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EDITORIAL NOTE

On behalf of the Faculty of Law and its Editorial Advisory Committee it is my proud privilege to present this volume of the Delhi Law Review to its esteemed readers. Of course, it is a matter of profound regret that the continuity in the Publication of the journal on time was broken on account of certain unavoidable circumstances for which the Faculty of Law and Editorial Board begs apology.

The contributions presented in the present volume cover a wide spectrum of Law and contemporary legal Issues and the Editorial Board has done a commendable job in editing the same.

As an Editor-in-Chief of this volume I do not feel that it is appropriate for me to comment on the merits of the articles and other contributions of this volume, as in my view such a right should be reserved for the readers. The Editorial Board is deeply thankful to the contributors for their valuable contributions which are not only topical but of great contemporary importance and relevance to the legal fraternity and other interest groups in the country and abroad.

The Delhi Law Review has established its own place in the rubric of Legal Literature of the country as well as abroad and I believe that the future contributors would find their place in the future issues of the journal in the same best traditions and standards which this journal has been maintaining over the years.

I am thankful to the Editorial Committee especially Prof. B. Errabbi for taking pains in editing the manuscripts and bringing them to the shape in which these have been published in the journal. On behalf of the Editorial Committee, I take this opportunity to invite the readers and legal academicians and all those who are interested in law and related fields to contribute articles, notes and comments for publication in this prestigious journal of the Faculty of Law.

I express my sense of gratitude for the overwhelming response which we have been receiving from the contributors and readers of the journal.

In conclusion, I express my heart felt appreciation to the proprietor of the Shivam Offset Press for doing a meticulous and professional job in the publication of this issue.

ADMINISTRATIVE JURISDICTION AND THE CIVIL COURTS IN THE REGIME OF LANDLAW IN INDIA

*Dr. Dieter Conrad**

THE ADMINISTRATIVE COURTS OF BRITISH INDIA AND THE "RULE OF LAW"

Institutions have a strange tendency to persist irrespective of changes in, or even the disappearance of, their original purposes and functions. The general recurrence of this phenomenon, however, ought not to blunt our sensibilities to the problems of legitimacy involved under particular circumstances. Thus the continuation of the political and legal structures of the colonial states in decolonized societies may at first appear as almost inevitable in the complex situation following newly gained independence. But it is sometimes strange to observe the survival of even very peculiar and historically contingent arrangements, which prompts the question whether something more than institutional inertia is involved. A case in point is the subject of the present study: the very extensive adjudicatory function in land disputes entrusted to the general state administration in rural India since the days of British rule, to the partial exclusion of the jurisdiction of the ordinary civil courts.

The first and most obvious explanation for the resulting curious bifurcation of jurisdiction would be the historical one: its origin in the preponderant British concern with the collection of land revenue. As the general administration was built up around the chief function of revenue collection—to this day the chief executive officer in the Indian district is officially named the collector (i.e. a tax collector) in many states—so the courts themselves were originally an appendage to this administrative function; later, when made institutionally independent, they were accorded only a restricted jurisdiction tailored to the needs of an effective but undisturbed land revenue administration. In particular, the civil courts were barred from interfering with revenue settlement itself, because judicial probing might have exposed the considerable arbitrariness involved in the process and, by attempts to define justiciable standards of assessment, might have upset revenue collection. An explanation on these lines, however, would still leave us all the more juggling with the question

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why this system has been carried over into independent India when land revenue had almost lost its fiscal significance, administrative concerns had changed and, in contrast, the citizen's right to judicial protection had assumed a new importance. This would at least suggest a hypothesis that this peculiar set-up may have had additional and more complex rationales which account for its continuation under changed conditions.

In fact revenue collection was only the most immediate and direct concern of the British administration as it was introduced in the initial legal role cast by the Diwani grant. From the early days the wider objectives of the British rulers included establishing their political domain as a territorial framework for commercial exploitation.¹ After the first years of wild and undisguised plunder, such a concept could mature into the idea of good and just government ensuring prosperity and development — "improvement" to use the contemporary term — of the territories administered. Needless to say this coincided happily with the object of raising the revenue yield. But the opening of a more long-range perspective of government led to a shift of emphasis towards the intermediate concerns of institution building. This applies especially to the British administrators who, let it be said, tended to perceive their role less in direct relation to the ultimate ends of British colonial rule, as to the actual needs of running the administration. A more disinterested kind of discourse could thus emerge centering on the inherent institutional problems of administration as such, including the administration of justice.² Even if allowance is made for an element of ideological self-deception in this, arguments for the objective rationality and, therefore, for the resilience of the system might emerge more clearly in this context and could be assessed more properly. Typical problems encountered in organizing the adjudicatory function — as discussed under the rather peculiar historical conditions of ruling a complex alien society — may even today still repay our attention to a subject which otherwise appears to be highly technical and uninviting to the non-specialist.

In its most generalized form the problem posed for the role of the judge is the relationship of closeness and distance to parties and interests involved in a dispute. How close to the dispute should the judge be in order to be approachable and to have a real understanding of the issue - how distant should he be in order to remain disinterested and non-partisan?

1. B. B. MISRA, *THE JUDICIAL ADMINISTRATION OF THE EAST INDIA COMPANY IN BENGAL*, 1765-1782, (Delhi, 1961), 18-149; H. Kulke and D. Rothermund, *GESCHICHTE INDIENS* (Stuttgart, 1982), 250 ff.
2. On the development of the British administrators' self-perception with respect to their role in India see generally E. Stokes, *THE ENGLISH UTILITARIANS AND INDIA*, (Oxford, 1959).

In the development of India's judicial system - which did indeed begin with the institutions created by the East India Company's administration of the province of Bengal after the Diwani grant — we can see the implications of this basic role tension unfolding in the administration of land system³, i.e. systems of land laws centering on the collection of the traditional land revenue. Some important aspects this has taken are:

- a. Professionalization of the judge as an issue. To us such professionalization is a matter of course and appears as an element of judicial independence, professional expertise and exclusive judicial career orientation operating as elements of distance from the conflicting interests to be adjudicated. But we ought to remember that the professional judge is a late product of differentiation, even in our culture. His role, i.e. the combination of professional expertise with political power to decide, has not developed in many traditional cultures where the judicial function is generally exercised as an incident of governance or administration, by the ruler himself or by his administrators. The process of role differentiation can be observed in the growth of the Indian judicial system. It was accompanied, however by a recurrent discussion on its relative merits *vis-à-vis* retention of judicial powers in the hands of the general administrator — legally speaking in lay hands. The argument invariably was that the professional judge is too remote from the actualities of society, too uninformed about real conditions, too unapproachable for or incomprehensible to the mass of the population.
- b. Related to this is the opposition of two principles which Max Weber conceptualized as material *vs.* formal rationalization of law.⁴ Material rationalization here means an evolution of the legal system which is oriented towards achieving substantive, ethical justice (as perceived by the law-enforcing agency). Obviously this is called for where stark social inequalities make reliance on a more formal, technicalized legal game unrealistic. It is equally obvious that it implies a more commanding position for the judge, freedom to dispense with formalities in the interest of an envisaged equitable solution, and thus a certain paternalistic tendency which may or may not operate in a disinterested manner.
- c. In the presence of gross social inequality the perceived exigencies of substantive justice tend to foster inclinations to bifurcate the legal

3. The expression is taken from B.H. Baden-Powell's monumental work, *THE LAND SYSTEMS OF BRITISH INDIA*, 3 vols. (Oxford, 1892).

