. I felt that the starting of the LL.B. (Hons.) programme should wait until we were in a position to set up a Centre in the South Campus, corresponding to the CLC, with proper building, library and other infrastructure.

Table III

Table III lists, comparatively, the foundational LL.M. courses recommended by the CDC and suggested by me. I feel that a foundational course in Comparative Jurisprudence, which the CDC does not recommend but we have in our Faculty, is essential preparation for academic specialists (teachers and researchers) in law. I am also not sure that our present Faculty resources will permit the introduction of a course in "Comparative Analysis of Law and Economy", recommended by the CDC. The CDC scheme provides for five foundational courses, and mine provides for four. The four foundational courses suggested by me are distributed equally in the four terms; the 5 foundational courses recommended by the CDC are distributed unevenly -- 2 each in the 1st and 2nd terms, none in the 3rd, and 1 in the 4th. The CDC allots a weightage of 200 marks for dissertation, as is now the case in the Faculty; my proposals on the other hand suggest a research paper carrying 100 marks which would be a case-comment, book-review, or note, in about 100 pages, suitable for eventual publication in the *Delhi Law Review*, if found good. The dissertations now written are anywhere between 200 and 350 pages. These are not properly supervised as the students tend to submit them to their supervisors for approval at the eleventh hour, lack focus, and are sometimes copied from old dissertations. A research paper on the other hand can be properly

scrutinised by the supervisor, and there will be less scope for copying from old dissertations.

Tables IV & V

Table IV gives, comparatively, the elective LL.M. courses recommended by the CDC and suggested by me. CDC recommends nine groups; I suggest thirteen groups. Under the CDC scheme a student has to opt for 1 group consisting of six papers distributed equally between the 1st, 2nd and 3rd terms; under my proposals a student has to choose three groups consisting of four papers in each distributed equally among the terms. In my opinion the CDC scheme, by confining an LL.M. student to one group, deprives him of a wider sweep and broader opportunities and promotes the very kind of narrow specialisation which it disapproves of. The uneven sequencing of courses in the CDC scheme also means uneven distribution of the load of teaching and learning to be done. On the other hand, my scheme distributes them equally among the four terms-[see Table VI]. It also takes note of the fact that students will put in their best efforts only if there is some pressure put upon them in the form of written examinations at the end of each term. It has been our experience that students left to write their dissertations without any course work to do in a semester tend to become slack and do not submit their dissertations in time. The CLC report does exactly this, when it requires the student to write his dissertation in the fourth term without any other course work. Further, it requires the student to do only two courses in the 3rd term.

The elective groups recommended by the CDC and suggested by me are not radically different. The course content of the elective papers suggested by me can usefully draw from the work done by the CDC. More elective groups can be added to the list set out in my proposals, based on the recommendations of the CDC, e.g., Ecology, Natural Resources and Legal Order, provided that teachers can be found to teach them and the library resources for teaching them are adequate. I am against the introduction of new subjects without proper preparation. I wish the CDC had also recommended to the UGC the resources that must be provided to the law schools in terms of men and material to carry out its recommendations properly. Many of the groups suggested by me consist of courses which we are already teaching in our Faculty and will present little problem in finding teachers to teach them.

One feature of the elective groups in my scheme is worth

highlighting here. A student can enrol in any of these groups for an advanced diploma in that speciality without enrolling for the LL.M. course. Those who do not aspire for an advanced career but wish to specialize in any field may enrol in the relevant group (e.g., Taxation) for an advanced P.G. Diploma in that group. This will eliminate the need for "specialist Master's courses" and will serve as a built-in system of continuing legal education for the members of the bar and even the bench. I do not favour special Master's programmes in Tax Laws and the like. Law teachers are as much a part of the profession of law as practitioners or judges. Though we should expect them to have a wider perspective and a greater concern for the society at large, they must at the same time develop expertise in the area which they teach. Nor do I believe that anyone can master the entire gamut of the law which is co-extensive with life itself. Such specialisation is inevitable in modern times.

In sum, my proposals are in no way at odds with or repugnant to the CDC scheme. They adapt the latter pragmatically to suit the existing realities in the Faculty, and in some respects improves upon it, but surely does not "completely overlook" the recommendations of the CDC report.

I must also add that my proposals offer just a draft prepared by me to form the basis of discussion and to initiate deliberation. They can be thrown out, lock, stock and barrel, if others feel that they are devoid of merit. The Faculty can adopt the CDC scheme in entirety. But the final decision must rest with the decision-making bodies of Delhi University, and other universities, and they ought not to abdicate their responsibility.

Table I
LL.B. Curriculum : Core /Compulsory Courses

<i>CDC scheme</i>	<i>my proposals</i>
001 Constitutional Law	301 Constitutional Law-I 401 Constitutional Law-II
002 Administrative Law	501 Administrative Law
003 Contracts	102 General Principles of Contract 202 Commercial Transactions & Consumer Protection

004	Torts	105	Torts
005	Criminal Law	104	Criminal Law-I
		204	Criminal Law-II
006	Family Law	103	Family Law-I
		203	Family Law-II
007	Law of Property Relations	304	Property-I
		404	Property-II (including Rent Control)
008	Elements of Indian Legal System	101	Introduction to Indian Legal System
009	Power, Procedure and	201	CPC
010	Justice-I & II	302	Evidence
		402	Ct. P.C.
		503	Limitation and Arbitration
		603	Pleading & Conveyancing
011	International Law	205	Public International Law-I
		305	Public International Law-II
012	Jurisprudence	502	Jurisprudence-I
		602	Jurisprudence-II
013	Practical Training	601	Practical Training; Professional Ethics, Moot Courts; Clinical Legal Education; SC Rules and Minor Acts
		303	Business Associations
		403	Labour Laws
		405	Taxation Laws
Table - II			
<i>LL.B. Curriculum: Elective Courses CDC scheme my proposals</i>			
013	Jurisprudence: Judicial Process		
014-015	Corporate Law	303	Business Associations (core)

016-017	Labour Law	403	Labour Law (core)
018	Criminology and Penology	504-505	Criminology
019	Election Law	604-605	Elections
020-021	Environmental Law	504-505	Environmental Law
022	Urbanisation and the Law		--
023	Law, Science and Technology		--
024	Security Transactions		--
025	Law of Intellectual and Industrial Property	504-505	Intellectual Property
026	Law and Rural Development		--
027-028	Consumer Justice	202	Commercial Transactions & Consumer Protection
		504-505	Public Control of Business
029	Law and Poverty	504-505	Law and Poverty
030	Private International Law	604-605	Private International Law
031	Comparative Law and Jurisprudence	504-505	Comparative Law
			-Public Control of Business, -International Trade, -Military Law
		604-605	Negotiable Instruments -Banking and Insurance -Interpretation of Statutes - & Legislative Drafting -Carriage and Motor Vehicles -International Institutions -Insolvency

Table III
LL.M. Curriculum : Foundational Courses

<i>CDC scheme</i>	<i>my proposals</i>
001 Law and Social Transformation in Colonial India	003 Law and Society
002 Law and Social Transformation in Contemporary India	-do-
003 Comparative Analysis of Law and Economy	-
004 Social Science and Legal Research	002 Legal and Social Sciences Research Methods
005 Dissertation (doctrinal/empirical)	004 Research Paper 001 Comparative Jurisprudence

Table IV
LL.M. Curriculum : Elective courses
CDS scheme

Gr A International Law and Organisations	Gr IV International Law
Gr B Law and Deviance	Gr II Criminal Law
Gr C Law and Economic Regulations	Gr V Corporate Law Gr VI Commercial Law Gr IX Intellectual and Industrial Property Laws Gr XI International Business Law Gr VIII Taxation Law
Gr D Labour, Capital and Law	Gr VIII Labour Law
Gr E Ecology, Natural Resources and the Legal Order	-
Gr F Jurisprudence	001 Comparative Jurisprudence Gr X Comparative Law
Gr G Democratic Aspirations & Legal Order	Gr I Constitutional & Administrative Laws
Gr H Feminist Critiques of Legal Order	-

Gr I Science, Technology and Law

	Gr III Family Law
	Gr XI Tort Law
	Gr XIII Fiduciary Relationships

Table V
LL.M. Program : Sequencing of Courses

<i>semester</i>	<i>compulsory CDC proposals</i>	<i>my proposals</i>	<i>electives CDC proposals</i>	<i>my proposals</i>	<i>total CDC proposals</i>	<i>my proposals</i>	<i>marks CDC proposals</i>	<i>my proposals</i>
I	2	1	2	3	4	4	400	400
II	2	1	2	3	4	4	400	400
III	0	1	2	3	2	4	200	400
IV	1	1	0	3	1	4	200	400
<i>total</i>	5	4	6	12	11	16	1200	1600

R. V. Kelkar Memorial Lecture 1993

Criminal-Law Administration and Human Rights in Modern India

A. Prefatory Note

TAHIR MAHMOOD

Dean, Faculty of Law, Delhi University

One of the brightest and loveliest teachers the Delhi Law Faculty ever had, Raghunath Vinayak Kelkar, died of cancer on 18 November 1986. Deeply mourned by his colleagues and students, Raghunath left on the Faculty unerasable imprints of his dedicated scholarship and debonair personality. Boldly facing the great personal losses, his aged father decided to keep him academically alive by setting up an endowment for an annual series of lectures to be delivered at the Faculty around his death anniversary every year. Since Raghunath specialised in criminal law, it was decided to arrange these lectures in that very field of legal studies.

The first R. V. Kelkar Memorial Lecture was arranged in November 1987 on the first anniversary of Raghunath's demise. Every year, since then, the event has been regularly organised. Among those who in the past years agreed to deliver these lectures were eminent jurists including Rustamji, Perl Shastri, Soti Sorabji, L.M. Singhi and Avadh Behari Rohatgi. The list of eminent men invited to chair the lectures included H.R. Khanna, Subhash Kashyap, T.K. Thommen, M.H. Kania and S.B. Vad.

The seventh R. V. Kelkar Memorial Lecture took place on 20 November 1993. The theme of the lecture this year was "Criminal-Law Administration and Human Rights in Modern India". This year's speaker was leading human-rights activist of our time Justice V.M. Tarkunde. The lecture was chaired by National Minorities Commission Chairman, Justice Sardar Ali Khan.

Full proceedings of the event appear below.

B. Tribute to R. V. Kelkar

AHMED SIDDIQUIE

Reader in Law, Delhi University

I consider it a real privilege to have been given this opportunity to say a few words about my friend and colleague, late R. V. Kelkar, with whom I shared the teaching of criminal law and torts in the Faculty for many

years. While thinking of him, the first thing which comes to the minds of most of us was his efficiency and dedication as a teacher. The number of dedicated teachers in our law schools perhaps has never been overwhelming, but now this particular species seems to be almost on the verge of extinction. Kelkar indeed was an exception.

Among Kelkar's various contributions the most notable was his pioneering interest in the procedural criminal law. It has been the bête in our law faculties, justified to some extent, that procedural subjects are not whole-time teachers' cup of tea and most of us, therefore, tend to ignore them and confine ourselves to the substantive-law subjects. Now it is being realised that such a compartmentalisation of substantive and procedural laws certainly is not a sound academic policy. Not only part-timers are too handicapped, due to the lack of time and other constraints, to do justice with their teaching, over the years the line of demarcation between the two aspects of law has become quite thin with procedural subjects gradually becoming more and more substantive in content. The well-known book on criminal procedure written by Kelkar is, without any doubt, the best one of its kind written in the country. Though not a student of Kelkar in the formal sense, I learnt a lot from him about the subject through discussions, and even now whenever in need of any guidance, I think of good old days when he was readily available on such occasions.

At a personal plane, I found Kelkar a man of sterling character, possessing in ample measure the various qualities of head and heart. True, that even some of his friends and admirers found him somewhat rigid and inflexible in his views, but perhaps that is inevitable in case of persons such as Kelkar with exceptionally strong convictions and commitments. The somewhat delayed official recognition of his academic worth, though a sad reflection on the system prevailing in our universities, did not make him dependent or bitter and he continued to display the exceptional devotion to his work till the very end. It may not, therefore, be inappropriate to describe him as a true *karmyogi*.

C. Introduction of Speakers

TAHIR MAHMOOD

Dean, Faculty of Law, Delhi University

The distinguished speaker of the day V.M. Tarkunde represents all that is the best in the Indian traditions of politics, law and judiciary. He has been in public life since 1935. At the beginning of his career he was associated with the leading lights of the day in these fields — including S.M. Joshi

and M.N. Roy. Before too long he had become a leading lawyer of Bombay. In 1957 he was elevated to the Bench of the Bombay High Court. Twelve years later the Bar attracted him again and he resigned his Bombay High Court judgeship to start practice in the Supreme Court of India. Much earlier he had been an active participant in the Radical Humanist Movement. For twelve long years, 1969 to 1980, he remained President of the Radical Humanist Association. Since 1970 he has been editing its journal — the *Radical Humanist*.

In 1974, along with late Lok Nayak Jay Prakash Narayan, Tarkundeji set up the 'Citizens for Democracy' [CFD] and has since then been associated in different capacities with this now well known organization. In 1976 another organization associated at its inception with the Lok Nayak—the People's Union for Civil Liberties [PUCL]—elected Tarkundeji as its working President. With this organization, too, he has remained associated in different capacities. Tarkundeji's enormous contribution to the activities of the CFD and the PUCL has made him immortal. A decade ago the US Academy of Humanism had honoured him, very befittingly, with the title "Humanist Laureate".

This year when, alarmed by the growing trends of fascism and communalism in the country, some concerned citizens of the country [including this humble self] decided to launch a new organization, we could think of no better leader than V.M. Tarkunde to rally behind. He is now the President of this organization — the Forum for Democracy and Communal Amity [FDCA] — as active, as fresh and as helping and inspiring as he was when he started the CFD twenty years ago or perhaps when he joined public life in Bombay another forty years earlier.

I wish Tarkundeji many long years of active life and offer him a very hearty welcome on behalf of the teachers, karmacharis and students of the Delhi University Law Faculty.

The Chairman of this morning's program Janab Sardar Ali Khan Sahab is also an eminent law-man. He studied law at London where he earned his LL.M. degree in 1956. The same year he was called to Bar. On returning home he practised law for long years at Hyderabad and then became a judge of the Andhra Pradesh High Court, of which later he was the Chief Justice for some time. During his innings at the Bench and the Bar he served also as the Dean of the Law Faculty at Hyderabad's prestigious Osmania University and as President of the Andhra Pradesh Judicial Academy and the State Legal Aid and Advice Board. After his retirement from the High Court, he had a short stint at the Law Commission of India, but was soon moved to the National Commission for Minorities as its Chairman.

Heartily welcome amidst us Janab Sardar Ali Khan Sahab, on my own behalf and on behalf of the Faculty's teachers, karmacharis, and students.

D. Custodial Crimes and Ways to Curb Them

V.M. TARKUNDE

Former Judge, Bombay High Court

Police and people

Before dealing with the necessary amendments to the laws relating to arrest and custody and their effective implementation, it is necessary to emphasize that no progress in this branch of police work can be expected so long as the relations between the police and the people are as bad as they are today. There can be little doubt that the attitude of most of the police towards the people, particularly towards those who are poor and deprived, is arrogant, haughty and high-handed. The result is that the police gets no public cooperation in its work of investigating into offences, so that virtually the only method left with it is to apprehend suspected persons and to interrogate them by using third-degree methods. Improvement in the situation can be brought about only if the higher police officers and state governments take the initiative to improve the attitude of the police towards the people. Positive attempts must be made so that the police earns the respect and confidence, and eventually the friendship, of the people among whom it works.

It is for the higher officers of the police and the state governments to chalk out the ways and means by which a sense of cordiality may be developed between the people (including the poorer sections of society) and the police. One way is to let the police ranks know that those of them who earn the respect and confidence of the people are likely to be promoted and those who incur public hostility are likely to miss promotional chances. Secondly, one police officer in each district should be appointed to act as an ombudsman who can be approached by any person having a grievance against the police and who would promptly deal with the complaint. Probably there are such ombudsmen already appointed in the police force but, if that is so, it is necessary that the names and the locations of the ombudsmen should be widely advertised so that they can be easily approached by aggrieved persons. A third remedy is to see that policemen who commit custodial offences of any kind are adequately punished and the punishment awarded to them is given the maximum publicity. A wrong impression prevails amongst the upper hierarchy of the police as well as

the armed forces that the morale of the ranks would be adversely affected if erring personnel are adequately punished and the punishments are given wide publicity. If the maintenance of cordial relations with the public is understood as a requirement of success of the police force in the discharge of its main function of curbing the offenders, it should be easy to realise that any means which thus increases the efficiency of the police force would increase rather than decrease the morale of the ranks. It is obvious that publicity given to the punishment awarded to erring policemen would increase the confidence of the public in the fairness and the efficiency of the police forces.

With these preliminary remarks, I will now deal with the changes which are required in the relevant laws relating to custodial crimes and then turn to the ways and means by which the laws so altered may be more effectively implemented.

Law on arrest

Section 50 of the Criminal Procedure Code requires that every person arrested without a warrant shall be given full particulars about the offence for which he is arrested or other grounds for such arrest. When a person is arrested in execution of a warrant, section 75 of the Criminal Procedure Code requires that the arrested person shall be notified the substance of the warrant and, if so required, the warrant shall be shown to him. As suggested in the excellent working paper on custodial crimes prepared by the Law Commission, whenever a person is arrested it should be imperative for the police officer to obtain the name of any relation or friend to whom information about the arrest may be communicated. I would add that it should also be incumbent to inform the relation or friend all the particulars of the alleged offence if a person is arrested without a warrant and to give or send a copy of the warrant if the arrest is made in execution of a warrant, besides giving a copy thereof to the arrested person. Further, the relation or friend should invariably be informed of the police station where the person is being taken by the person arresting him. It is a fact that very often the police officers arresting a person with or without a warrant do not follow the procedure laid down under sections 50 and 75 of the Criminal Procedure Code. It is necessary that failure of the police to observe the requirements prescribed by law while arresting a person should be made a punishable offence.

It is common experience that the police often arrests a person by visiting him in the dead of the night. The arrest is usually made without a warrant and the residence of the arrested person is also searched without legal authority. The object of the midnight call is to strike terror in the victim and his family members. No independent witnesses are, moreover,

available to witness the illegalities committed by the police on such occasions. The law should prevent such midnight arrests in the absence of very exceptional circumstances which should be clearly defined. Transgression of this law by the police should also be a punishable offence.

The Supreme Court has held, as observed in the working paper of the Law Commission, that an arrested person should be entitled to have his counsel present during interrogation, so as to minimise the use of third-degree methods. Moreover, it is necessary that at the time of the arrest itself an opportunity should be available to the accused to contact his counsel, through telephone or otherwise, so that a prompt action may in proper cases be taken for a writ of habeas corpus. These provisions are required to be incorporated in the relevant sections of the Criminal Procedure Code. Breach of these provisions should be a specific offence.

The prescribed rules require that as soon as a person is arrested, an entry with regard to the arrest and the time of the arrest should be made in the relevant record. It is common experience that very often such entries are not made for days or even weeks after the arrest, and when the entries are made they are totally false. It is essential that the failure to make the necessary entry and the making of false entries should be made serious offences which, if established, should result in adequate punishment.

One of the most abused provisions of the Criminal Procedure Code is section 151 which enables every police officer "knowing of a design to commit any cognizable offence" to arrest any person without orders from the magistrate and without a warrant. Many innocent persons have been arrested under this section either for ulterior motives or under political pressure. Sub-section 2 of section 151 requires that a person so arrested is not to be detained for more than 24 hours unless his further detention is authorised under some provision of the Code. What is usually done in order to formally comply with this sub-section is to take advantage of sections 107 to 116 of Criminal Procedure Code which relate to the taking of security for keeping peace. Under these provisions, powers have been given to executive magistrates (who usually comply with what the police wants) to enquire whether the arrested person is likely to commit any breach of peace or to disturb public tranquillity, whether he possesses or distributes seditious matter, whether he has been taking precautions to conceal his presence, and so forth. The enquiry may last six months and the person may be kept under arrest during the period of enquiry.

Two things are necessary to prevent the misuse of these provisions. Firstly, the powers under section 107 and subsequent sections in that chapter of the Criminal Procedure Code should be taken away from executive magistrates and conferred on judicial magistrates. Secondly,

whenever the arrest by the police of any person under section 151 or the action taken against him under sections 107 to 116 is found to be unfounded and unjustified, the law should provide that the policemen concerned will be liable to be prosecuted for unlawful confinement and will be adequately punished.

It is found that first information reports are not taken down at the police station when the officer-in-charge finds that the alleged offence is committed by a policeman or by any person who is a police favourite. Not recording of a first information report without adequate reasons should be regarded as a serious breach of duty for which the concerned officer should be liable to penal action.

Treatment under custody

Most of the torture of undertrial prisoners takes place during the course of investigation. Law should make it mandatory that before interrogation of an arrested person he must be informed by the interrogator that he has a right to have his counsel present at the time of every interrogation. The accused should also be entitled to contact his relations or friends to approach a counsel to secure his presence at the interrogation.

The Supreme Court has laid down that one of the consequences of Article 21 of the Constitution is that no detained person can be subjected to restrictions or indignities which are not necessary for the purpose of continuing him in detention. For this reason the Supreme Court has condemned more than once the unnecessary handcuffing of prisoners or taking them through public streets. In spite of these rulings of the Supreme Court, some prisoners are still handcuffed or even paraded in public streets in order to humiliate them. This should be made a serious offence for which the concerned policeman should be adequately punished.

There are Acts like the TADA which extend to the whole country and which make it very difficult for an arrested person, even if he is innocent, to secure his release on bail. Moreover, a person arrested under the TADA may remain in jail for a whole year even if there is no evidence against him and no challan is filed in his case in the designated court. Such oppressive laws serve no useful purpose. They cause grave injustice and by increasing the dissatisfaction of the people they defeat the purpose for which they are enacted. Such laws deserve to be abrogated.

The conditions in which undertrial prisoners as well as convicts are detained in various Indian jails is a very important subject which appears to be outside the scope of the present paper. It is very difficult for human rights activists to secure permission to enter jails and inspect them. Permission to do so should be made available in all deserving cases, and after the necessary evidence is collected, a samnhar should be held on jail conditions in India.

Trial of custodial offences

Offences committed while arresting persons and keeping them in custody, some of which have been mentioned above, would be tried in usual course by magistrates, sessions courts and the higher judiciary. Even violation of human rights which would be investigated by the human rights commissions will result in criminal trials in the ordinary way.

Whenever any accused person who is under arrest is brought before a magistrate, either for remand under section 167 of the Criminal Procedure Code or for any other purpose, it should be the prescribed duty of the magistrate to enquire whether he was ill-treated while in custody and his statement should be recorded by the magistrate. If the alleged ill-treatment is found to have caused injuries to the accused, it should be the duty of the magistrate to arrange for his medical examination and to record the result thereof. The practice which is followed in many cases of securing an order of remand under section 167 of the Criminal Procedure Code without physically producing the person before the magistrate should be specifically prohibited by law.

In the course of trial of custodial offences, when it is found that an injury was or injuries were caused to a person while in police custody (whether the injuries resulted in custodial death or not), a presumption should arise that the injury or injuries were caused by the police officer who had the custody of that person during the relevant period. This proposal has already been made by the Law Commission but is not yet implemented. It should be implemented forthwith by adding section 114C in the Evidence Act.

In the working paper of the Law Commission on custodial crimes it has been suggested that section 197 of Criminal Procedure Code, which requires sanction of the state for the prosecution of certain police officers, should be qualified by a proviso in the following terms:

"Nothing contained in this section shall apply in case of custodial offence where a court on an enquiry is prima facie of the opinion that the accused public servant committed an offence of penal nature within his custody."

It is submitted that this proviso requires to be widened by including all offences committed during the arrest of the person and should not be confined to offences committed after the arrest and when the person was in custody. Moreover, the expression "offences of penal nature" in the proposed proviso should be substituted by the words "offences of penal nature or involving violation of Article 21 of the Constitution." This will make it unnecessary to have state sanction in cases where arrested persons are subjected without adequate justification to indignities such as hand-

cuffing and parading in public streets.

Every person in custody should be entitled to apply to a magistrate for being medically examined. The medical examination may become necessary on account of ill-treatment or as a result of a natural ailment. In either case the magistrate should have the right after making an enquiry to decide whether the person in custody should be medically examined and if so by whom.

The working paper of the Law Commission has dealt with the question of compensation which may be granted at the conclusion of criminal trial in cases where the human rights of an arrested person are violated or where custodial death has taken place. It is submitted that the compensation should be fixed by the criminal court and should not normally be left to be decided by the civil court. In a complicated case, however, the criminal court should have the jurisdiction, after fixing interim compensation, to order that the victim may approach a civil court for the award of full compensation. Out of two theories mentioned in the working paper of the Law Commission for the fixation of compensation, namely, the interest theory and the multiplier theory, the latter (the multiplier theory) is preferable. This is because the multiplier theory enables adequate compensation to be given for mental anguish caused by death or physical injury and disability. The court, however, should be free to adopt the interest theory when the compensation to be awarded would result in greater benefit to the victim or his heirs as the case may be.

No executive magistrate should have the power of discharging any judicial function, particularly where a question relating to human rights is likely to arise. As already observed, they should not be empowered to discharge any duties under section 107 and subsequent sections of the Criminal Procedure Code relating to the security for keeping peace and good behaviour. They should also not have the power to decide matters relating to the custody of undertrial prisoners under section 167 of the Criminal Procedure Code, as certain laws allow. Generally, matters involving human rights should be decided only by judicial authorities.

In respect of custodial deaths, section 176 of the Criminal Procedure Code, even after its recent amendment, is of little use in finding out whether a death in custody was due to natural causes or due to police misbehaviour. The reason for the inefficiency of section 176 is that the enquiry under that section is not preceded by an investigation through an agency independent of the police establishment. Even an efficient judicial officer would find it very difficult to reach a satisfactory conclusion in regard to the cause of a custodial death if the necessary evidence is not led before him after a proper and impartial investigation. This is why all

custodial deaths and violations of human rights alleged to have been committed by government agencies (including police forces) should be investigated and dealt with by the human rights commissions which are now provided for by the Protection of Human Rights Ordinance 1993.

Provisions of Human Rights Ordinance 1993

All the offences mentioned in this paper relating to arrest and confinement fall within the wider category of violations of human rights. As these violations are usually committed by government agencies such as the police and other security forces, a body free from executive influences is necessary to investigate such violations and take suitable action. This work should be carried by the central and state human rights commissions which will be set up under the 1993 Ordinance. The Ordinance, however, has many shortcomings which may render human rights commissions ineffective. A statement issued by the Citizens for Democracy on October 4, 1993 enlists the main defects contained in the Ordinance. In order that the commissions may fulfil their objectives, these defects should be removed before the Ordinance becomes an Act of Parliament.

The main defect in the Ordinance is that it prevents the human rights commissions from investigating into the violations of human rights allegedly made by the army and the para-military forces of the Union such as the BSF and the CRPF. This means that the human rights commission of the Jammu and Kashmir state will have no work at all as far as the valley is concerned, and the position will be only marginally different in Punjab and parts of Assam. Moreover, the para-military forces are habitually invited for assistance by the state governments on various occasions such as communal riots, legislative elections and even strike situations. Since as communal riots, legislative elections and even strike situations. Since unfortunately the para-military forces are at present the main violators of human rights, the human rights commissions would be largely ineffective unless their powers are extended to cover the violations committed by the army and the central para-military forces.