4. M. Weber, "Rechtssoziologie", in *WIRTSCHAFT UND GESSELLSCHAFT*, (Tubingen, 1925²), 468 ff.

system. Such tendencies were characteristic of British India and persist even today: the idea is to have a rough and ready, cheap "barefoot" justice for the poor masses, frequently recommended as conforming to traditional patterns, and a more refined formal system for the upper classes.⁵ The problem then arises how a minimum integration of this dualistic pattern into a coherent and common system may be brought about so as to meet the essential requirements of the rule of law.

This last mentioned aspect, concerning the rule of law, has been made the subject of a forceful exposition of principle by the English constitutionalist A.V. Dicey. The reference is to his famous polemic against the French system of administrative courts - a system which Dicey protests "rests on ideas foreign to the fundamental assumptions of our English common law, and especially to what we have termed the rule of law".⁶ Dicey virtually equates rule of law with the requirement that one uniform law and one mode of legal enforcement should apply equally to everyone and that, in particular, no sphere of social life and no class of persons should be exempted from the control of the ordinary law courts. It appears that Dicey, when he was thus upholding British legal principles against *droit administratif*, was either unaware or did not care to take note of the fact that, at the time of writing, a huge body of administrative law existed in a country under British jurisdiction - a foreign and subjugated country it is true, yet not so foreign as to exclude the importation of fundamental ideas of the English common law including notably, "the Rule of Law".⁷ In India, after an early and solemn affirmation of "rule of law" principles in Dicey's sense, subsequent developments had led to the

5. According to Max Weber's analysis this is rather a typical elite strategy in systems of justice administered by a class of notables (*Honoratiorenjustiz*). The interests of the dominating class are best served by such a dual system: formalized justice among the class of notables and their "peers" arbitrary dispensation of "equity", or even denial of justice, for the economically weaker sections. (Weber, "Rechtsoziologie", 471).

6. A.V. Dicey, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION*, 9th ed. with introduction and appendix by E.C.S. Wade, (London, 1945), 329. The words quoted are taken from the last version of Dicey's text as successively amended by him up to the 7th edition in 1908. The original text of his lectures (first published in 1885) uses slightly different phrasings, such as "rules which are admittedly foreign to the spirit and traditions of our institutions" or "fundamentally inconsistent with our traditions and customs" (quoted from the 2nd edition published, substantially unchanged, within six months from the first, in 1886: A.V. Dicey, *LECTURES INTRODUCTORY TO THE STUDY OF THE LAW OF THE CONSTITUTION* 2nd ed. (London, 1886), 183, 218.

7. "Indeed it has been said that one of the most beneficent results of the association of England with India has been to introduce the Rule of Law into the land..." M.C. Setalvad, *THE COMMON LAW IN INDIA*, (Bombay, 1970), 35.

carving out of a large area of administrative adjudication by revenue officers or so-called revenue courts.

In a curious mixture, these courts combined powers to decide disputes between the government and citizens (or, at the time rather: subjects) - the sphere of administrative law proper - with powers to decide disputes between private parties relating to land - a function properly belonging to ordinary courts, but accruing to the revenue courts for practical considerations as incidental to land revenue administration. The lumping together of these two different functions under the somewhat loose term "administrative justice" has become a general characteristic of English administrative law and, consequentially, also of Indian administrative law. In the shape it assumed in the revenue jurisdiction in British India administrative justice included some of the worst features which loomed large in Dicey's indictment of the French *droit administratif*:

- (a) exclusion of the jurisdiction of the civil courts and substitution by a set of less confidence-inspiring tribunals under the control of the administration. In contrast to England, this exclusion in India was unmitigated by the supervisory jurisdiction of the High Court, since the power of the High Court to issue prerogative writs was confined to the Presidency Towns and could not even be used against revenue courts situated within a Presidency Town if the decision concerned lands upcountry in the province (*mofussil*).⁸
- (b) privileged position of the administration in being able to decide its disputes with its subjects by its own tribunals;
- (c) protection of civil servants even against tort claims for damages in cases of transgressions by statutes such as Bengal Government Indemnity Regulation II/1822 or sec. 10 Bombay Revenue Jurisdiction Act, 1876. Besides this, the civil courts - that is English judges had even managed to exclude the major part of the Company's (and Government's) vicarious liability for the tortious acts of its servants by construing a privilege for its "sovereign functions" in analogy to the British Crown privilege.⁹

The phenomenon is prominent enough to warrant a reflection of why Dicey and others could have overlooked it. India's status as a colony did

8. *Mofussil*: the territory of a province outside the Presidency Town (i.e. Bombay, Calcutta, Madras). For the exclusion of the High Courts' supervisory jurisdiction in the *mofussil* see the decision of the Privy Council in *Ryots of Garabandho v. Zamindar of Partakmedti*, 70 I. A. 129 (1943).

9. *P & O Steam Navigation Co. v. Secretary of State* (1861), 5 Bombay High Court Reports. App. A (Sir Barnes Peacock, C.J.).

not as such make it irrelevant in the consideration of English legal principles. Dicey did refer at some length, for instance, to the Legislative Council of British India¹⁰ as an example of a non-sovereign law-making body, contrasting it to the sovereignty of the British Parliament. With respect to rule of law such direct comparisons might have been a little more embarrassing. While the gradation of political and legislative power was an obvious part of the colonial system, a general principle like rule of law was being used as a justification of British rule in India. In Dicey's time the ideology of the British empire in India was carried to the extreme of claiming a civilizing mission as its historical legitimization, a British duty to impart their law to the natives and to establish government by law in India.¹¹ At any rate the respective measures in India had not been taken, so to speak, without awareness of or lack of reflection on the theoretical implication. They had been accompanied by explicit discussions on first principles of jurisprudence and government, fully up-to-date with contemporary English discourse. It would seem that India, as in other respects, was used as a testing ground for unconventional theories of public administration, an ideal experimental arena for ambitious administrators freed from the constraints of the domestic scene.

10. As it then existed under the Indian Councils Act, 1861, (24-25 Vict., C. 67) modified by the Government of India Act, 1865, (28, 29 Vict., C. 17).

11. See generally the discussion of the influential views of men like John Strachey and James Fitzjames Stephen in Stokes, Utilitarians, 287 ff. and consider quotations such as the following (*ibid.* 307, from Stephen's chapter "Legislation under Lord Mayo" in W. W. Hunter, LIFE OF THE EARL OF MAYO, 2nd ed., London 1876, 158 ff.). "The utmost, I think, that European experience justifies us in asserting, is, that the maintenance of peace and order and the supremacy of regular law ... is an indispensable condition of the only kind of benefits which it is in our power to confer upon India" and, "Our law is in fact the sum and substance of what we have to teach them. It is, so to speak, the gospel of the English." In a similar vein H. Cowell, History and Constitution of the Courts and Legislative Authorities in India, Tagore Law Lectures 1872, 6. ed. (Calcutta, 1936), 63. (speaking of the Regulating Act) "... to teach both rulers and subjects in the East that respect for law which is the foundation of social order and the greatest gift which England has had in its power to bestow on India." Stephen's own perception of government by law, it should be admitted, did not include a separation of judicial from executive functions. In his Minute on the administration of justice in India he had strongly advocated the retention of criminal jurisdiction by the district officers. He did recommend separation of the civil jurisdiction from the executive function, but took care to limit "judicial" functions to "the decision of civil and criminal cases properly so called" though he owned in passing that "much of the work connected with the collection of the revenue and the settlement department is substantially judicial" (*ibid.* p. 5) If, however, such a fusion of functions appeared perfectly compatible with rule of law to such a prominent administrator and legal writer, it is all the more astounding that the discrepancies were not taken note of when Dicey's opinions gained universal, almost canonical, recognition.

J.F. Stephen, Minute on the Administration of Justice in British India, Selections from the Records of the Government of India, Home Department, (Calcutta, 1872), 7, 33, 1.