The commissions would not be allowed to set up their own independent investigative machinery, although they would be given the power to appoint administrative, technical and scientific staff. The commissions will have to carry out their investigative work through the police supplied by the government. It is common experience that the police are reluctant to carry out proper investigation into the excesses committed by their own colleagues. The commissions would fail in protecting human rights if they are not enabled to appoint and develop investigative machineries of their own. Although the composition of the commissions is apparently improved by providing for the appointment of three members of the judiciary and two

members from amongst persons having knowledge and experience in relation to human rights, the selection committee on whose advice these members of the commissions will be appointed remain the same as in the Bill. The majority of members of the selection committee will be leaders of the government in power with a minority consisting of some leaders of the opposition. In order that the commissions should be independent of the executive, the majority of members of the selection committee should consist of judges of the Supreme Court for selecting persons to be appointed to the central commission, and of the High Courts for selecting persons to be appointed to the state commissions. This is necessary not only for ensuring independence of the commissions but also for generating public confidence in their impartiality.

The Ordinance gives the option to the state governments to appoint or not to appoint human rights commissions. Appointment of state commissions should be made compulsory. Parliament has the power to do so.

While the Ordinance has made a welcome innovation by providing that the sessions court in each district may be specified to be a human rights court, it does not grant to the commissions the power to initiate proceedings against violators of human rights through public prosecutors appointed by them under the Ordinance; that power will vest in the central and state governments. The work of the commissions would be almost futile if they cannot prosecute the wrong-doers through their own public prosecutors.

It is surprising that the Ordinance has retained the provision contained in the Human Rights Commissions Bill 1993 that no commission shall enquire into any matter after the expiry of one year from the date of the violation of human rights. This means that even if an investigation into a violation of human rights is started soon after the violation takes place, the proceedings will have to be dropped if the accused succeeds in prolonging it beyond one year from the date of his misbehaviour. The provision is obviously absurd.

E. Human Rights in India

SABDAR ALI KHAN

Chairman National Commission on Minorities, Delhi

Sources of Human Rights

The object of this academic note is to focus attention on the ambit and scope of human rights in India. It is not proposed to go into the question of actual administration of human rights through judiciary in any great detail, except to make a reference to it briefly as machinery available for

enforcement of human rights in India. In the Constitution of India the concern of its framers about the sanctity and preservation of human rights has been expressed in several places. The framers of the Constitution were very much concerned about the concept of human rights in our country.

It can be said that the human rights in India flow from two main sources:

(a) Part III of the Constitution wherein certain fundamental rights have been guaranteed to the citizens as well as to some extent to the foreigners living in India.

(b) Such of the international human rights which are enforceable in India by virtue of international obligations assumed by the Republic of India by virtue of being party to multilateral conventions signed at the international level.

It may not be possible here to go into the details of the various theories of international law under which it is established that an international obligation assumed by the states becomes in its ultimate analysis an enforceable principle of municipal law which has the necessary sanction behind it as required by any other law for the time being in force.

Human Rights Ordinance 1993

In the light of the above two sources constituting the main components of international human rights and individual human rights, it would be pertinent to take a look at some of the salient features of the provisions of the Human Rights Ordinance of 1993 which was promulgated by the President in the 44th year of the Republic of India. This Ordinance has been promulgated while the Human Rights Commissions Bill of 1993 for the constitution of the National Human Rights Commission and the state human rights commissions as well as the human rights courts was pending before Parliament. It is stated that since the Parliament was not in session at the time of the promulgation of the Ordinance but circumstances existed which rendered it necessary for the President to take immediate action for the constitution of human rights courts, the Ordinance was promulgated and came in force immediately. It may be pointed out that the Ordinance extends to the whole of India and takes into its ambit and scope the Armed Forces, namely, the naval, military and air force and any other armed force of the Union for the protection of human rights in India.

In clause 1, sub-clause D, human rights are defined in the Ordinance as "the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the international covenants and enforceable by courts in India." It is significant to mention here that

the term international covenants is defined under Clause II, sub-clause F, of the Ordinance as "the international covenants on civil and political rights and the international covenant of economic, social and cultural rights adopted by the General Assembly of the United Nations on 16th of December 1966. *A fortiori*, therefore, in so far as human rights are concerned, India is bound by the terms of international covenants on civil and political rights as adopted in 1966. However, in so far as other multilateral covenants and treaties are concerned, India is not bound by the same unless it is so provided in future by any other legislative enactment. The above two covenants on human rights are of far-reaching importance as they constitute the main sources of international human rights applicable in the territory of India. As against this, it must be mentioned that there are certain human rights which can be broadly termed as individual human rights. In this category of human rights, we can include all those fundamental rights which have been guaranteed under Part III of the Constitution and which are legally enforceable in the municipal courts of the land. Therefore, it can be said that appropriate judicial remedies are available to the individual for infringement of his individual or international human rights.

Beneficiaries of human rights

Before we go into the question of actual demonstration of these fundamental rights collectively, it would be necessary to emphasise the point that the human rights are now available not only at the state level but even to organised groups of people as well as individuals whose rights are infringed by the action of any state agency or another individual, as the case may be. Yoram Dinstein of Tel Aviv University has stated in his article "Collective Human Rights of People vis-a-vis Minorities":

"It is important to differentiate between a people and a nation. There is an Indian nation and a Bengali people, an Israeli nation and a Jewish people. A nation is easy to define inasmuch as it consists of the entire citizen body of a state. All the nationals of the state form the nation. In each state there is one nation, and this is why the terms "state" and "nation" have become practically interchangeable. But, within the compass of one state and one nation, there can exist several peoples, large and small. Such a state is usually called multinational, but what is actually meant is that the nation comprises several people."

It is, therefore, essential to realise that the main concern of human rights is to ensure the enforceability of such rights in the interest of the vulnerable sections of population of the state, like the backward classes, the minorities, women, etc. It is significant to know that stress has been laid on this aspect of the problem in Article 27 of the 1966 International Covenant on Civil and Political Rights in the following terms:

"In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

The concern of the National and the state human rights commissions, therefore, should be to ensure the maximum protection of the civil as well as the cultural rights of the peoples of a state who are otherwise likely to remain a down-trodden lot in the society.

In the case of *Northbhorn* decided by International Court of Justice, due recognition was given to the individual human rights of a person as against collective human rights available to groups of persons or to the state as a whole. Another point which requires consideration is that the totality of human rights do not fall any more within the domestic jurisdiction of any state. Therefore, the provisions of Article 2, paragraph 7, of the Charter of the United Nations do not come into play as far as human rights are concerned. This view has been confirmed in the advisory opinion given by the World Court in the case of "*Nationality Decrees in Tunis and Morocco*".

The net result of the above discussion is that such of the fundamental rights which are guaranteed under Part III and are available to citizens and in some cases even to foreigners are clearly justiciable. Similarly, other international human rights emanating from international covenants referred to above are also legally enforceable on behalf of an individual, a group of persons or the state as a whole.

Commissions & courts

Mention may be made briefly about the setting up of the National Human Rights Commission and the state human rights commissions and the human rights court in various states. Suffice it to say that the overall combined operational effect of these three components is to ensure a direct enforceability of the human rights at various levels. So far as the constitution of the commissions either at national or state levels is concerned, the glaring feature which needs to be mentioned is that care has been taken in the Ordinance, unlike what was contained in the Bill before the Parliament, to ensure the preponderance of the judicial elements in these commissions. This may be taken broadly as a tribute to the independence of the judiciary in India and its excellent track record on the one hand, and the demonstration of an unshakable faith by the common man in the institution of judiciary on the other.

It is also pertinent to note that the Ordinance preserves the essential linkage between the three National Commissions, namely, National Commission for Minorities, National Commission for Scheduled Castes and Scheduled Tribes and National Commission for Women, with the National Commission on Human Rights. The chairpersons of the three Commissions are to be *ex-officio* members of the National Commission on Human Rights. This is an act of wisdom on the part of the framers of the Ordinance to eliminate in so far as it is possible the overlapping of the jurisdiction and functioning of the three National Commissions mentioned above and the National Human Rights Commission. If the machinery envisaged under the Ordinance and the enactments under which the National Commissions are working function smoothly, there is every reason to believe that the combined efforts of all these three or four bodies will successfully deliver goods to the common man of this country.

The setting up of human rights courts is a novel idea in India which, if pursued diligently, is likely to prove a useful channel for the enforcement of human rights.

In the end, the emergent concept of global human rights makes it clear that we are all living in a small world indeed, and it is for us to make it a better place to live in by ensuring effective implementation of human rights.

F. Conclusion

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The learned speaker of the day and the chairman both have spoken of the Human Rights Ordinance 1993 promulgated as an emergency measure. The step is an evidence of realization, on the part of the government and legislators, of the fact that criminal law is being misused to deny human rights to people and that the said rights are being otherwise widely abused.

Some time ago when at a seminar in Lucknow I introduced a participant as an "eminent criminal lawyer", a young school-girl came forward to ask me "uncle how can a person be both a criminal and a lawyer"? With great difficulty I could explain to her how a "criminal lawyer" was different from a "criminal and lawyer".

Trends now seem to have wholly changed. Tarkundeji has confirmed the bitter fact—that we already knew a bit — that criminals can now be found, not only among lawyers, but also in the disguise of policemen. They can be spotted, I add, also among politicians, electioneers, custodians of

state authority and the so-called peoples' representatives and public men. This wide-spread criminalisation of life is indeed alarming.

The extent to which basic human rights are now being violated — as exposed both by Tarkundeji and Sardar Ali Sahab — is awful and deplorable. The great Urdu poet of 19th century, Ghalib, had perhaps anticipated today's state of affairs when he recited:

*Bas ke dushwar hai har kam ka asan hona;
Admi ko bhi myasssar nahin insan hona.*

[It is indeed difficult for normal things to be common,
That is why even the man is not being treated as human.]

In the dark clouds I do find a silver lining. Let us reject all those selfish politicians and public servants who are exploiting religion and otherwise defeating the policies of law by their nefarious activities. There are still amongst us guiding stars like the speakers of the day. Let them lead the Nation. The Nation will regain its lost glory.

Inequities of Laws on Dowry Deaths —A Critique

I. Introduction

The evil of the dowry system has been a matter of grave concern to society and it is disturbing to see the number of dowry deaths increasing even as the literacy rate is going up side by side and we are constantly harping on improving human relations. Many people consider and expect a newly married wife to be a gold mine, and if she proves otherwise they treat her as combustible material. It is surprising that the mother-in-law, who came in the same capacity two or three decades earlier, should also adopt this attitude.

It is said that behind every successful man there is a woman. This saying was supposed to mean that woman should inspire man to achieve great heights. Instead, now she is also supposed to provide him with the infrastructure for his success in the material world.

Marriage, according to our ancient culture, is a sacrament and is believed to have been ordained in heaven. The religious rites performed at the marriage altar signify that the man accepts the woman as his better half by assuring her of protection and provision of food and other necessities of life. He is also supposed to give her companionship as a male and to share with her the pleasures and pains of life. With this concept of marriage there should be no scope to look for mundane benefits, particularly dowry.¹

II. Historical Perspective

Dowry is a deep-rooted evil in our society. It started by way of customary presents showered with love and affection. In olden days it was customary to give some presents to the bride and bridegroom and members of his family at the time of marriage. The parents of the bride, out of affection and concern, used to provide the couple with the paraphernalia necessary to set up a home.

The system started at a time when girls were generally not very educated and, even if educated, were unwilling or unable to take up gainful employment. There were also few opportunities for them either to supplement the family income or to become financially independent.

There was yet another reason for such customary gifts. The

daughter, then, was not entitled to a share in the joint family property when she had a brother. Therefore, the father out of affection used to give some cash or other gifts to the daughter at the time of her marriage. The right of the father to give a small portion of the joint family property as a gift to the daughter at the time of her marriage was also recognised.

Unfortunately, however, over the years new practices developed. The bridegroom and the members of his family started demanding cash or other gifts from the bride's parents as a matter of right. Such demands continued even after the marriage. There were instances of harassment of the bride, if the demands were not complied with.

III. Legislative Curbs

In order to curb this evil practice, the Dowry Prohibition Act 1961 (Act 28 of 1961) was enacted. It prohibited the giving or taking of dowry. However, despite the Act, the pernicious practice continued and the bridegroom and members of his family continued harassing and even torturing the bride to force her to bring cash and costly articles from her parents. Reports of women facing such harassment committing suicide and at times being burnt alive started appearing in the newspapers with great frequency. In view of this situation, Parliament amended the Indian Penal Code (hereinafter called IPC) and introduced section 498-A therein. It also amended the Code of Criminal Procedure (hereinafter called Cr.P.C.) by introducing section 198-A therein, and also inserted section 113-A in the Evidence Act (hereinafter called IEA). All this was done through the Criminal Law (Second Amendment) Act 1983 (Act 46 of 1983).²

Again, the Indian Parliament by the Dowry Prohibition (Amendment) Act 1986 (Act 43 of 1986) inserted section 304-B in the IPC, relating to 'Dowry Death'. The first schedule of the Cr. P.C. was also accordingly amended. Furthermore, section 113-B was added to the Indian Evidence Act.

I fully share the anxiety of the legislature to provide for protection of the suffering women who are harassed or are subjected to cruelty to force them to bring dowry, and for penalising people who cause such harassment or inflict such cruelty. However, I would like to examine whether by enacting section 304-B the legislature has not exposed innocent people to a grave risk of undeserved punishment and even blackmail. Perhaps to remedy one kind of injustice it may have created an instrument of another type of injustice.

Sections 304-B (1), IPC and 113-B, IEA are reproduced below.

Section 304-B(1) : IPC

Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage, and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or by a relative of her husband for, or in connection with, any demand for dowry, such death shall be called 'dowry death' and such husband or relative shall be deemed to have caused her death.

Section 113-B: Indian Evidence Act

When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman had been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the court shall presume that such person has caused the dowry death.

Explanation: For the purposes of this section 'dowry death' shall have the same meaning as in S.304-B of the Indian Penal Code (45 of 1860).

IV. Judicial Responses

In section 304-B : IPC the legislature has used the phrase 'deemed to have', which creates a legal fiction. The Supreme Court, while construing such deeming provisions, has adopted and applied in a number of cases the rule of construction expounded by Lord Asquith in *East End Dwellings Co. Ltd. v. Finsbury Borough Council* :³

"If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it. The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

This proposition has been approved by the Supreme Court also in *State of Andhra Pradesh v. Vallabhapuram Ravi*.⁴

A careful analysis of section 304-B(1) : IPC shows that this section has the following essential ingredients:

- (1) the death of the woman should be caused by burns or bodily injury or otherwise than under normal circumstances;

- (2) such death should have occurred within seven years of her marriage;
- (3) she must have been subjected to cruelty or harassment by her husband or any relative of her husband soon before her death; and
- (4) such cruelty or harassment should be for or in connection with demand for dowry.⁵

If these ingredients are satisfied, the husband or such relative shall be deemed to have caused her death.

Thus, in effect, once the above ingredients are proved, it is 'deemed' that the husband or his relative has caused the woman's death and, by virtue of the legal fiction, it would be treated as a fact even though it may not actually be a fact. From this it would inevitably follow that evidence cannot be given to disprove this assumed fact. The courts are bound to draw the presumption; and owing to the deeming provision once the presumption is drawn, it will be conclusive proof that her death has been caused by the husband or his relative, although the real cause of her death may be quite different.

A husband may be cruel to his wife and constantly harass her for not bringing from her parents valuable articles, and his neighbours and relatives may be aware of such harassment. If, following these incidents of harassment, the wife dies owing to an accidental fire from the stove, then even though the husband at that time may be reading a newspaper in another room of the same house, by virtue of the application of section 304-B(1) : IPC, the husband would become liable to be punished and be imprisoned for a minimum period of 7 years--whereas having regard to the actual facts and circumstances of the case he should be liable only to be punished for cruelty under section 498-A : IPC.

By virtue of the term 'deemed' used in section 304-B(1) : IPC, once the four essential elements indicated above are satisfied, the husband or his relative shall have to be convicted under that section. The court will have to hold the offence under section 304-B : IPC as having been proved--without examining whether any act of the accused had actually caused the woman's death--although the accused may not even be intending, planning or anticipating her death.

Once it is presumed that it is a dowry death, the courts are left with no discretion; they have to hold the husband and his relatives guilty. Thus, the legislature has encroached upon judicial discretion.

While commenting on section 303 IPC, the Supreme Court in

*Mithu v. State of Punjab*⁶ observed that a provision of law which deprives the court of the use of its wise and beneficial discretion in matters of life and death, without regard to the circumstances in which the offence was committed and therefore without regard to the gravity of the offence, cannot but be regarded as harsh, unjust and unfair. It has to be remembered that the measure of punishment for an offence is not afforded by the label which the offence bears, as for example, theft, breach of trust or murder. The gravity of the offence furnishes the guidelines for punishment and one cannot determine how grave the offence is without having regard to the circumstances in which it was committed, its motivations and repercussions. The legislature cannot make relevant circumstances irrelevant, deprive the courts of their legitimate jurisdiction to exercise their discretion not to impose the death sentence in appropriate cases, and inflict upon them the dubious and unconscionable duty of imposing a pre-ordained sentence of death. The Supreme Court further observed that "the legislative prescription of a computerised sentence of death is not supported by scientific data".⁷

In the present situation also there is no scientific data to support the legislative measures of enacting a deeming provision for the purposes of furthering the cause of justice. Therefore, section 304-B may be struck down by the Supreme Court as being harsh, unjust and violative of Articles 14 and 21 of the Constitution.

In cases of dowry deaths the witnesses who depose against the husband and his relatives are usually relatives of the bride. In view of the close relationship and affection for the deceased, such witnesses would, naturally, have a tendency to exaggerate or add facts which may not have been stated even by the deceased woman at all. Not that it is done consciously, but even unconsciously the love and affection for the deceased could create a psychological hatred against the supposed murderer. Therefore, the court has to examine such evidence with very great care and caution.⁸

It is well settled that where the evidence admits of two possibilities, one which goes in favour of the prosecution and the other which benefits the accused, the accused is undoubtedly entitled to the benefit of doubt. However, an examination of section 304-B(1) : IPC shows clearly that the courts cannot allow such benefit of doubt. The Rajasthan High Court has observed that:

"The power of tolerance would vary from person to person. Some people try to make the life easy by tolerance, while others even on petty points bring an end to their life."⁹

We can, therefore, visualise a situation where even casual requests

for articles from the bride's parents by the husband who may be facing grave economic distress could be deemed to be mental cruelty to the bride leading her to end her life--the court being left with no option but to sentence the husband and his relatives to at least seven years' imprisonment. It is not suggested that the request for articles from the bride's parents has any justification, but absolutely precluding the courts from exercising their legitimate discretion is a serious infirmity in the law relating to dowry deaths. Dr. C.K. Parikh has stated:

"It is quite possible to be in apparently perfect health but at the same time suffering from a serious disease of which a man himself may not be aware. The death can occur so suddenly and so unexpectedly that a suspicion of foul play may arise."¹⁰

Fortunately, the courts have been cautious in the application of this provision, although the Supreme Court has not yet authoritatively interpreted the exact scope and meaning of the deeming provision contained in section 304-B of the Indian Penal Code. The Calcutta High Court has observed:¹¹

"In section 113-B (IEA) the proximity test has been assigned a definite role for determining whether it is a fit case for invoking the compelling presumption or that it calls for the presumption of law as envisaged in this section. The expression "and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for or in connection with any demand for dowry", as used in section 113-B IEA, is pregnant with the idea of proximity test. The cruelty or harassment must have been committed soon before death. This reflects the insignia of proximity test. The question as to what length of time will answer the requirement of the words 'soon before' may, of course, depend upon the facts and circumstances of each case."

It has been held that simply because a young lady has brought her life to a tragic end by committing suicide by consuming insecticide, it cannot be said that she had embraced death on account of any demand of dowry by her husband or mother-in-law; it has to be established by the prosecution beyond reasonable doubt.¹²

The Punjab and Haryana High Court has observed in the case of *Babir Singh v. State of Punjab*:¹³

"These statutory provisions cannot be allowed to be misused by the parents or relatives of a psychopath wife, who may have chosen to end her life for reasons which may be many others

than that of cruelty. The glaring reality cannot be ignored that this ugly trend of false implication with a view to harass and blackmail an innocent spouse and his relatives is in fact emerging."

References

1. See AIR 1986 SC 250.
2. See 1988 Cr LJ (SC) 88.
3. 1952 AC 109 at 132.
4. AIR 1985 SC 870.
5. *Shanti v. State of Haryana* 1991 Cr LJ (SC) 1716.
6. AIR 1983 SC 473 at 479.
7. *Ibid.*
8. *Sharad Birdichand v. State of Maharashtra* AIR 1984 SC 1622 at 1636.
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10. *Textbook of Medical Jurisprudence and Toxicology* (1991).
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Legislatures' Privilege to Prohibit Publication of Their Proceedings and the Freedom of Speech : A Critique

I. Introduction

The conflict between the legislature, the judiciary and the press has become a regular phenomenon in India. The genesis of the controversies lies in certain misconstrued notions of supremacy of one over the other. The legislatures stress their sovereignty, the press emphasizes its freedom, and the courts act as custodians of fundamental rights. In this article I have tried to analyse one such area of conflict—privilege of legislatures to prohibit publication of their proceedings and the fundamental right of citizens to freedom of speech and expression.

The matter seems to have been settled by the Supreme Court in *M.S.M. Sharma v. Sri Krishna Sinha and others*¹ and *In re under Article 143 of the Constitution of India*². However, there is still a lot to be pondered upon.

II. Constitutional Provisions

The powers, privileges and immunities of Parliament and state legislatures are governed by Articles 105 and 194 of the Constitution. Freedom of propagation of ideas and their publication and circulation is regulated by Article 19(1) (a).

Article 19, after declaring that all citizens shall have the right to freedom of speech and expression, adds:

"Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interest of the sovereignty and integrity of India, the security of the state, friendly relations with foreign states, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence."

Articles 105 and 194 declare that subject to the provisions of the Constitution and the rules and standing orders regulating the procedure of the legislatures, there shall be freedom of speech in Parliament and

state legislatures. The two articles add that:

"No member of the legislature of a state shall be liable to any proceedings in any court in respect of anything said or any vote given by him in the legislature or any committee thereof and no person shall be so liable in respect of the publication by or under the authority of a House of such a legislature of any report, paper, vote or proceeding."²

Parliamentary privileges have been defined as:

"The sum of the peculiar rights enjoyed by each House collectively, and by members of each House individually, which is a constituent part of the powers of Parliament, without which they could not discharge their function, and which exceeds those possessed by other bodies and individuals"³

Parliamentary privileges are an essential incident of the high and multifarious functions which the legislatures are called upon to perform. It has been pointed out that:

"The expression 'freedom of speech' is used in one sense in Article 19 (1) (a) and in another sense in Articles 105 (1) and 194(1). In Article 19 (1) (a) freedom of speech includes freedom of publication. In Article 105(1) and 194(1) freedom of speech is just freedom of speech and does not include freedom of publication."⁴

Clause (3) of both Article 105 and Article 194 has been amended by the Constitution (44th Amendment) Act 1978. Before this amendment the clause laid down that the privileges, powers and immunities of Parliament and state legislatures shall be those of the House of Commons of the United Kingdom at the commencement of the Constitution until they were defined by an Act of Parliament. Since 1978 the privileges of legislatures and their members and committees have to be determined on the basis of what they were immediately before the commencement of the 1978 Amendment [i.e., 20 June 1979]. The change is merely cosmetic; its only object was to omit the reference to the House of Commons, though in substance the privileges are still the same as enjoyed by the House of Commons at the commencement of the Indian Constitution.

III. The Issues

Did the British House of Commons at the time of commencement of the Constitution enjoy the privilege to prohibit publication of even true and faithful reports of the debate and proceedings that took place within the House? Do the privileges of legislatures are superior to fundamental

rights of the citizens under Article 19 (1) (a) of the Indian Constitution?

The first question has been dealt at length by the Supreme Court in *M.S.M. Sharma v. Sri Krishna Singh*⁵. The court answered it in the affirmative. Subba Rao, J. in his dissent, however, denied the existence of any such privilege. With due respect it is submitted that Subba Rao's opinion seems more tenable. An authentic work says:

"It is within the power of either House of Parliament, should it deem it expedient, to prohibit the publication of its proceedings. In the House of Lords, it is a breach of privilege for any person to print or publish anything relating to the proceedings of the House without its permission. The House of Commons, on many occasions, has declared the publication of its proceedings without the authority of the House to be a breach of privilege, and the House has never formally rescinded the orders which from time to time it has made with regard to this subject. At the present time, however, neither House will consider a report of its proceedings in a newspaper or other publication to be a breach of its privileges, unless such report is manifestly inaccurate or untrue"⁶

Another work of high authority says:

"So long as the debates are correctly and faithfully reported, the privilege which prohibits their publication is waived... the orders which prohibit their publication are not enforced, but when they are reported malafide, the publishers of newspapers are liable for punishment."⁷

The position which emerges from a study of the authorities on the British parliamentary practices is that in the seventeenth century the House of Commons made standing orders prohibiting the publication of its proceedings. That was the need of those times to ensure secrecy. In the 18th century prohibition was enforced for fear of public opinion. But when gradually the parliamentary form of government became broad-based and perfect, publication was not only allowed but encouraged by the House of Commons. The said orders of 17th century were not expressly repealed but were abandoned in practice.

The majority in *M.S.M. Sharma*⁸ case seems to have relied heavily on standing orders of 17th century though in practice the privilege was not exercised and had been given up later. Article 105, clause (3), spoke of the privileges as enjoyed by the House of Commons in 1950 and not all the obsolete privileges. The Constitution-makers never intended to push the country to the ancient period and apply all the age-old practices

of England in modern India. Ambedkar's speech in the Constituent Assembly is very relevant:

"The privileges which we speak of in relation to Parliament are much wider than the two privileges mentioned... Nor is it easy to say what are the acts and deeds of individual members which bring Parliament to disrepute."⁹

The above view indicates that the purpose of providing the privileges was to save the House from disrepute and not to maintain secrecy. Thus only publications which bring disgrace to the House are to be prohibited.

It is pertinent to note the historical difference in the development of the House of Commons and our legislatures. The House of Commons has to maintain secrecy from the Crown, but since ours is a democratic country where the government is by the people, for the people and of the people, why such a secrecy? Such was never the intention of the Constitution-makers.

If we accept the view of the majority in *Sharma's* case and read in the Constitution privilege to prohibit publication of proceedings, it directly comes in conflict with the fundamental right of the citizens to freedom of speech and expression which includes freedom of publication. Are fundamental rights subject to privileges of the legislatures?

Article 19(1) (a) of the Constitution of India gives the fundamental right to speech and expression to its citizens. This right is subject only to the grounds mentioned in clause (2) of the Article, on which reasonable restrictions can be imposed. The list of grounds is comprehensive. It may be noted that while there is contempt of court among such grounds, there is none like contempt of legislatures or privileges of legislatures. It is not that the Constitution-makers were not aware of the privileges; the omission was deliberate. It is a clear indication of the fact that they did not want to subject the fundamental right to freedom of speech and expression to the privileges of the legislatures.

IV. The Conflict

There is, thus, a conflict. No restrictions can be placed on the freedom of speech and expression on the ground of privilege of the legislatures. At the same time under Article 105 and 194, clause(3), the legislatures can prohibit publication of their proceedings. Scholars differ in their opinion about this conflict. One view, to which I also subscribe,

is that the fundamental rights are supreme and all other provisions of the Constitution are subject to them. In the scheme of our Constitution fundamental rights have a paramount position. In giving to themselves the Constitution the people have reserved the fundamental rights to themselves. Article 13 gives a very special position to fundamental rights. The nature of the rights, their protection under Article 13 and their enforcement under Article 32 reflect the great importance the Constitution-makers attached to fundamental rights. The Supreme Court in a number of cases has highlighted the important place fundamental rights enjoy in our Constitution.¹⁰

Every institution created by the Constitution should function within its allotted field and not encroach upon the rights of the people who created them. I feel that the special position of the fundamental rights should be preserved and they should not be sacrificed for the sake of an ancient foreign practice.