Even more remarkable is the phenomenon that Dicey's neglect of the existence of colonial administrative law has endured to this day in the former colony itself. While the introduction of the rule of law is being hailed as "the revolutionary achievement of the British Indian Administration",¹² the growth of administrative tribunals in India is regarded as a recent development and a by-product of the modern welfare state.¹³ The traditional jurisdiction of the revenue administration in land disputes - still today, perhaps, an area of law affecting the majority of the Indian population - is hardly mentioned in general text books on Indian administrative law or Indian legal history. In its comprehensive Report on the Reform of Judicial Administration¹⁴ the Law Commission of India has nothing to say about this kind of administrative justice, not even when discussing the comparative merits of French droit administratif. Meanwhile, as we shall see, administrative jurisdiction has even been considerably expanded in land reforms legislation enacted since Independence.

ORIGINS OF THE COURT SYSTEM AND CORNWALLIS' REFORMS

Under the East India Company the first system of civil "courts" in the Province of Bengal, as introduced by Warren Hastings' Judicial Plan of 1772,¹⁵ consisted primarily of the collectors in the districts "sitting as" judges of first instance (Mofussil Diwani Adalat). The collectors were basically tax officials, and when off-duty, private traders, without any special legal qualifications. In the administration of indigenous laws they had to be assisted by native legal experts, the law officers (kazis and pundits) as advisors. The appellate court, or Sadar Diwani Adalat, was nothing more than the Governor and his Council in Fort William (Calcutta) i.e. the rulers of the country. When the British Parliament created a real court of law, viz. the Supreme Court in Calcutta, by the Regulating Act of 1773,¹⁶ conflicts immediately arose. The professional lawyers brought out

12. C. Sinha, "Significance of Cornwallis's Judicial Reforms in Bengal Presidency", in JOURNAL OF THE INDIAN LAW INSTITUTE, 11 (1969), 184 ff.

13. B.K. Gupta, "Administrative Tribunals and Judicial Review: A Comment on Forty-Second Amendment", in: R. Dhavan, and A. Jacob, (eds) INDIAN CONSTITUTION, TRENDS AND ISSUES, (Bombay, 1978), 401 ff.; S.N. Jain, ADMINISTRATIVE TRIBUNALS IN INDIA, EXISTING AND PROPOSED, (Bombay, 1977), 2.

14. Law Commission of India 1958, 14th Report (Reform of Judicial Administration), 2 vols. (New Delhi, 1958), see the discussion on "Administrative Bodies" in ch. 31.

15. C.W. Forrest, (ed.), SELECTIONS FROM THE STATE PAPERS OF THE GOVERNORS GENERAL OF INDIA, vol. II, Warren Hastings. Documents, (Oxford, 1910), 290; Misra, THE JUDICIAL ADMINISTRATION, 168. The system is known as adalat system (adalat: the term for a law court in Mogul administration) and applied only to the mofussil i.e. the provincial territory outside the Presidency town of Calcutta; this was the territory covered by the diwani grant.

16. 13 Geo III, C. 63.

from England to serve as judges of the Supreme Court introduced technical procedures of the common law, with disturbing and often oppressive effects. But they also used their jurisdiction over the Company's servants to assume control over the Company's adalats - which they understandably treated not as courts proper but as a kind of tribunal (Patna Case) - and also over zamindars as part of the revenue collecting machinery (Cossjurah Case). They intervened directly against irregularities in the revenue collection (Saroopchand Case).¹⁷ All this could be viewed as a typical conflict between judicial and executive power. It was, not surprisingly, irksome for the executive power, and it was resolved in favour of executive power against Dicey's "fundamental assumptions of the Common Law" by the Act of Settlement, 1781.¹⁸ The Supreme Court lost its jurisdiction to interfere with revenue collection and also with the exercise of "judicial functions" by the Company's servants; Governor-General and Council in their public capacity were exempted from the Court's jurisdiction, and in their capacity as Sadar Diwani Adalat were recognized as a court of law.¹⁹ In their role as a court they met - originally once in a week²⁰ - to decide appeals from Mofussil Diwani Adalats. On other days in the same composition but in a different role, sitting "on the executive side"; they decided on appeals in revenue matters.

The bar on the Supreme Court's jurisdiction in revenue cases also remained a permanent feature for later superior courts under British rule it was carried over as a limitation on the powers of High Courts implicitly in the High Courts of Judicature Act, 1861, and by express provision in the Government of India Acts 1915 (sec. 106) and 1935 (sec. 226). It was only removed in 1950 by the Indian Constitution (Art. 225 proviso).²¹

On the local level the revenue function has been clearly separated from civil jurisdiction and had been entrusted to different agencies in 1781.²² This was partially undone in 1787, when the two functions were again united in the person of the collector. He was, however, to keep them procedurally discrete. Thus, apart from his revenue collecting function he was to sit as civil judge in the Diwani Adalat, but in a different judicial

17. See generally the account given in M.P. Jain, *OUTLINES OF INDIAN LEGAL HISTORY*, 3. ed., (Bombay, 1972), 90 ff.

18. 21 Geo III. C.70.

19. A.B. Keith, *A CONSTITUTIONAL HISTORY OF INDIA 1600-1935*, 2nd ed. (London, 1937), 88 ff.

20. Misra, *THE JUDICIAL ADMINISTRATION*, 275.

21. Significantly the restriction was re-introduced under Indira Gandhi's emergency regime by the Constitution (42nd Amendment) Act, 1976 sec. 37, but again removed by the Constitution (44th Amendment) Act, 1978.

22. For details see Misra, *THE JUDICIAL ADMINISTRATION*, 263 ff.

capacity in a so-called revenue court (Mal Adalat) dealing with disputes on assessment and realization of land revenue and, for good measure, also as a magistrate in a court combining police functions with minor criminal jurisdiction. This extraordinary combination of powers was justified by an argument which was to recur periodically from then onwards, invariably with ulterior motives: that the "natives" were accustomed to look to one single despotic authority in all matters and that they should continue to be governed under the kind of simple, personal and despotic government to which they were accustomed and culturally disposed by habits of submission.²³ Little did it ever matter that this popular idea was at best an oversimplification and did not adequately reflect the principles of Mogul administration.²⁴ More pertinent, in any case, were the other reasons advanced with the object of strengthening the efficiency of revenue collection and avoiding "friction" between the various overlapping functions of administration. All such considerations were happily lumped together by the Court of Directors, ascribing to the union of powers a tendency "to simplicity, energy, justice and economy".²⁵ The evil effects which could be expected under such a dispensation soon appeared and, besides corruption and oppression, included administrative clumsiness, since the collectors were overburdened. Within a few years this led to a complete reversal of policy in the famous Cornwallis reforms of 1793.

These reforms as a whole stand out as a vigorous assertion of liberal principles in the "Whig" tradition of political philosophy. In contrast to the doctrine of accustomed personal despotism, "abstract theories drawn from other countries"²⁶ were now relied upon; "reason and humanity" urged "the introduction of a new order of things, which should have for its

23. Sir John Shore 1785, cf. the account of the reform in Jain, *Outlines*, 161 ff.; C. Sinha, *THE INDIAN CIVIL JUDICIARY IN MAKING*, (New Delhi, 1971), 73. The argument is echoed by the instructions issued from the London Court of Directors stating the necessity of accommodating "their views and interests to the subsisting manners and usages of the people rather than by any abstract theories drawn from other countries"; F. K. Firminger, *THE FIFTH REPORT FROM THE SELECT COMMITTEE OF THE HOUSE OF COMMONS ON THE AFFAIRS OF THE EAST INDIA COMPANY*, Dated 28th July, 1812. Edited with notes and introduction. Vol. I. (Calcutta, 1917), 53. More realistically Cowell, *HISTORY AND CONSTITUTION*, 172; the object of the reform was "to accustom the natives to look to one master".