The other view is that all the provisions of the Constitution have equal force; no Article has a greater sanctity than any other. There is nothing in the Constitution which gives any special place to the fundamental rights. According to this view, if fundamental rights are considered supreme, no need for harmonious construction would arise.

V. How to Reconcile

If two articles of the Constitution appear to be in conflict, every attempt should be made to reconcile them and let them co-exist. The need for reconciling Articles 19, 105 and 194 was considered in *M.S.M. Sharma's* case.¹¹

"The only way of reconciling the two is to read Art. 19(1) (a) as subject to the latter part of Art. 94(3). The provisions of Art. 19(1) (a) which are general must yield to Art. 194 (1) and the latter part of 194 (3), which are special."

Subba Rao, J. in his dissent suggested another way of reconciling the two provisions:

"Art. 19(1) (a) gives freedom of speech and expression to the citizens while the second part of Art. 194 (3) deals with the powers, privileges and immunities of the legislature, its members and its committees. The legislatures and its members have certainly a wide range of powers and privileges and the said privileges can be exercised without infringing the rights of a citizen. When there is a conflict, the privilege should yield to the extent it affects the fundamental rights. This construction gives full effect to both the Articles."¹²

Following the principle of reconciliation, errors should be made to give effect to both the provisions. If the majority opinion is followed, citizens will have no right at all to publish the proceedings of the House. To that extent their fundamental right under Article 19 would become redundant. If the minority view is followed, the legislature can enjoy all its privileges but should not encroach upon the fundamental rights of the citizens.

There is no reason to differentiate between the two parts of Article 194 (3). The first part provides that the privileges may be such as may from time to time be defined by law. If the legislature makes any law which abridges the fundamental rights, it would attract the provisions of Article 13 and could be declared un-Constitutional. The second part should be read in this light and that should also not be in violation of fundamental rights. It would be strange to say that what the legislature cannot do by making a law, it can do by not making a law.

It is submitted that if Articles 105 and 194--clause (3)--are read subject to Article 19(1)(a), the former would not be defeated. The legislatures can enjoy all the privileges till they do not encroach upon the fundamental rights of the citizens. The privilege to prohibit publication can be exercised, but subject to Article 19 (1) (a) and 19(2). If the secrecy of the proceedings is to be maintained, reasonable restrictions can be imposed in the interest of the security of state. Similarly, malafide reporting which lowers the dignity of the House can be prohibited on the ground of defamation. Effect can thus be given to clause (3) of Articles 105 and 194 without violating Article 19(1) (a).

The majority view in *Sharma's* case was that the provision of clause (3) in Articles 105 and 193 prevails over Articles 19(1) (a) but is subject to Article 21:

"Thus, if a person is to be deprived of life and liberty even by exercise of privilege of the legislature, it has to be according to procedure established by law".

It is inexplicable that one fundamental right should be subject to Articles 105 and 194 but another should prevail over those Articles. Either all fundamental rights should prevail over Articles 105-194 or both should be subjected to the latter. All fundamental rights have the same force and same sanctity.

I feel that in a modern democratic set up a blanket prohibition of publishing legislative proceedings would be totally unjustified. It is of paramount public and national importance that the proceedings of the House should be communicated to the public. It is a must in a

democracy where the citizens have a right to know what their representatives are doing. It would be great injustice if the proceedings of the House were shrouded in secrecy and concealed from the knowledge of the Nation.

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An Autonomous Election Commission — Constitutional Perception

I. Introduction

Recently there has been a debate regarding the scope and extent of the powers of the Election Commission and the interference of the executive in election matters. This debate was triggered off by an order of the Chief Election Commission [CEC],¹ which postponed "all and every election" under the control of the Election Commission [EC] till further orders. This caused a flurry of activity in the political and legal circles, as fundamental questions relating to elections were brought to notice.

The unprecedented order was a result of an impasse which became an inevitability, as two constitutional functionaries, the executive and the EC, could not come to an understanding over their overlapping spheres of activity in matters relating to elections. Some talks were held to try to resolve the issue but the attempt failed, which precipitated such an action from the CEC. This step of postponing all elections was taken because the CEC felt that it was necessary in view of the executive's stand of not adhering to the requisits made by the EC, amounting to an "open attempt to subjugate the EC under the executive" which if allowed, would "destroy the roots of democracy".²

The executive interference, which infringed upon the independence of the EC, related to the question whether the commission had a right to demand the staff and troops needed for elections, and whether it had disciplinary control over the staff borrowed from the executive. Since these questions could not be answered, the CEC thought it necessary to take the drastic step of halting the election process in the country.

This article is an attempt to determine the legal position on the stand taken by the EC, in its order, concerning its independence from the executive, and also whether the order passed by the EC was constitutionally valid. These two aspects of the order are treated separately.

II. Constitution & Powers of EC

Before going into the discussion relating to the order of the CEC, we must determine the powers conferred upon the EC in the

Constitution. The Commission derives its powers from Article 324 of the Constitution. The "superintendence, direction and control" of preparation of electoral rolls and conduct of elections vests in the EC.³ The head of EC is the Chief Election Commissioner, who can be joined by other Election Commissioners, appointed by the President, in a manner provided by a law passed by Parliament, if any.⁴ In case of other Election Commissioners the CEC is to act as chairman.⁵ The CEC can be removed, in the manner and for the reasons for removal of a judge of the Supreme Court.⁶ The Parliament has been given the powers to make laws in all matters relating to or in connection with elections to the Centre and the states, including preparation of electoral rolls, the delimitation of constituencies and all other matters for securing the constitution of the assemblies.⁷ The legislature of the state has been given the same powers to the extent of matters relating to elections in a state, as long as there exists no law made by Parliament.⁸

The Constitution-makers thought it necessary to create a centralised body to conduct elections in the country, which was a radical change from the past. The object underlying these provisions was to ensure an election free from the control of the party in the power for the time being, without which representative democracy becomes meaningless.⁹ To ensure an election machinery free from executive interference, the Constitution-makers gave such powers to the EC. The system followed by our Constitution was analogous to one followed by the Canada Elections Act 1920, where the supervision of the dominion elections was vested in the Chief Election Officer, who was chosen by a resolution of the House of Commons and removed in the same manner as a judge of the Supreme Court of Canada.¹⁰

Judicial decisions

In *Mohinder Singh Gill v. Chief Election Commissioner*¹¹ it was held that the words "control", "superintendence" and "conduct of elections" must be read in broad terms, which would include powers to make provisions which are necessary for the smooth conduct of elections, subject to laws made by Parliament. In *A.C. Jose v. Swami Pillai*¹² the Supreme Court said that the EC cannot make decisions contrary to the laws enacted by the legislature. It does not possess legislative powers, but it can use Article 324 on the silent parts, acting bonafidely, responding to the rule of law and be amenable to the norms of natural justice in so far as conformity to such canons can reasonably and realistically be required of it, as fairplay-in-action is a most important area of the constitutional order, viz., elections. Thus, the judicial pronouncements give some discretionary powers to the EC

in matters not touched upon by the legislature, but always treats the EC as independent of the executive.

III. Imperfections in the System

The Constitution-makers intended to minimise the executive interference by creating an autonomous EC which could oversee all elections in the country. Though this radical change from the past of creating a constitutional functionary conducting elections did minimise executive interference, there were some imperfections in the system. There was scope for executive meddling as the EC was not given its own staff, and, thus, had to borrow staff from the executive.

The Constituent Assembly realised that giving the EC its own staff would result in heavy burden on the exchequer. It was impractical, as the staff at the EC would at times have heavy work and at other times no work. Therefore, it was felt that there was no need for duplicating the machinery and thereby increasing the administrative expense. It was thought best to borrow clerical and ministerial agency at the time of elections and return them when the work be over.¹³ B.R. Ambedkar, referring to the borrowed staff, said that:

"During the time that it is working under the Election Commission, no doubt administratively, it would be responsible to the Commission and not to the Executive Government."¹⁴

Borrowing staff from the executive has resulted in increasing number of cases where there has been interference by the executive in the functioning of the EC. This fact was brought to public notice by the order of the CEC. The same imperfection relating to borrowed staff was foreseen by R. K. Sidhna, a member of the Assembly. In his speech he said:

"If you want to make the scheme perfect, you should not borrow any staff from the provinces. Though during the period of elections the staff would be under the control of the Commission, it would be only for a temporary period. They will be permanent people responsible to the Executive and if the Executive wants to play mischief, it can issue secret instructions to that staff to act according to their behests. The staff may feel that their permanent duty lay with the Executive, that the work with Commission was only for a short period and they would carry out the fiat on behalf of permanent officials."¹⁵

The two considerations regarding staff are clear--that it is impractical to give the EC its own staff, and that it is essential to

minimise executive interference. The best method to avoid this conflict of interests is to allow the EC to borrow staff from the executive, making sure that they are responsible to the Commission and not the executive. There are two stages which must be perfected to ensure freeing the elections from executive interference. The first stage being the appointment stage, and the second being the disciplinary stage.

Perfection through appointments

The EC needs administrative machinery as well as law and order machinery for a smooth conduct of polls. Article 324(6) of the Constitution uses the word "staff", which includes both administrative and law and order machinery.

Let us first deal with the law and order machinery, which is essential for the peaceful conduct of polls. The Attorney General of India¹⁶, referring to this subject, has said that the assessment of the law and order situation before the polls and the kind and quantum of troops required for each situation must be decided by the states, as it is a state subject.

In so far as the assessment of a law and order situation is concerned, it was held by the Supreme Court in *Election Commission of India v. State of Haryana*¹⁷ that, though the state should be best equipped to assess the law and order situation in the areas under its jurisdiction and control, the final decision as to whether it is possible and expedient to hold elections at any given point of time must rest with the EC. It was also held that the EC could not be said to act arbitrarily as, before coming to a decision relating to the law and order situation, it must consider the views of the state government and other local bodies and authorities.

By giving the power to assess the law and order situation at the time of elections, the Supreme Court has preserved the autonomy of the Election Commission. If the power to assess the situation vested in the state, as suggested by the Attorney General of India, the executive would have wide scope of interfering with elections by making a wrong assessment suiting the executive government in power.

Not only the assessment of a situation but also the decision on the type of forces required and the quantum necessary should vest in the EC. The EC, under Article 324(6), has the power to demand such forces as are necessary for the discharge of the functions it performs.¹⁸ The Constitution makes it a mandatory duty of the executive to provide such forces as required and of the quantum thought necessary by the EC.

The Attorney General of India was correct when he said that law and order was a state subject, but this power must be harmoniously construed to best serve the spirit of the Constitution and to suppress the mischief. The EC has powers relating to matters of elections, and its powers are provided to minimise the possibility of executive interference. By harmonious construction we can give the power to make assessments and to demand such troops as are necessary to the EC, while for all other matters relating to law and order the state would have full control. By this method the spheres of activity can be clearly demarcated and the scope of overlapping would be eliminated.

The difficulty arises when the forces requested are deployed elsewhere and are difficult to arrange. Before the order of the CEC, the EC had requested the executive to make available CRPF for their deployment in two sensitive elections.¹⁹ The executive had said that since the forces were involved in highly sensitive matters of internal and external security, they could not be made available. In a situation where the executive has a bona fide reason for not providing the forces required by the EC, and it is not an indirect attempt to subvert the election process, it would be wrong on the part of the EC to insist on the same forces. It was for the court to decide whether in this case the executive was acting in a bona fide manner or not, but matters such as this must be best resolved in a consultative manner.

The Attorney General has also stated that by sending central forces to a state the federal structure of our Constitution would be eroded.²⁰ This view is misplaced as the central forces which are sent to a state, for election related purposes, are instructed by EC. The Centre cannot, without the direction of the EC send any forces to the state. The federal structure would have been destroyed if the Centre sent forces on its own direction, surpassing the EC completely. Since the EC has the power to ask for forces when it thinks fit, the federal structure is preserved.

Now we consider the administrative machinery. The Attorney General has said that the EC can choose the staff it requires from the list of names provided to it by the executive. He said that this was necessary because only the executive can decide which person can be sent to the EC on election work and which person must remain with the executive administration due to the onerous duties vested in him.²¹

This view is contrary to the provisions of the Constitution under Article 324(6). As discussed earlier, the EC can ask for the staff it wants to discharge the function of conducting elections. The executive has to "make available" such staff as is requested by the EC. Even

under the Representation of the People Acts of 1950 and 1951 the EC has been given the power to appoint the staff it requires.²²

The constitutional provision and the provisions made in Acts of Parliament make it clear that such staff can be asked for as the EC thinks fit. The suggestion of the Attorney General of giving the EC a choice of the names drawn up by the executive is fraught with dangers and goes against the view of an independent EC. It is dangerous because the executive can provide the EC with the list of names of staff which would favour the executive government during elections. As discussed before, the staff can be given secret instructions to enhance the object of political victory to the executive government.²³ Since this view of drawing up a list of names gives scope for executive interference, it should be rejected. If the staff requested by the EC is involved in important administrative duties and cannot be made available, the EC should not insist on such staff and can look for an alternative. Care should be taken to ensure that the executive is acting in a bona fide manner.

Hence the importance of the appointment stage for the independence of the EC is fully envisaged by the Constitution. There is no need of a constitutional amendment to achieve the objective of creating an independent EC. By harmonious construction, keeping in view the spirit of the Constitution of providing for autonomy to the EC, we can eliminate the possibility of conflict of powers.

Perfection through discipline

To further remove the imperfection in the system of election, the disciplinary powers over the staff borrowed by the EC must vest in the Commission. Since the staff which is borrowed are still permanent officials of the executive, there would be a tendency towards favouring the executive government in order to get rewards from the executive. Thus if the EC does not have the authority to discipline such staff it would be impossible to make such staff responsible to the EC. The stand taken by the government is that the EC should not have the power to take disciplinary action, but rather the parent department of the staff borrowed should have the power to initiate disciplinary proceedings.

In the Representation of the People Act 1950 and the Representation of the People Act 1951, under section 13CC and section 28A respectively, it is provided that the staff borrowed are "deemed" to be on "deputation" to the EC, and would be subject to the "control, superintendence and discipline" of the EC.²⁴ Also, the period of deputation would last till the time the work entrusted upon them is completed, i.e., the completion of the election. The significant fact to

note is that the staff is deemed to be on "deputation" and subject to the "discipline" of the EC.