24. For a short description of this system as encountered, though in a degenerate state, by the British in Bengal, see Misra, *THE JUDICIAL ADMINISTRATION*, 52 ff. The "one officer theory" took its departure from the union of revenue collection and civil jurisdiction in the office of the diwan, but disregarded, quite apart from the more complex office structure in the districts, the fundamental division between criminal and civil jurisdiction (nizam and diwan in the province, faujdar and amil in the district).

25. Firminger, *The Fifth Report*, 53.

26. See the view of the Board of Directors in n. 23 supra.

foundation, the security of individual property, and the administration of justice, criminal and civil, by rules which were to disregard all conditions of persons, and in their operation, be free of influence or control from the government itself'.²⁷ In their judicial part the reforms reflected a principled disposition towards rule of law leading to the most thorough going attempt so far at separation of judicial from executive functions.²⁸ The collectors' revenue courts (Mal Adalats) were abolished and a universal jurisdiction of the civil courts (i.e. the Diwani Adalats) established also extending to revenue matters and imposing judicial control on the functioning of revenue official. The policy is set forth with resolute clarity in the explanatory introductions typical of the legislative style of the "Cornwallis Code".

(The government) "have resolved that the authority of the laws and Regulations so lodged in the courts shall extend not only to all suits between native individuals, but that the officers of Government employed in the collection of the revenue, the provision of the Company's investment, and all other financial or commercial concerns of the public, shall be amenable to the courts for acts done in their official capacity in opposition to the Regulations: and that Government itself, in superintending these various branches of the resources of the state, may be precluded from injuring private property, they have determined to submit the claims and interest of the public in such matters, to be decided by the courts of justice according to the Regulations, in the same manner as suits between individuals."²⁹

Thus the existing combination of notionally distinct judicial and executive functions in the person of the collector was replaced by a real separation of posts, and the position of a full time district judge created. The personification of the judicial role clearly marked the distance from administrative interest and at the same time was a step towards

27. Firminger, *The Fifth Report*, 29.

28. See generally Sinha, "SIGNIFICANCE OF CORNWALLIS", 185 ff.; Jain, *Outlines*, 174 ff.
29. Bengal Regulation III/1793 Preamble. Cf. the explanation given for the abolition of mal adalats in the Preamble to Bengal Regulation II/1793: "The proprietors can never consider the privileges which have been conferred upon them as secure, whilst the revenue officers are vested with those judicial powers. Exclusive of the objections arising to those courts from their irregular, summary, and often ex parte proceedings, and from the collectors being obliged to suspend the exercise of their judicial functions, whenever they interfere with their financial duties, it is obvious, that if the Regulations for assessing and collecting the public revenue are infringed, the revenue officers themselves must be the aggressors, and that individuals who have been aggrieved by them, in one capacity, can never hope to obtain redress from them, in another."

professionalization, even if at first servants of the Company without special legal training were thus employed. Professionalization in the courts was also promoted by the establishment of a regulated advocacy, the Sadar Diwani Adalat appointing professional pleaders for each Adalat.³⁰ Elaborate rules of procedure only served to accentuate the distancing of the judicial from the practical administrative work. But the principle of distance was also pursued in relation to the native population: Indians were completely excluded from the posts of district judges,³¹ because they were generally considered corrupt, i.e. too closely connected to society and its particular interests. This rigour of principle, it has to be said, was mainly reserved with the objective of securing the new proprietary titles in land as conferred on the zamindars by the Permanent Settlement. It is transparent from the language of the regulations quoted that rule of law principles are enunciated here as a part and a corollary to the attempt to create a new class of landed proprietors. For the interests of smaller fry - the actual cultivators or raiyats who had been reduced to the status of tenants - the solicitude was less marked. They were subjected to the jurisdiction of Indian lay judges (munsiffs) when sued in petty causes (up to 50 Rs.) concerning money or moveable property, and in distraint proceedings for recovery of rent initiated by the zamindars.³² Commissions for such honorary judgeships were issued to Indian landholders, i.e. mainly zamindars. It must have been obvious that they could scarcely be relied upon to be either distant or neutral.³³ The contours of bifurcated justice were beginning to appear.

30. Regulation VII/1793. This element in course of time developed its own dynamic in the direction of greater professionalization of the judges also: in particular, demands for better legal training of the British judges appointed directly to the posts of District Judges from the Company's covenanted service (cf. the following text and note) were supported by reference to the need to match the growing professional skills of the Indian advocates (Jain, *Outlines*, 320).

31. This was achieved by reserving the posts to the Company's covenanted servants recruited in England, sec. 57 Charter Act, 1793. At its face value the provision was racially neutral and was thus immune from guarantees of equal access to public office irrespective of race, place of birth etc., as contained in the Government of India Act, 1833, sec. 87 or Queen Victoria's Proclamation of 1858. The resulting exclusion was only gradually softened when Indians gained access to the Indian Civil Service by passing the examinations in London from 1862 onwards; cf. the table in B.B. Misra, *THE BURGAUCRACY IN INDIA. AN HISTORICAL ANALYSIS OF DEVELOPMENT UP TO 1947* (Delhi, 1977), 101. The special provisions for appointment of district judges still to be found in the Indian Constitution (art. 233, cf. sec. 254 Government of India Act, 1935) are referable to this racial origin.

32. Sinha, *Civil Judiciary*, 12. For the enlarged powers of distraining the tenants' personal property for arrears of rent, as introduced by the ill-famed Regulation VII/1799 (popularly known as qanun-haftam or haptam i.e. "seventh") cf. Baden-Powell, *Land-Systems*, vol. I, 633; A.C. Banerjee, *THE AGRARIAN SYSTEM OF BENGAL*, vol. 2, 1793-1955 (Calcutta, 1981) 20 ff.

33. Bengal Regulation XL/1793; cf. Sinha, *Civil Judiciary*, 12; Jain, *Outlines*, 184 ff.

The principle of separating judicial from executive posts was extended to the Sadar Diwani Adalat later, under Wellesley in 1801 and, again, Cornwallis in 1805.³⁴ But the logical conclusion, the establishment likewise of a separate judicial service staff, was only attempted under Minto from 1807 onwards, by separating a judicial from the revenue branch within the Company's service, and by requiring a definite choice of career from the servants. However, the rule was not strictly maintained and for a long time members of the same civil service cadre were eligible for both judicial and administrative appointments, sometimes in turns.³⁵ The distinction was further blurred, when judicial powers in revenue matters as well as criminal jurisdiction of magistrates were retransferred to the collectors. In non-regulated provinces, like Punjab or Central Provinces, for a long time the Deputy Commissioner still continued to officiate as District Judge.³⁶ Moreover, throughout the British period it remained axiomatic that the civil servant had to do executive - i.e. revenue and magisterial - work for several years before he could opt for a judicial career. This administrative experience, rather than a more thorough legal training, was considered indispensable for preparing him for his judicial task.³⁷ It was to acquaint him with local conditions, the country, its inhabitants and social relations, and it naturally tended to inculcate a Government perspective in him. The resulting character of the "civilian judge"³⁸ and the linkage between the two service careers is an important element to consider when we appreciate the relative merits of revenue vs. civil courts in adjudicating disputes of land law. It was only under the Indian Constitution of 1950 that truly separate judicial cadres were introduced, i.e. the principle of a professional life career for judges.