The Attorney General of India²⁵ has stated that in service jurisprudence the borrowing authority does not have the authority to exercise disciplinary powers over the deputed staff, except with the approval of, or with consultation with, the parent authority. He also stated that, the word "discipline", which occurs in the sections mentioned before, relates to the performance of election duty and does not extend to the exercise of disciplinary proceedings. Also, that by giving disciplinary powers to the EC, the provisions of Articles 309 and 311 would be violated. The government has taken the stand that the findings of the EC on irregularities committed by the deputed staff would be considered a preliminary enquiry, while the rest of the disciplinary proceedings would be taken up by the Department of Personnel.

The general rule with regard to deputation is that the borrowing authority does not have the power to take up disciplinary proceedings.²⁶ Though there is no specific All India Service Rule dealing with deputation to the EC, there is a provision under Rule 7 of the All India Service (Disciplinary and Appeal) Rules 1969, which is the only rule which deals with powers for action against government servants on deputation. Rule 7(1)(b) (vii) gives the residuary power of taking disciplinary action, to the central government. Therefore, under the general law, the central government can take disciplinary action against government servants on deputation. It is a well known rule of interpretation of statutes that a special law prevails over a general law. Hence, under the two sections mentioned earlier, the Parliament can be said to have given disciplinary jurisdiction to the EC over the deputed staff as an exception to the general rule.

The word "discipline" which occurs in the two Acts of Parliament can mean nothing else but disciplinary control. The word has been specifically used with the other words, "superintendence" and "control". In matters relating to powers of the EC, the word "direction"²⁷ is used instead of "discipline", along with "superintendence and control". Thus, it can be said that Parliament has given disciplinary control to the EC by creating an exception to the general rule of deputation. This view conforms with the provisions of Article 309, where it is stated that Acts of appropriate legislature may regulate the recruitment and conditions of service of the persons appointed, as the exception is created by Parliament.

Even though the EC has disciplinary jurisdiction over the staff, it would not have the right to remove or dismiss them. Article 311(1) does not give the authority of removal or dismissal of a member of a civil post to an authority subordinate to that which appointed him. Some staff may be appointed by the President of India, which cannot be dismissed or removed by the EC. This situation can be overcome if the analogy of interpretation of Article 235 is followed. Under this Article, the High Court of a state has disciplinary control over the subordinate courts.²⁸ The proceedings are taken up by the High Court which sends its recommendations to the governor of the state. The High Court itself cannot remove or dismiss members of the State Judicial Service, as they are appointed by the governor of the state. As was held in *Baldev Raj v. Punjab and Haryana High Court*²⁹, the recommendations sent to the governor of the state by the High Court are binding on him. Similarly, the EC can have the disciplinary control over the staff on deputation and can send its recommendations to the appointing authority, which would be bound by it. In such a manner Article 311(1) would not be violated.

It is misplaced to say that by giving the EC disciplinary jurisdiction over the deputed staff, the EC would have unbridled powers. The EC cannot act in an arbitrary manner as the disciplinary proceedings would have to be conducted according to the principles and rules of law normally followed in such proceedings. Any proceeding which is basically initiated to malign a government servant would be struck down by the court.

The objective of giving disciplinary control to the EC is to make the deputed staff realise that they are fully responsible to the EC and not to the executive government. It would not have been necessary to give disciplinary jurisdiction to the EC if the government carried on the disciplinary proceedings against the staff which was found to have indulged in irregularities while on deputation to the EC. There is also scope of executive interference which is against the spirit of the Constitution.

To give disciplinary power to the EC there is no need of an amendment, so long as the word "discipline" is interpreted to mean disciplinary control. The constitutional aim of an independent EC would be achieved if such an interpretation is taken. The recommendations of the EC in this matter should be made binding on the appointing authority, for removal or dismissal, to eliminate executive interference.

*The order*³⁰

IV. Constitutional Validity of Order

The effect of the order passed by the CEC was to postpone all the elections under its control, including biennial and bye-elections to the Council of States, bye-elections to the state legislative councils and bye-elections to the state legislative assemblies, as had been announced or notified or were in progress. It was stated that the challenge of the government to deny the powers to the EC was fraught with the most perilous consequence for future democratic elections and was an open attempt to subjugate the Election Commission to the executive. It further stated that till such deadlock was resolved, the Commission could not find itself in a position to carry out its constitutional obligation in the matter envisaged by the makers of the Constitution. Thus, elections to ten seats were postponed and the whole election process came to a grinding halt. There were serious law and order problems in two of the states, while the others did not face any such problem.

Bar on writ jurisdiction of courts

It has to be determined whether the courts can be moved to challenge the validity of the order passed by the EC. Under Article 329(b), the courts are barred to interfere in electoral matters, and the only remedy available is an election petition. The bar on courts includes the writ jurisdiction as well. In *N.P. Ponnuswami v. Returning Officer*³¹, it was held that till the entire process of election was not completed, the courts are barred to exercise their writ jurisdiction under Article 329(b). It means that from the notification of election till the return of a candidate, no action of the EC can be called in question because elections have to be concluded "as controversial matters and disputes arising out of elections should be postponed till after the elections are over, so that election proceedings are not unduly retarded or protracted." In *Ponnuswami's case*, the action of the returning officer who rejected the petitioner's nomination papers was sought to be quashed by the High Court, but the petition was rejected as elections were still in progress. In *Mohinder Singh Gill's case*³² the petition related to a case where the poll result was cancelled, and a re-poll ordered. The court held that since elections were still in progress as a re-poll was ordered and a candidate had not been returned, the court had no jurisdiction to hear the petition. The court further held that only those acts of the EC which are within the powers conferred upon it under Article 324 and which are in furtherance of free and fair elections conducted expeditiously, can be barred from interference by the court.

Thus, the courts can interfere in actions of the EC during elections only if the actions are outside the scope of its powers or if they are not in furtherance of conducting of free and fair elections expeditiously. In the order all elections were "postponed", which implied that they were still in progress at that point of time. Therefore, the courts could not even hear a petition challenging such an order, unless it was beyond the power of the EC. To determine whether the order was beyond the powers of the EC we must consider the reasons for such an action.

V. Comments & Conclusion

As discussed earlier, the government was wrongly denying the rights and authority of the EC in matters relating to staff, troops and disciplinary authority. The constitutional validity of the order must not be determined merely on the ground that the government was wrongly denying the authority of the EC and thereby interfering with its functioning. It has to be seen whether the EC has the power under the Constitution to pass an order postponing all elections under its control.

Even though the executive was interfering with the working of the EC, the manner adopted to check this interference, by passing such an order, was un-Constitutional, being arbitrary and not within its discretionary power. It cannot be denied that the conduct of free and fair elections is the primary duty of the EC, but the importance of holding elections expeditiously cannot be ignored. The ideal situation is when an election is free and fair and also conducted expeditiously.

A democracy would best function if all the citizens are represented, i.e., there are no vacant seats in the legislatures. Elections to vacant posts must be expeditiously conducted to achieve better functioning of our representative democracy. Fazal Ali, J. in *Ponnuswami's case* said:

"It does not require much argument to show that in a country with a democratic Constitution in which the legislatures have to play a very important role, it will have serious consequences if the elections are unduly protracted or obstructed."³³

Thus, it is obvious that in furtherance of our democracy elections should not be delayed unless there are compelling reasons.

The EC does have discretionary powers regarding the decision whether elections should be postponed or cancelled. If it considers that the situation is not conducive to hold free and fair elections, but not otherwise. Once the election process has commenced, and the administrative and law and order machineries are functioning for the purpose of elections, the Commission should not disturb the time schedule of the elections, unless there are compelling reasons to do so.

Elections in two of the constituencies faced difficult law and order unrest,³⁴ the Commission had demanded troops to deal with the unrest, but was not provided with the troops desired, nor was a suitable alternative provided. In this situation the Commission was fully justified in postponing the elections, as it thought the situation was not conducive to hold free and fair elections without disturbances. Here there was a compelling reason to postpone elections.

As far as other elections were concerned, there was no law and order problem. It can be said that since the EC was denied disciplinary authority over the deputed staff, there was potential for executive interference and free and fair elections were impossible. It is not disputed that there is scope for executive interference when the EC does not have disciplinary control, but this reason cannot be considered compelling enough to postpone the elections. The importance of conducting elections cannot be discounted and, thus, as far as the other eight elections were concerned, there was no need to postpone these elections.

Hence the EC acted beyond the power conferred on it, and it was un-Constitutional. The court could exercise its writ jurisdiction in this case as the Commission acted beyond the ambit of its powers. If the EC thought that it was denied its authority regarding staff, troops and disciplinary authority, it should have referred this matter to the Supreme Court, but rather it chose to adopt a confrontational approach and went beyond its powers.

It has been determined that the EC, though it cannot be given its own staff due to the large administrative expenses involved,³⁵ should be given enough authority with regard to the staff made available to it, to preserve its independent status. The administrative staff and the law and order machinery should be made available, whenever thought necessary by the Commission, even though they might conflict with state interest, to further the intention of the Constitution-makers. By giving the EC disciplinary control over the staff borrowed from the executive, interference in the matters related to elections would be further reduced. The courts should interpret the enactment of Parliament in such a way so as to enhance the object of an autonomous EC. By giving the EC these two powers, which it deserves, imperfections in the system could be further minimised.

The system of elections should be free and fair without any interference, otherwise the confidence of the voter would be lost. This loss in confidence in elections is detrimental to the functioning of democracy, as voters would not cast their votes because of the fear of

the votes being ineffectual. Therefore, the independence of the EC should not be compromised.

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Offence of Rape — Reflections on A Recent Supreme Court Decision

I. Hassan Case

A recent judgement of the Supreme Court to reduce sentence in a 1978 Karnataka rape case from seven to three years has generated a heated debate among jurists and lawyers on the need for drastic amendments in the laws against rape so as to make them more deterrent and stringent. The facts of the case are as follows:

A twenty one year old nurse was travelling by bus from Bangalore to Hassan in Karnataka to attend her brother's marriage, when she met two men who befriended and persuaded her to stay at a lodge at night in Hassan. There they raped her at knife point. On raising alarm by the woman, the staff of the lodge rescued her and handed over the rapists to the police. The sessions judge acquitted one of the accused on account of his 'young age': twenty-one years at the time of rape. Ironically, the victim was also twenty one. The Karnataka High Court, on appeal, established the case of rape and sentenced both the accused for seven years rigorous imprisonment. On appeal by the accused to the Supreme Court, the case took eleven years to be decided and the decision necessitated the present debate.

II. What IPC Says

The whole controversy centres around sections 375 and 376 of the IPC. Section 375 defines rape and says that a man is guilty of rape when he commits sexual intercourse with a woman in any of these five situations: viz. (i) against her will; (ii) without her consent; (iii) with her consent, when her consent has been obtained by putting her in fear of death or hurt; (iv) with her consent, when the man knows that he is not her husband and that the consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married; (v) with or without her consent when she is under sixteen years of age.

Section 376 of IPC provides the punishment for rape -- the minimum being seven years and the maximum life imprisonment. However, the first proviso to section 376 states that the court may, for adequate and special reasons to be mentioned in the judgement, impose a sentence of imprisonment for a term of less than seven years. It is this proviso and the 'adequate & special reasons' given by the court for the reduction of the sentence to three that have aroused the controversy.

The Supreme Court said that considering the circumstances "it was

not unlikely" that at first the two men may have had "a genuine desire" to help the girl in reaching her brother's place quickly, but later when the girl agreed to share the same room with them, the two young men became "victims of sexual lust."¹

Thus, the Supreme Court centred its decision on the concept of "victim-precipitated" rape—a concept in which the victim is regarded as the cause of the crime often on such flimsy grounds as the alleged provocation of her attire or past sexual behaviour. The attacker, on the other hand, is treated—as James Coleman and others put it—as a decrebrate organism unable to quell his lust in the face of such "outrageous" provocation.²

III. New Thinking

However, as pointed out by the same authors, such concept of 'victim-precipitated' rape turns out, on a close examination, to be a myth.³ This concept sympathises with the rapist and perpetuates the myth of rape as a crime of passion. Instead, rape can be best defined as a sexual activity that occurs under actual or threatened forcible coercion of one person by another. In most cases rapes are planned events in so far as they involve factors creating motivation, influencing inhibitory processes and relating to opportunity.⁴ Refuting rape as a crime of passion, US psychologist Nicholas A. Groth in his book *Men Who Rape: The Psychology of the Offender* calls rape: "a pseudo-sexual act, a pattern of sexual behaviour that is much more concerned with status, hostility, control and dominance than sexual pleasure or sensual satisfaction"⁵. Thus Groth characterises rape as involving either power motives or anger expression, more than sexuality on the part of the rapists.

Particularly, in Indian context, where very few rape cases are reported as the victim may not disclose the incident due to fear of scandal and social stigma, such depiction of women as "agent provocateurs", casting them in the role of culprits, would discourage the few women victims who take the bold step of reporting the crime to police.

In the tradition-bound non-permissive Indian society disclosure of being raped is likely to ruin the prospects of the girl's rehabilitation in the society for all times to come. So, unless her story was painfully true, she would not take such a grave risk. Rightly said Krishna Iyer J. in *Rafiq* :⁶

"When a woman is ravished what is inflicted is not merely physical injury but the sense of some deathless shame... Judicial

response to human rights cannot be blunted by legal bigotry".

The Supreme Court added that since the incident had taken place long back and because the accused had suffered disrepute and mental agony during the course of the case, a reduced sentence under the "adequate and special reasons" clause of the proviso to section 376, IPC would meet the ends of justice. Apart from the callousness of such an attitude which takes no notice of the victim's mental agony, the reasoning seems flawed. Given this precedent, instead of clearing the backlog of long delayed cases, it might be appropriate simply to let off the defendants. Unfortunately, the major part of the delay — 11 out of 15 years—occurred in the Supreme Court. Growing up with a stigma of being 'raped' for 15 years can be traumatic.