EVOLUTION OF THE DUAL SYSTEM

The Cornwallis system of complete separation of powers, despite its powerful ideological appeal, did not survive. It soon turned out that the new civil courts were overburdened, and arrears of cases amounted to unexpected heights. A number of explanations for this phenomenon were advanced, among them the elaborate formality of civil procedure and, a recurring theme, the litigiousness of Indians. A more natural explanation may have been that the number of courts was much too small to cope with the demand for justice engendered by the sweeping agrarian reforms, and

given the policy of reserving the posts of district judges for highly paid English servants there were, in reality, financial constraints preventing an adequate growth of the judicial system.³⁹ Instead, remedial measures were sought in the direction of relieving the civil courts of cases involving burdensome factual and local inquiries. Into this category fell the cases formerly handled as revenue cases by the Mal Adalats. Accordingly, a process of retransferring rent cases to the collectors commenced in 1799 and led in several stages - such as reference by the courts to the collectors for inquiry and advisory report,⁴⁰ and later a preliminary summary jurisdiction - to the full restoration of the collectors' powers to try such "revenue" matters, i.e. litigation between landlords and tenants. This was finally accomplished in 1859 by the Bengal Rent Act.⁴¹

One major reason for the civil courts' difficulties in dealing with such matters, and for the ensuing delays in settlement, was the fact that, contrary to Cornwallis' expectations, the new landlords and tenants alike had been reluctant to reduce their contractual relations to writing and that, accordingly, the landlords had largely failed to issue definite pattas or title-deeds to their raiyats as provided by law.⁴² The resulting need for intricate inquiries was believed to be more effectually served by the collectors who "had better opportunities to be acquainted with the relative rights of the landlord and tenants than the Diwani Adalats".⁴³ Why this should be so is not immediately clear, since the collectors no less than the Diwani Adalat were responsible for a whole district, and the local munsiff might have been the more obvious choice. The true reason was the curious inter-relationship of revenue questions proper - such as settlement and arrears of land revenue - with questions of rent. Recovery of rent from the tenants was evidently seen as incidental to revenue collection and, in fact, historically had been indistinguishable from it. After the introduction of the zamindari settlement the one person with whom Government "settled" the land revenue, i.e. the zamindar, was regarded as, and consequently became, landlord and proprietor. The collection of land revenue from the raiyat which had been his traditional function had now become exaction of "rent" in a private capacity. But since he himself had to satisfy the

39. Jain, *Outlines*, 225.

40. Regulation VII/1799, sec. 15.

41. Bengal Rent Act (10/1859) otherwise known for introducing the protected position of occupancy raiyat.

42. Bengal Regulation VIII/1793, sec. 50. For the failure of the patta-requirement cf. Baden-Powell, *Land-System*, vol. 1, 632; Sinha, *Civil Judiciary*, 74 ff. L. Kabir, *The Rights and Liabilities of the Raiyats Under the Bengal Tenancy Act, 1885 and the State Acquisition and Tenancy Act, 1950*, (Dacca, 1272), 10f.

43. Minute by the Marquess of Hastings, 2 October 1815 as rendered in Jain, *Outlines*, 231.

34. Jain *Outlines*, 213.

35. Sinha, *Civil Judiciary*, 55 ff.; Jain, *Outlines*, 319 ff. Misra, *The Bureaucracy*, 191.

36. Cowell, *History and Constitution*, 245, ff.

37. Cf. in particular the discussion in J.F. Stephen, *Minute*, 28 ff.

38. For critical remarks, particularly from the viewpoint of the Indian public, see Jain, *Outlines*, 319 ff.

Government's revenue demand under penalty of immediate auction sale of his estate in the event of default, in the Government's as well as his own interest he had to be enabled to meet his obligations by prompt recovery of rent from his tenants.⁴⁴ On the other hand, it was expected that zamindar and raiyat would agree to "equitable" rents somewhat in conformity to rates of land revenue previously charged, since these rates bore some relationship to the value of the land; this again was a matter comparatively familiar to the collectors from their settlement operations with the landlords.⁴⁵ In this way issues of rent and tenant protection became associated with revenue jurisdiction. Generally the concepts of rent and revenue tended to shade into one another, and the fusion or confusion of ideas was complete when the economic doctrine of land rent was made the basis of land revenue assessment.⁴⁶ The interconnection between rent and revenue matters appears clearly in the explanation offered by Baden-Powell⁴⁷ for the transfer of jurisdiction in the Bengal Rent Act:

"The reason for giving revenue officers power in these matters, is that the experience of Civil Courts is not always such as enables them to understand revenue practice, and that the settlement of rent depends on facts and circumstances not 'easily reducible to the usual forms of evidence'. Officers daily dealing with land management, and knowing the local details in many cases, acquire a sense of fitness and a practical power of adjusting rents which are invaluable, but cannot always be adequately explained in a formal judgment."

Compared to the District Judge, the Collector, or his subordinate revenue officer⁴⁸ was the "closer" judge, because unlike the former he regularly had to tour the district and to familiarize himself with local conditions. This was not limited to questions of revenue settlement and soil productivity, but included the variegated other functions of general administrator and, in particular, policing functions as a magistrate.⁴⁹ The

44. Regulation XVII/1793 granted powers of distraint to the zamindars on the same footing for "arrears of rent of revenue".

45. See the discussion in Baden-Powell, *Land Systems*, I, 612 ff.

46. On the role of Mathus' and Ricardo's doctrine of rent for Indian land tax policy cf. Stokes, *Utilitarians*, 81 ff. In 1972, L. Kabir is still discussing its applicability to the rents paid by tenants in Bengal (*Rights and Liabilities*, 183 ff.)

47. Baden-Powell, *Land System I*, (Oxford, 1892), 642.

48. Mainly the Subdivisional Officer (S.D.O.), empowered to try smaller revenue cases.

49. Since 1831 the functions of collector and district magistrate had been united, and this combination was to remain an essential feature of the colonial administration throughout the British period. The measures coincided, hardly by accident, with the strengthening of the collector's revenue jurisdiction and was part of paternalist conceptions influential under Bentinck (C. Sinha, *Civil Judiciary*, 91 ff.).

Collector thus had a general intimacy with local conditions, as opposed to the specialized, professional approach of the Civil Judge. He was in a better position to pronounce on matters like fairness of rent or prevailing rent rates in a locality because, unlike the court, he was not only required to deal with isolated, atypical cases, but was in constant touch with normal affairs in his administrative routine. This argument of "closeness" to local conditions, however, was balanced by an element of social distance, and this would distinguish the Collector from the local Munsif. The Collector no less than the District Judge was a member of the covenanted service, or later, of the Indian Civil Service, i.e. normally British; he would e.g. be neither Hindu nor Muslim - a dividing line which not infrequently coincided with the division between landlords and tenants.⁵⁰ Even if in the later years of the Empire carefully selected Indians were admitted to these posts, they would be kept aloof by the discipline and *esprit de corps* of the prestigious imperial organization.

The argument of "closeness" to local conditions would carry conviction mainly for first instance findings, especially findings of fact, where the "man on the spot" is called for. It is much less persuasive at the appellate or revisional stage, and cannot justify the usual wholesale transfer of certain subject matters to the hierarchy of revenue "courts" (appeal from the Collector to the Commissioner, Revision to the Revenue Board). In view of this limitation compromise solutions were sometimes tried. The intermediate arrangement of rent cases in 1831 and 1834 has already been referred to: there was a preliminary determination by the Collector in summary proceedings, leaving the parties free to pursue the matter further by way of a regular suit to the district Adalat. Later in Bengal a similar combination was introduced for the preparation of a Record of Rights under the Bengal Tenancy Act, 1885 (as amended 1898): in the context of a revenue settlement rents also could be settled and recorded by the Revenue-officer subject to the possibility of a suit to the Civil Court within 6 months.⁵¹ On similar lines, in the U.P. Tenancy Act of 1939 an appeal is provided from a first instance determination by the Revenue Court to the Civil Court (District Judge).⁵²

50. The account of the Pabna district riots of 1873 in Kabir, *Rights and Liabilities*, 30. See also *The General Remarks* in E. Blunt, *The ICS. THE INDIAN CIVIL SERVICE*, (London, 1937), 54 on the "disability" of Indian as contrasted to British officers, namely to "belong either to the Hindu or the Muhammadan community", and thus always to be liable to suspicions of communal partisanship.

51. See 104. ff. Bengal Tenancy Act; cf. D. Rothermund, *GOVERNMENT, LANDLORD AND PEASANT IN INDIA. AGRARIAN RELATIONS UNDER BRITISH RULE, 1865-1935*, (Wiesbaden, 1978), 107.

52. U.P. Act XVII/1939 sec. 265.

Apart from the question of local expertise it has always been a standard argument in favour of administrative jurisdiction that its proceedings are more informal, less burdened with technicalities and thus - this is the real consideration - more open to equitable considerations in favour of the weaker party. Lord Hastings in his Minute of 1815⁵³ had already made the point that the decisions of the collectors were unembarrassed by the technical pleadings and delays of lawyers. The absence or the reduced influence of lawyers in administrative proceedings remained a recurring theme in the official eulogies of informality. There may have been a certain class, even racial, bias in the administrators' attitude to the newly emerging class of Indian vakeels and pleaders, who were soon well versed in legal finesse, sometimes indeed better versed than their administrative counterparts officiating as Collectors or District Judges. But there was also a genuine apprehension that the interposition of lawyers might give an edge to the richer party who could afford the better advocate and with his help prolong the proceedings. The other major point in the argument for informality was the power of the revenue officers to make inquiries on their own initiative, or even cause such inquiries to be made by their subordinates, instead of being bound by the strict rules of the adversarial civil procedure.⁵⁴ This provides an interesting structural parallel to the inquisitorial procedure (*Offizial maxime*) before administrative courts on the German or French pattern. The Collector's power to take evidence and collect information on his own is emphasized e.g. by the Bengal Rent Law Commission in the context of proceedings for enhancement of rent. Such powers of enquiry are expressly reserved side by side with dispute-deciding "judicial" powers in a modern statute like the Madhya Pradesh Land Revenue Code, 1959:

sec-31: "The Board or a Revenue Officer, while exercising power under this Code ...to enquire into or to decide any question arising for determination between the State Government and any person or between parties to any proceedings shall be a Revenue Court."

It is only natural the specific reservations were sometimes voiced against civil appeals with their greater distance from the "natural" equities of the factual situation. An instance of this is the debate on the Deccan Agriculturists Relief Act, 1880 in the Governor-General's Legislative Council in 1879:⁵⁵ the measure recommended was to replace appeal

53. Cf. note 43 *supra*.

54. For instance sec. 73 Bengal Rent Act (X/1859) provides that the Collector may order a local inquiry by a subordinate officer or may himself make such local inquiry in person.

55. Legislative Council of India, Minutes 24, 10, 1879; Rothermund, Government, 64. f.

before the subordinate courts in certain matters by inspection through a specially deputed judge (District Judge or a judge directly responsible to him). The investigator, Theodore Hope, painted the drawbacks of civil appeals in dark colours: it was a tedious process sometimes taking up to 6 years; it was expensive for the parties, court fees alone amounting up to 13.6% of the subject value; it was an uncertain process, verging on gambling; appeal courts often showed a reluctance to go into questions of fact, instead they raised technical legal questions as a shield - but if they went into facts, the uncertainty would be even greater(!). Finally, there was the social inequality favouring the richer party: "Many a man without money who has a good case cannot afford to appeal. Many a man with money needlessly drags his opponent through all the appellate courts." On top of all this the then Finance Member Sir John Strachey - a stalwart and most influential member of the ICS - added the general reflection: In spite of improvement which has taken place in the civil courts, it still remains as true as ever that every measure by which we can keep the people out of the courts will be a great blessing to the country."⁵⁶

These statements certainly reflect the sentiments of a sizeable proportion of the services *via-a-vis* the courts - even if it meant that they ran under heavy fire from Benthamite orthodoxy in the Viceroy's Council. They are cited as symptomatic of a good deal of the discourse on revenue jurisdiction, though strictly speaking they were concerned with the summary powers of a civil judge. The civil judge here, in the role of inspector, was acting outside his court, in an administrative, quasi-judicial function. We have also to remember that he was a member of the same service as the Collector.

The essential point is: a rough and ready administrative way of dispensing justice was being advocated instead of regular court procedure not so much because of the superior familiarity with local conditions (absent in the Civil Judge) but because it was considered more equitable for the poorer section of the population. It was speedier, cheaper and it excluded advocates - very suspect class of individuals.⁵⁷ In all fairness, the argument concerning court fees, is hypocritical - after all it was the Government itself which was charging high court fees and had made the administration of justice a revenue-earning concern. But the equity

56. Minutes loc. cit., 298.

57. In the Dekkhan Agriculturists' Relief Act (XVII/1879) as finally passed, pleaders, vakeils, advocates etc. are excluded from the proceedings before the Conciliator. In suits before the civil judge, when the party opposing an agriculturist hired an advocate, pleader etc., the judge could direct the Government pleader to appear on behalf of the agriculturist party (sec. 68. f).

argument must be owned to be sincere. One may recall that also for Dicey comparison with English Equity courts was one of the faint justifications of administrative law which sprang to his mind.

The general argument based on informality of proceedings before administrative officials has, it must be said, lost much of its force with the development and progressive formalization of revenue jurisdiction. The incidental remark in the passage by Baden-Powell quoted above - concerning the inadequacy of the "usual forms of evidence" (characteristically, an unexplained quotation) - is quite illuminating, because it apparently repeats a standing argument without taking note of the fact that it had become, by the time of Baden-Powell's writing - out of date. As revenue officers acting in a judicial capacity were formally styled "Revenue Courts"⁵⁸ empowered by statute to take evidence like a court of law, the Indian Evidence Act, 1872, with all its technicality had become applicable to their proceedings.⁵⁹ In 1881, when the Bengal Rent Law Commission still dwelt on the advantages of informality in administrative justice, the procedure of the Revenue Courts in trying suits between landlord and tenant had, in fact, to a great extent become the same as that of the Civil Courts.⁶⁰ The modern position is that the Code of Civil Procedure applies to proceedings before Revenue Courts generally, unless specific enactments applicable to them provide otherwise.⁶¹ The loss of adventurous informality is reflected in a bored modern administrator's account: "The revenue cases vary in nature according to the time of year, but there is seldom anything of interest in them, and it is enough to mention that they are tried in the same way as civil suits...".⁶²

GENERAL CONTOURS OF THE MODERN POSITION: PROBLEMS UNSOLVED

The equity line of argument rather than local expertise of informality as such is also borne out by the final arrangement as it emerged. In spite of great variations - these matters were provincial subjects of legislation

58. See, e.g. sec. 77(1) Punjab Tenancy Act (XVII/1887): "When a Revenue officer is exercising jurisdiction ... he shall be called a Revenue Court". Similarly sec. 31 M.P. Land Revenue Code, 1959 quoted above.

59. The Indian Evidence Act, 1872 (I/1872) according to its section 1 "applies to all judicial proceedings in or before any Court"; sec. 3 gives the definition: "Court" includes all Judges and Magistrates, and all persons, except arbitrators, legally authorized to take evidence". Fitzjames Stephen, *Minutes*, 26.