Criminal Law Amendment Act 1983 introduced some additions to the law relating to sexual offences, viz. section 228A (IPC) whereby disclosing identity of the victim of rape is made punishable, and section 327 (2) Cr. P.C. under which proceedings in a rape trial are to be held in camera. These provisions not only protect the honour of sexually victimised women but also make it possible for them to depose in court without any fear of social ostracism. The present judgment of the Supreme Court can be seen in sharp contradiction to the good efforts of the legislature.

The message of the *Hassan* case is that rape is a crime of passion that can be mitigated. It also means that the rapist's right to mercy is greater than the victim's -- thereby revealing a gender bias which has also been evident in a spate of decisions in rape cases in India. The Bombay High Court, for instance, recently let off a father who assaulted his minor daughter, who was trustingly sleeping next to him, on "humanitarian grounds" since he was poor and depressed and his wife had left him. The message inferred from this case may be that a poor man may rape his young daughter, especially when his wife has left him, and that men cannot control their sexual desire.

In *Tikaram v. State of Maharashtra*², better known as *Mathura* case, the court overruled the Bombay High court's conviction of two police officers for the rape of Mathura, a sixteen year old tribal girl in police custody. The court held that though there was sexual intercourse there was no rape because there was no mark of physical injury and hence no proof that Mathura had physically resisted. The message is that if there is no mark of physical injury then there is lack of resistance from the victim and hence her consent.

In *Premchand v. State of Haryana*³ the mandatory minimum

sentence of ten years awarded to two police officers for raping a woman was reduced by the Supreme Court to five years, only because the woman was of 'easy virtue' and there was no proof of physical resistance.

Thus, the present Karnataka case decision, along with the above cases, adds strength to the views of the radical feminists like Catherine Mackinnon who argue that law's objectivity is male subjectivity; law is male through and through and that women's experience is excluded from the law. The Supreme Court decision, being the law of the land, has to be accepted, but the serious psychological deprivation experienced by the rape victims cannot be ignored. The best course probably is to set up support institutions and plug the loopholes which allow different interpretation of the law.

In USA a significant development has been the setting up of "rape crisis centres" and "hotlines". These centres have all female participants including some of the rape victims, and aim at providing counselling and other therapeutic measures to the victims. They operate through a telephone 'hotline' maintained for the purpose.⁴ In recent years, new rape laws have been adopted by a majority of states, about one third of them based on the "Michigan model", which describes four degrees of criminal sexual conduct, with different levels of punishment for different degrees of seriousness. In calling the offence "criminal sexual conduct" rather than 'rape', the Michigan law also appropriately places the emphasis on the offender rather than the victim.

Clearly, there is a need to broaden the definition of 'rape' and for a complete overhaul of procedures, including appointment of women officers for collection of evidence and making punishment for offenders more severe. The role of women's organisations based on the model of 'rape crisis centres' in USA can be very effective because the best therapist for the female sex victim is another victim. Rape is an ugly and intrusive violation of another person's integrity and selfhood that deserves to be viewed with more gravity and its victims with more sensitivity.

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Working of Water (Control and Prevention of Pollution) Act 1974 — A Critique

I. Introduction

Sensitivity to the environment has been an integral part of the Indian civilization. The Rigvedic texts which are the oldest written laws, were the first expression of man's ecstatic communion with nature. The verses are imbued with a sense of vitality which comes from a close connection with the life-giving forces of nature. With the growing complexity of society, the pastoral society's wonder of nature was translated into laws which sought to protect the environment. It was the *dharma* of each individual in society to protect nature. For example, for causing injury to plants different punishments were provided. Govindraja in his text on Manu made a distinction between injury to shade-giving plants, flower-bearing plants and highest amerements respectively. Kautilya went a step further and fixed punishments on the basis of importance of the parts of the tree. Rivers also enjoyed a high position in life of society; they were considered as goddesses and fouling the water of a river was considered a sin attracting punishments of different grades like penance, outcasting, fines, etc.

The list of laws which sought to protect the environment in ancient India were endless. During the British raj as well there were important developments in environmental legislation. In 1860 for the first time an attempt was made to control specifically water and atmospheric pollution through criminal sanction. A plethora of legislations having a direct or indirect bearing on environment came up. It is interesting to note that the British raj did not require much legal control in the area of water pollution as compared to air pollution. Perhaps at that time river water had yet to face the challenges it faces today.

In modern India the problem of environmental pollution is of a different scale and dimension. Industrialisation has advanced rapidly and has been accompanied by unprecedented and intensive environmental pollution. Industrial processes have not yet attained the perfection of natural processes where the input is equal to the output. In other words, in any natural process (be it photo-synthesis) whatever goes in the input is utilised completely and there is no waste. In industrial processes wastes are inevitable due to the relative inefficiency of the process itself. Industrial progress therefore implies greater waste and consequently

greater pollution. The conflict between industrial progress and environment is absolute.

Today environmental legislation has to ensure that industrial development is not thwarted by a concern for environmental protection; and yet importance of environmental protection is not underestimated. In India this is understandably difficult. In spite of numerous environmental laws pollution continues to plague us with increasing intensity.

II. A Recent Case

The reason why pollution is unabated in spite of myriad environmental laws can perhaps be deduced by analysing the manner in which these laws operate. This paper seeks to study the recent closure of a distillery in a certain state for the pollution of a certain river and show how the Water (Prevention and Control of Pollution) Act 1974 was used in the process. Such a study may give insights into some deficiencies of the Act and of environmental law in general.

The river 'Y' flows in state 'X' and provides drinking water to a township 'V'. It has numerous industries on its bank, including a distillery. The State Board, which has been constituted under the Act and is the agency responsible for prevention of pollution, was totally against the distillery being set up near the river. This was because it was pointed out that the distillery would be a source of pollution in the river. Due to administrative pressure, it had to agree to grant permission subject to special conditions that: (a) under no circumstance should treated effluent be discharged in any water course; and (b) such treated discharge should be used on land for irrigation purposes.

However, distillation was started without the fulfilment of conditions. Within a few months on complaint from the local administration of town 'V' that the distillery was responsible for polluting the river, the State Board passed an order under section 33-A of the Act and cut off the electricity supply to the unit. The distillery went to court against this order.

The High Court directed that electricity be supplied to the bottling unit only. Within a month's time the court directed the State Level Committee (SLC : a high level administrative body consisting of the Secretary, Commerce & Industries, Secretary, Housing & Environment among other members) and the State Board to take a decision on the matter. The SLC gave clearance for the distillery to be set up without assigning any reasons. Thereafter the State Board also gave its consent. Once again the consent was conditional. The conditions were: (a) effluent treatment should conform to IS 2490, (b) effluent treated should

be inside the premises of the plant, (c) methane recovery plant should be installed for treating the effluent; and (d) industry would not allow any of its effluents to be discharged outside the premises.

The distillery once again did not comply with the conditions. After the lapse of a considerable time period, the chairman of the State Board was informed by the local administration that the river was polluted and a large number of fish had died. The distillery was held to be likely source of pollution. The water had turned reddish and was declared unfit for consumption. After inspection of samples a notice was issued under section 33-A of the Act against the distillery. The reason stated was the non-compliance of conditions which the State Board had earlier laid down. The distillery went to court against the order and managed to obtain a stay order. It has begun functioning now.

III. Reasons for Failure

Having known the facts of the case we may now go on to analyse the reasons why the State Board could not enforce all the conditions it had imposed on the distillery. The main reason was the lack of independence of the Board and its control and manipulation by vested interests. This lack of independence stems from the manner in which it has been constituted under the Act which provides for 17 persons to be members of the Board, all the members including the chairman to be appointed by the government. The chairman can be removed by the government without any reasons being assigned. He has no security of tenure. Thus if there is a question of implementing a decision against the interests of the government, the State Board cannot be expected to function independently.

In the instant case this is precisely what happened. Since distilleries contribute a sizeable portion to the state revenues, the government was quite reluctant to take action, which is why the State Board also vacillated. Even when the State Board expressed its disapproval of setting up the distillery near the river, it was overruled by the SLC. The State Board comes under the administrative control of the departments in SLC-Housing & Environment and Commerce & Industries. These departments were keen to continue the distillery. It is only when the pollution became lethal, leading to the death of a number of fish, that some action was taken. Even this action was taken against strong political and governmental pressure.

Apart from the government, the membership of the State Board is representative of industrial houses. The inclusion of representatives from industries and corporations renders the State Board a weak agency for control of pollution. This is because industries are major pollutants of

the environment. Having their representatives on the State Board for control of pollution compromises the position of the Board.

In spite of these pressures the State Board often does take action, but the kind of action it takes is limited in scope. On being informed about a polluting industry the state board can go in for litigation under section 33 for restraining a person who is likely to cause such pollution from so doing. The other alternative is to issue directions under section 33-A, for closure, prohibition or regulation of any industry, operation or process, stoppage or regulation of supply of electricity, water or any other service. The state board usually issues directions under section 33-A because litigation under section 33 can be costly, complex and long-drawn. Section 33-A is on the other hand an emergency provision where quick action can be taken. However, there is another side of the coin, and that is the relative ease with which a stay order can be obtained from the court against the directions under section 33-A. Thus, using section 33-A leaves room for the industries to escape the provisions of the Act. Although the State Board can again issue directions 5 days after a stay order, this has never been done.

Another problem which inevitably arises while using section 33-A is that its effect can be nullified by the government. When an order under section 33-A (say for cutting off electric supply) is issued by the State Board, it is government agencies which are responsible for carrying out the order. Often due to inter-departmental rivalries these agencies are slow or reluctant to carry out the order of the State Board. This completely defeats the purpose of an emergency regulation. The industries go to the court as soon as a direction under section 33-A is issued and when the court issues a stay order it orders the maintenance of status quo ante on the date of hearing. If on the date of hearing the government agencies have not carried out the orders of the State Board, the industry will function normally after passing of the stay. This defeats the purpose of preventing pollution.

While these are some of the flaws in the Act itself which reduce the efficiency of environmental laws, the inefficiency of these laws can also be traced to deficiencies in jurisprudential basis of these laws. The main jurisprudential orientation is outdated in environmental law. The main reason is that it is totally counter-productive from the economic point of view. The cost of complying with pollution standards are enormous. For example, in the case analysed above the cost of installing a methane digester was Rs 3.25 crores. In such a case assuming a confrontationalist position (like in criminal administration) is of little help against the culprits (the industries) because of two reasons:

- (a) the agencies responsible for prevention of pollution are quite ineffective in enforcing punitive measures, and
- (b) since the economic costs of complying with the standards is anyway so high, the industries would rather err than shoulder the economic burden of compliance.

Even if the penalties were increased for non-compliance, the purpose would not be served since the boards would still be pliable through economic and political malpractices by the industries.

Another peculiarity of criminal-justice administration on which environmental law is based is the principle of direct causality which transforms into a drawback when applied to environmental legislation. The basic conditions of the applicability of the principle of direct causality are:

- (a) agency causing harm and the victim suffering it must be directly related through cause and effect relationship;
- (b) mens rea of the cause must be established;
- (c) causality relationship must be immediate, not remote.

In the instant case this principle of direct causality posed tremendous problems for the board in fixing the liability on the distillery. There were a number of possible sources of pollution of the river --

(a) domestic and industrial wastes from two townships and one large city near the river; (b) distillery (c) other industries on the banks of the river. Thus the direct relationship between pollutants and sufferers was difficult to establish.

Another problem encountered by the board in fixing liability is that the State Board has to prove that the agency polluted knowingly--i.e., mens rea has to be established. For example, section 24 of the Water Act clearly lays down that:

- (a) no person shall knowingly cause or permit any poisonous, noxious substances ... to enter into any stream, or well or sewer or on land; and
- (b) no person shall knowingly cause or permit to enter into any stream any matter which may tend, either directly or in combination with similar matters, to impede the proper flow of the stream.

It can always be claimed by the industry that it was not aware that any effluent had been discharged by it to cause pollution or it can be claimed that the discharge was due to some accident.

In the case analysed above the State Board was able to pinpoint the distillery as a source of pollution because of a high concentration of potassium in the polluted river. Potassium can only be from an effluent released by a distillery. In normal circumstances even this potassium would have been difficult to detect--the distillery releases it only during heavy rains so that it gets washed away undetected. On the day previous to the incident there was a forecast of heavy rains. The distillery therefore possibly released large quantities of effluent. Fortunately it did not rain, leading to intensive pollution of the river. It therefore required the "hand of God" for our environmental legislation to be effective.

IV. Changes required

Clearly, we have to rely on concrete legislative changes rather than the whimsical "hand of God" for our environmental legislation to be more effective. As regards changes in the jurisprudential basis of environmental law, it is clear that the conflict mechanism model is ineffective. A new form of jurisprudence needs to be evolved, which envisages cooperation between the board and the industries. The industries should not necessarily be looked upon as enemies but as partners in solving our environmental problems. Instead of listing out deterrents for non-compliance, there should be incentives offered for compliance with the laws. For example, there could be tax deduction for those who comply with the law, or tax relief for purchase of purifying equipment.

The basic need of cooperation must be kept in mind while formulating environmental legislation. A cooperation-oriented jurisprudential base does not mean that no liability should be fixed on industries for pollution. Environmental offence can be changed from being a criminal liability to that of being a liability in tort. The problem would then be of civil law where the laws of evidence are much simple. The compensation to be paid by the polluting party under torts would be directly relative to the amount of damage caused--unlike in criminal law where penalties are decided a priori and are often far below the cost of damage which the industry has caused.

It has been suggested that on identification of polluters the board, instead of prosecuting them, could levy an economic assessment on them which would correspond to the excess profits made by non-compliance with the laws. While this is a better alternative to prosecution, the old problem of how to identify the polluter comes up again. Also the boards cannot be expected to levy the economic assessments effectively because the ground reality is the non-independence of the boards. Political and

economic forces will ensure that such economic assessments rarely occur in spite of pollution.