60. Cf. e.g. sec. 43 M.P. Land Revenue Code, 1959 and sec. 5 Code of Civil Procedure, 1908. Subsection (2) *ibid* gives an interesting definition of "Revenue Court", meaning "a Court having jurisdiction under any local law to entertain suits or other proceedings relating to the rent, revenue or profits of land used for agricultural purposes...".

62. Blunt, *The I.C.S.*, 106.

and have remained state subject under the Indian Constitution - certain general tendencies clearly stand out:

- (a) the jurisdiction of the civil courts has been barred in matters of revenue assessment and collection - i.e. in matters of administrative law proper.⁶³
- (b) the true domain of civil courts has remained the determination of ownership, or proprietary right as it is sometimes more cautiously called, in title suits between two contenders. This is the class of people with whom originally the revenue settlement was made - the assignment of proprietary rights being but a consequence of the settlement. In this context the superior local knowledge of the Collector has never been an argument. The notion that "property" under a civilized government must be protected by the civil courts has remained unbroken - and there were no social considerations calling for a more "equitable" or summary adjudication;
- (c) it is the range of subordinate titles, particularly tenancy rights, which have increasingly become a matter of administrative concern, and where the competition between civil and revenue courts had led to a great variety of solutions. This third - residual - category likewise covers the field where aspects of social justice most likely come into play and - after the uprisings of 1857 - the administration's concern with rural unrest. Thus it is not surprising, at least in the British period, to find a tendency to retain and sometimes enlarge the sphere of administrative jurisdiction.

There have always been marked differences and a great variety of experiments and solutions of detail. The province where civil courts retained the largest share of their original jurisdiction is Bengal. The steps successively taken to transfer all tenant litigation to the revenue courts, culminating in the Bengal Rent Act, 1859, were soon partially retraced in 1869⁶⁴ and 1885.⁶⁵ The retransfer of rent cases to the civil courts, however, was not effected throughout the entire territory of the Presidency so as to still leave considerable scope for revenue jurisdiction under the Act of 1859 in certain areas, for instance in Orissa. But even under the Bengal Tenancy Act, 1885, the jurisdiction of the civil courts was drastically curbed in any local area where critical conditions had led to the preparation

63. Cf. for instance sec. 158(2) ix, xiv, xv Punjab Land Revenue Act, 1887 (XVII/1887).

64. Bengal Act VIII/1861.

65. Bengal Tenancy Act, 1885 (VIII/1885).

of a Record of Rights under Ch. X.⁶⁶ This special regime had a natural tendency to expand its sway in course of time; thus, in the 1890s, the whole of Bihar was declared a local area to be brought under the operation of Ch. X.⁶⁷ The antipole to Bengal was Punjab, where settlement operations had always included preparation of records of rights and determination of tenancy questions. Here, as in the Central Provinces, we find the device of investing the revenue officer with the powers of the civil courts, whereupon he "shall be deemed to be a Civil Court"⁶⁸ - i.e. the officer whom we have already observed could turn into a revenue "Court" now miraculously changes into an ordinary "civil court" - a solution of the problem of rule of law which Dicey did not anticipate.

Looking at the long lists of jurisdictional rules as e.g. in the Punjab Tenancy and Revenue Acts,⁶⁹ one might expect overlappings and occasional conflict between the jurisdictions. If the general rule is to have title suits decided by the civil courts, trouble might have been caused by the provision of sec. 158 (2) viii of the Punjab Land Revenue Act excluding the civil courts' jurisdiction on "the claim of any person to be liable for an assessment of land revenue." Conflicts of jurisdiction did in fact occur, and special provisions had to be enacted in order to settle such conflicts. Thus one of Dicey's justified criticisms of administrative law did become a reality, namely that much legal ingenuity has to be wasted on issues of jurisdictions and thereby a good deal of the equitable effect of "untechnical" procedure can be lost.

The jurisdictional role of revenue officers has remained in independent India and has, in fact, greatly expanded because these officers were largely entrusted with implementation of land reforms - to the exclusion of civil courts. Here the justification on the basis of social and equitable concerns clearly appears. But the traditional grounds are also put forward in official explanations, and without elaborate discussion, as a matter of course: "...the work of enforcement of the provisions is generally entrusted to the Revenue machinery because settlement of disputes would be quicker and less expensive to the parties and the Revenue Officers are better acquainted with rural conditions".⁷⁰

66. Rent assessments by the Collector in this case, except when made in connection with a revenue settlement (supra n. 51), could not be challenged in a civil court, sec. 109.

67. Rothermund, Government, 43.

68. Sec 136 Punjab Land Revenue Code (XVII/1887); sec. 33 C.P. Land Revenue Act (XVIII/1881) Sec. 158 (Exclusion of Jurisdiction of Civil Courts).

69. Punjab Tenancy Act, 1887 (XVI/1887) sec. 77 (tenancy cases); Punjab Land Revenue Act, 1887 (XVII/1887) sec. 158 (Exclusion of Jurisdiction of Civil Courts).

70. Ministry of Food and Agriculture, Government of India Agricultural Legislation in India. Vol. VI (Reform in Tenancy) New Delhi, 1955). XL.

The context of land reforms highlights a consideration which always had been at work behind the overt concern for social justice, equity and the like: the administration's own policy considerations. Even apart from the original motive of shielding revenue collection from court interference, adjudication by administrative tribunals is often preferred because it is better geared to ensure influence of departmental policy. This applies with particular force to administrative jurisdiction proper, i.e. settlement of disputes between Government and citizen. But it is also present in so-called situations where the tribunals are deciding disputes between two citizens. Though the revenue officer functioning as a court is taken out of the chain of command and has to exercise his independent judgement, he remains under personal and disciplinary control of his department (the Board of Revenue). His personal independence is in no way guaranteed by the service regulations. He is therefore likely to heed the general direction of departmental policy apart from the fact that, as a civil servant, he will be predisposed to share its outlook. The pressure might be considerable when the overall aim is to push certain governmental reform measures.

The difference between civil and revenue courts has become accentuated in two respects since Independence:

- (a) greater independence has been institutionally secured for the civil courts by establishment of separate judicial cadres placed under the superintendence of the High Courts (Art. 227 of the Constitution).
- (b) on the other hand the factual independence of administrative officers has been reduced. The colonial officer, mostly British, though "close" to local conditions was nevertheless "distanced" from the Indian society and thus could assume the role of an impartial arbiter - at least in his situations. The modern Indian officer is much closer to society and he is exposed to many political pressures by local members of the legislature, politicians of the local self-government councils and so forth. The problem of judicial independence of Revenue "Courts" - in fact administrative tribunals - has therefore become more acute than before.

A countervailing effect has been brought about by the integration of the whole revenue jurisdiction under the supervisory writ jurisdiction of the High Courts and the Supreme Court (Art. 226, 32 and 136 of the Constitution). The old bar on the original jurisdiction of the Superior Courts in revenue matters has finally(?) been removed by Art. 225 proviso,

as restored by the Constitution (44th Amendment) Act, 1978.⁷¹ But this institutional progress of the Rule of Law is affected by the age-old disease of the judicial system: the unexpected, and thus somewhat unorganic superimposition of the superior court' control over the whole hierarchy of revenue courts causes excessive delays. In recent years several such cases were decided in the Supreme Court after anything between 20 and 40 years of litigation.⁷² In other words, a satisfactory balance has still not been achieved, and where this article ends, further reflection should not.