An alternative model with cooperation as the basic element is difficult to evolve because there is a fundamental conflict between the interests of industries and the aims of environmental legislation. Economic incentives for compliance would be of limited significance, because there is a limit to which concessions may be given by the government. Till a satisfactory model is evolved, the courts should bear a tremendous responsibility for giving an impetus to environmental laws. Environmental legislations must be considered to be as sacrosanct as social legislations.

Note:

1. The case referred to in this comment is based on actual facts. Letters 'X', 'Y' & 'V' denote a state, a river and a township respectively, whose actual names have been withheld.
2. Help has been taken in writing this comment from the works of P.V.S. Nambodripad and Chhatrapati Singh.

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The New Judicial Trend of Citing Works of Living Authors — A Study in the Area of Family Laws

I. Introduction

The following ten judicial decisions — two of the Supreme Court of India and eight of various High Courts — have extensively quoted from several of my books and other works on the family laws of India:

1. *Fuzlunbi v. K. Kader Vali*, AIR 1980 SC 1730
2. *Mohd. Ahmed Khan v. Shah Bano*, AIR 1985 SC 845
3. *K.C. Moyin v. Nafisa*, 1972 KLT 785
4. *Abdur Rahim v. Padma*, AIR 1982 Bom 341
5. *Farzanabi v. Film Censor Board*, 1983 ALJ 1133
6. *Harvinder Kaur v. Harmander Singh*, AIR 1984 Del 66
7. *Raj Kumar Gupta v. Babra Gupta*, AIR 1989 Cal 165
8. *Usman Khan Bahmani v. Fathmunnisa*, AIR 1990 AP 225
9. *Noor Mohammed v. Mohd. Januddin*, AIR 1992 MP 244
10. *Mangila Bibi v. Noor Hussain*, AIR 1992 Cal 92

It is, I feel, a healthy trend that besides citing the old classics the courts are now taking notice also of the opinions and viewpoints of contemporary authors, discarding the earlier policy of not quoting from the works of those still living. It will, indeed, be interesting to examine how far the new trend has helped the courts in interpreting and applying the law in conformity with the thinking and ideas of the age.

What follows here is a brief classified study, from this angle, of the ten judicial decisions listed above.

II. Hindu-Law Acts 1955-56

Non-Hindu mother as guardian of Hindu child

The Division Bench decision of the Calcutta High Court in *Raj Kumar Gupta's case*¹ relates to the Hindu law of guardianship. There

was at issue in the case the right of the Christian wife of a Hindu man to the guardianship and custody of her infant child.

Section 6 of the Hindu Minority and Guardianship Act 1956--stating who would, legally, be the natural guardian of a Hindu minor--adds a proviso that "no person shall be entitled to act as the natural guardian of a minor under the provisions of this section" if he or she has "ceased to be a Hindu"—[c1. (1) of the proviso]. Commenting on this provision in one of my books on Hindu law, published in 1981, I had expressed an opinion that:

"Ceasing to be a Hindu is different from being a non-Hindu. So, where a parent has been a non-Hindu from the very beginning, clause (1) of the proviso to section 6, it is submitted, cannot be invoked. This will conform to the gloss put by the courts on the provisions of the Caste Disabilities Removal Act 1850."²

Quoting this opinion in *Raj Kumar Gupta's* case, the Calcutta Bench said:

"A person can cease to be a Hindu only when he or she was a Hindu and a combined reading of section 6 and the proviso may, therefore, be construed to give rise to the inference that one is not entitled to become natural guardian of a Hindu minor under this Act unless he or she is a Hindu. A learned author has, however, observed that 'ceasing to be a Hindu' is different from 'being a non-Hindu from the very beginning'. Be that as it may, the proviso, in our view is unfortunate and clearly a retrograde step in clear conflict with the Caste Disabilities Removal Act 1850."³

In a scathing attack on the personal-law system the court observed:

"However anachronistic it may appear to be, even today in India, proclaimed to be secular in its National Charter and mandated thereby almost four decades ago to secure to all its citizens a uniform civil code, religion is still being allowed to have a dominant and decisive role even in secular matters relating to law and its administration"⁴

The four Hindu-law enactments of 1955-56 are indeed replete with provisions openly discriminating against non-Hindus and the Hindus converting to other religions. The reality is that by enacting these provisions the state has acted in a way diametrically opposed to the

Constitution's stress on secularism and uniform civil code. To this unfortunate reality, not realized by many, I will revert in the third part of this paper.

Restitution of conjugal rights

Harinder Kaur's judgment of the Delhi High Court related to the constitutional validity of the provision for restitution of conjugal rights in the Hindu Marriage Act 1955. Prior to it, in *T.Sareetha*,⁵ P.A. Chaudhary, J. of the Andhra Pradesh High Court had expressed an opinion that the "barbarous and uncivilized" remedy of restitution was ultra vires Articles 14 and 21 of the Constitution. Criticising the Andhra judgment of 1983, I had said:

"It is doubtful if Articles 14 and 21 of the Constitution can be so stretched to use their implications for discarding established social norms"⁷

A little later rejecting and criticising the Andhra Pradesh opinion, the Delhi decision observed:

"Introduction of constitutional law into the ordinary domestic relationship of husband and wife will strike at the very root of that relationship"⁸

Unconditionally upholding the constitutional validity of the law on restitution of conjugal rights, the court examined, in the course of the judgment, at length various aspects of the law.

The Hindu Marriage Act, as originally enacted in 1955, provided that where the respondent "failed to comply with a decree for restitution of conjugal rights for a period of two years or upwards after the passing of the decree", the petitioner-spouse could seek divorce on that ground.⁹ In 1964, treating the said situation as an evidence of breakdown of marriage, the Act made divorce on that ground available to both the spouses — the waiting period after the passing of the restitution-decree remaining the same.¹⁰ Twelve years later by another amendment the waiting period was reduced to one year.¹¹

I have always held an opinion that, whether under the Hindu Marriage Act or any other law, failure to comply with the decree of restitution of conjugal rights up to the prescribed period should in itself result into dissolution of the marriage — in the restitution-decree the court could make an order to this effect¹². In *Harinder Kaur* the Delhi High Court referred to this opinion of mine:

"It has been suggested that after the passing of the decree of restitution and passing of the prescribed period of time within which cohabitation may be resumed, there

should be an automatic dissolution of marriage if there is no return by the withdrawing spouse to cohabitation. It is suggested that there should be no need for fresh divorce proceedings".¹³

The court seemed to be favouring reform of the law on the lines suggested by me, rejecting the plea made by some other scholars [including Rajkumari Aggarwal] for an outright abolition of the remedy of restitution of conjugal rights.¹⁴

It is well known that later in 1984 the Supreme Court upheld the opinion of the Delhi High Court, overruling the contrary *T. Sareetha* verdict of Andhra Pradesh.¹⁵

III. Muslim Personal Law

Out-of-court divorce at wife's instance

Can a Muslim wife get rid of her marriage without filing a civil suit for its dissolution by a court-decree? The answer of the authentic Muslim law is "yes: of course she can," and it clothes the wife with many valuable rights for this purpose. Forms of extra-judicial divorce available to a Muslim wife are:

(i) *Khula*—which is divorce at the instance of the wife; counterpart of *talaq* by men. Here the wife tells her husband that she wants to dissolve the marriage, by compensating him for her action if he so demands. If the husband agrees, the marriage is dissolved; but if he resists, while the wife persists in her decision, she can seek intervention of any law-enforcement agency (not necessarily a court) to have her decision implemented.

(ii) *Talaq-e-tafwiz*—which is wife's right to dissolve the marriage by her own action, generally or in specified circumstances, under a right to do so reserved for herself in the marriage-deed.

(iii) *Mubara'at* — which is divorce by mutual consent of the parties.

Indian legislation — both central and local — recognises all these concepts of Muslim law.¹⁶

Did the Dissolution of Muslim Marriages Act, enforced in India in 1939, abolish all the above-stated avenues of extra-judicial divorce for Muslim wives and replace them with a single remedy, i.e. fault-based judicial divorce? In the Kerala case of *K. C. Moyin*¹⁷, V. Khalid,

I. ruled that it did so. In order to substantiate his stand he examined the background and nature of the 1939 Act. It was in this connection that he quoted, in English translation (perhaps his own), a passage from one of my Urdu books.¹⁸

Khalid read too much in the Dissolution of Muslim Marriages Act. He also mistread my exposition of its scope and objects¹⁹ — perhaps due to language difficulty. I have a convinced opinion that as long as Muslim husbands are free to pronounce an extra-judicial divorce, Muslim wives' right to do the same cannot, and should not, be taken away. To do so will be both un-Constitutional and un-Islamic. Most certainly the legislature did not intend it in enacting the Dissolution of Muslim Marriages Act.

While declaring that the Dissolution of Muslim Marriages Act 1939 was an exhaustive statute that had the effect of depriving Muslim women of their pre-existing rights to have recourse to various forms of extra-judicial divorce, Khalid, J. had reluctantly spared only one such form of divorce — the *talaq-e-tafwid* — which, he thought, was "the only occasion when a wife could, perhaps, resort to reputation without intervention of court".²⁰ It is gratifying to find the Calcutta High Court unhesitatingly upholding, in the recent *Mangial Bibi's* case,²¹ Muslim wives' right to renounce marriage by this form of out-of-court divorce called *talaq-e-tafwiz* ('divorce by delegation').

One Mangia Bibi had dissolved her marriage to a cruel and deceitful husband by pronouncing a delegated divorce. On a superficial reading of the exposition of the law of 'delegated divorce' in one of my books on Muslim law, a magistrate had found the stipulation for such a divorce, in that case, to be legally defective. On appeal, the Calcutta High Court pointed out how the magistrate had mistread my work and put the law, as explained by me, in the correct perspective:

"The Magistrate, relying on certain observations made by Dr. Tahir Mahmood, in his renowned treatise on Muslim law, held that (a) the delegation must not be absolute, (b) the wife should be authorised to pronounce divorce only when any of the conditions specified in the agreement is violated, and (c) those conditions must be reasonable and not opposed to the policy of Islamic law. It appears, however, that the learned author has also observed, in the very next paragraph, that the aforesaid requirements do not apply where a husband unilaterally authorises a wife to divorce herself without an agreement with her in this regard."²²

'Delegated divorce' of either kind is, in fact, a very useful institution of Muslim law which, if properly used, can effectively balance wife's rights against those of the man in respect of divorce. While even Khalid, I did not bracket it with other Islamic forms of extra-judicial divorce by wife, which he inexplicably tried to outlaw²⁴—Calcutta High Court's appraisal, and approval, of the same must be halted.

Wife's right to dower (maher) and maintenance

Another important institution of Muslim matrimonial law which former judge V. Khaliq²⁵ had, in my opinion, misunderstood was *maher* (dower). I noted this in some of his Kerala High Court judgments [he was later elevated to the Supreme Court] and in 1980 commented on it in one of my books.²⁵ Within weeks after this book was published, the Supreme Court in the *Fuzlumbi*²⁶ judgment quoted my criticism of Khalid's opinion:

"We are aware of the criticism of this conceptual divorce between *maher* and post-divorce maintenance by Dr. Tahir Mahmood in his recent book where the learned author prefers to retain the nexus between *maher* and maintenance."²⁷

On the true nature of *maher* my opinion was also referred to by the Supreme Court. It reproduced from my book the following passage:

"As explained in an old judgment by Justice Syed Mahmood, *maher* is not the exchange or consideration given by the man to the woman but an effect of the contract imposed by the law on the husband as a token of respect for its subject—the woman. Giving a correct appraisal of the concept of *maher* the Privy Council once described it as an essential incident to the status of marriage. On another occasion it explained that *maher* was a legal responsibility of the husband. These judicial observations evidence a correct understanding of the Islamic legal concept of *maher*."²⁸

During the preceding year the Supreme Court had come out with *Bai Tahira*²⁹—its first ruling on divorced wives' right to maintenance—saying that post-divorce dues under personal laws should be "more or less sufficient to do duty for maintenance, if it was not so it can be considered for reduction of rate of maintenance but cannot annihilate it". My comment on *Bai Tahira* was:

"This [*Bai Tahira*] indeed is a liberal ruling and conforms to the spirit of Islamic law on the subject."³⁰

It was reproduced by the Supreme Court in its second consecutive decision on the subject given in the case of *Fuzlumbi*.

Cr. P.C. vs. Muslim law: the trio of S.C. decisions

Bai Tahira and *Fuzlumbi*, both decided by Krishna Iyer, J., came out with precisely the same basic ruling which a few years later was adopted in the celebrated *Shah Bano* case³¹. Unlike that case, in which Islamic law was referred to in rather uncharitable terms, Krishna Iyer's judgments evidenced due respect and deep appreciation for the letter and spirit of Islamic law. This is, doubtless, the reason why his judgments did not snowball into a *Shah Bano*. How we wish *Shah Bano* was decided before Krishna Iyer laid the august office.

Shah Bano's weak point was its audacity, albeit naive, to directly re-interpret the Quran. But for this, it would have gone unnoticed by the masses and the Nation could have spared its stormy aftermath. This convinced opinion of mine about *Shah Bano*, stated in its critique published soon after it was pronounced,³² has been reproduced in the decision of the Andhra Pradesh High Court in *Usman Khan Bahmani*'s case:³³

"Dr. Tahir Mahmood has observed that the Holy Quran, like the Holy Vedas and the Bible, is a revealed book. He has further said that laws derived from the Quran in the distant past are now found in the books of Muslim law which the court could have definitely interpreted; but re-interpreting the Quran straight away was not a task that the court should have performed. We are quoting this opinion to indicate the inherent danger in attempting a direct reinterpretation of the holy verses of the Quran."³⁴

Shah Bano, I have always said, erred not in substance but in strategy. The Andhra Pradesh High Court seemed to agree. To *Shah Bano* I will revert a little later.

Marriage-guardianship

Can the guardian of a Muslim minor girl 'give away' or "contract" the girl into marriage? The answer, as per authentic Islamic law, is an emphatic "no". I have explained in several of my works on the subject that neither a Muslim marriage is a mere contract nor has the old Hindu-law concept of "giving" a girl in marriage any place in the Muslim personal law. Some old judicial decisions, which held that marriage in Islam was simply a "contract" and that a minor girl could