PROMOTING EQUALITY THROUGH RESERVATIONS : A CRITIQUE OF JUDICIAL POLICY AND POLITICAL PRACTICE

Parmanand Singh*

The purpose of this essay is to evaluate the judicial responses to the policy of compensatory discrimination adopted by the Indian State ever since independence. The wider discourse that takes place in India today centres round the meaning of justice for the disadvantaged groups entitled to the benefits of job and educational reservations authorised by the constitution of India. The reservation issue has become much more controversial after the landmark decision of the Indian Supreme Court in *Indira Sawhney v Union of India*¹ (hereafter as the *Mandal Case*) in which the court has accorded complete legitimacy to the preferential treatment being given to the Other Backward Classes.² The elaborate system of compensatory discrimination for the Scheduled Castes and Scheduled Tribes, has never been a source of intense social conflicts, court cases or political stalemate.³ There is a constitutional presumption of their social, economic and educational backwardness. The judiciary has taken a consistent view that there is a firm constitutional commitment for the economic betterment of these classes who are constitutionally defined and centrally designated.⁴

The OBCs⁵, on the other hand, are nowhere defined in the Constitution and are left at the determination of the State governments. The constitution

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1. A.I.R. 1993 S.C. 477.
2. For a detailed discussion of Mandal Commission Report see Parmanand Singh and V.C. Mishra (eds) *RESERVATION CRISIS IN INDIA : LEGAL AND SOCIOLOGICAL STUDY OF MANDAL COMMISSION REPORT (1991)* Universal Traders, Delhi.
3. See Articles 341, 342, 366(24) and (25), *Constitution of India*. The courts have refused to review the Presidential notification and held that the SCs and STs are presumed to be backward and deserve massive compensatory benefits. See *State of Kerala v. N.M. Thomas A.I.R. 1976 S.C. 490*.
4. For judicial responses to SC/ST preferences, see Parmanand Singh, 'Social Justice for the Harijans : Some Socio-Legal Problems of Identification Conversion, and Judicial Review' 20, *Journal of the Indian Law Institute*, 355 (1978).
5. See Articles 15(4) and 16(4) of the Constitutional of India Also see Parmanand Singh 'Fundamental Right to Reservation : A Rejoinder' (1995) 38.C.C. 6-12, Parmanand Singh 'Some Problems of Tension Between Equality and Compensatory Discrimination' in M.P. Singh (ed.) *COMPARATIVE CONSTITUTIONAL LAW*, 336-52 (1989).

71. See note 21 supra and accompanying text.

72. See the Reports by M.L. Upadhyaya, "Law on Agrarian Reforms" in: INDIAN LAW INSTITUTE, ANNUAL SURVEY OF INDIAN LAW, (New, Delhi 1985), 300 ff. mentioning a case where 15 years had been spent with an appeal to the Supreme court after 10 years' litigation in Revenue Courts and High Court; *ibid*, the case of State of Bihar v. B. Chand, AIR 1985 SC 285, decided on 8 January 1985 after the original suit had started in 1951. See further Annual Survey, 1986, 199; 1987, 56 f. with the exceptional case of Ram Adhar Singh decided by the Supreme Court after 118 years of litigation; 1988, 160 f.

lacks any clear commitment for the OBCs. The Mandal controversy has very amply demonstrated the dangers of the political abuse of reservation device. It is almost certain that the OBCs are widely perceived to be numerous, populous and always expandable categories. The reservation for these categories has remained a intense source of social discord and protracted agitations. This paper attempts to portray the contemporary Indian discourse on the issue of OBC reservations in the setting of Indian society and its political and legal culture.

I. THE EMERGING PUBLIC DEBATE

The issue of reservations has divided the Indians in unaccustomed ways. Reservations are blamed for generating a variety of social evils. Castebased reservations are seen as perpetuating the evils of caste-system and accentuating caste consciousness besides impeding the goals of secularism. It is widely believed that the benefits of reservations are snatched away by the elites among the backward castes at the expense of the really needy and deserving. It is alleged that compensatory policies have failed to achieve the goals of participation, representation, integration and assimilation of the disadvantaged groups in the mainstream of national life. The system tends to engender a spirit of self denigration and increases the dependency of the beneficiaries on State patronage, thereby undermining their self-development and self esteem.

Then, those who are excluded complain that they are no better off than those preferred. They argue that in a setting of scarce resources and opportunities, it is an unfair way of distributing valued public-offices and professions on the basis of group identity. The quota system places an unfair burden on the merited applicants who have to stake their careers as a price for the collective good. The excluded ones are, therefore, very much doubtful about their ethical, moral or social obligation to repair the disadvantaged for the handicaps that they actually did not cause. Is it a compensation for centuries of invidious discrimination? Can reparation be made in any real sense for these kinds of historical injuries? They ask. Most Indians are supportive of affirmative action programmes aiming at helping the disadvantaged enabling them to catch upto the standards of competition set up by the larger society. Reservations, on the other hand, provoke resentments as they involve suspension of standards and alteration of rules of competition and constrict the chances of merited applicants.

It is argued that even if reservations are socially desirable for the SCs and STs on the ground of redressal of past injustices, there is no justification to extend the principle of historical compensation to the OBCs who have never been subjected collectively to historical contempt or prejudice. The

OBCs comprise largely of populous middle peasant castes. It is alleged that the OBC reservations have become a tool of aggrandizement on the part of politically dominant backward castes who are able to influence those who hold power. Even those in power see the advantage in the system for political gains.

These issues are debated in the judicial pronouncements, in the mass media, in the scholarly comments and among the political elites. Too much politicisation of the reservation issue is attributed to the increasing resilience of caste in all spheres of public life. There is little doubt that in the post-independence India caste has served as a readymade traditional channel of political mobilization. Politics has afforded to the lower castes a symbol to achieve upward mobility through reserved quota. This has resulted in struggle for power equation.

We arrive, then, at an ironic tension. The constitutional commitment to discourage caste is overshadowed by increasing resilience of caste in public life. Since the conferral of special privileges is essentially a political act, the reservation policies are designed more as a matter of political expediency rather than in conformity with constitutional imperatives. Marc Galanter has rightly remarked that the courts "act as a balancewheel channelling the compensatory policies and accommodating them to other commitments, but it is the political process that shapes the larger contours of these policies and gives them their motive force".⁶

II. SOCIOLOGY OF CASTE-CONFLICTS AND POLITICS OF BACKWARDNESS

Let us begin simply by examining the structure of caste conflicts over the single issue of reservations for OBCs. Some sociological studies⁷ have shown that the caste-conflicts on this issue are more acute in the Northern States than in the South. In South there has been a pre-independence history of communal quotas as a result of anti-Brahmin movement.⁸ In North the OBC category has been used only in late seventies and an attempt to reserve seats and posts on caste-lines had led to intense social conflicts.⁹ In Bihar and Uttar Pradesh, for example, the major beneficiaries

6. Marc Galanter, *COMPETING EQUALITIES: LAW AND THE BACKWARD CLASSES IN INDIA*, xviii (1984).

7. M.N. Srinivas "FUTURE OF INDIA CASTES" XIV E.P.W. 237-41 (1979), E.M.S. Namboodripad "Caste Conflicts v. Growing Unity of Popular Forces" *Id.* at 335-37, Leifsh Dushkin "BACKWARD CLASS BENEFITS AND SOCIAL CLASS IN INDIA - 1920-1970" *Id.* 661, Karuna Ahmed "TOWARDS EQUALITY: CONSEQUENCES OF PROTECTIVE DISCRIMINATION" XIII E.P.W. 69 (1978), Parmanand Singh "Some Reflections on the Indian Experience With the Policy of Reservations" 25 *Journal of the Indian Law Institute* 56, 59 (1983).

8. See Parmanand Singh *EQUALITY, RESERVATION AND DISCRIMINATION IN INDIA* 80-84 (1982).

9. See Pradhan H. Prasad "CASTE AND CLASS IN BIHAR" XIV E.P.W. 481 (1979), M.N. Srinivas *supra* n. 7, *Chate Lal v. State of U.P.*, A.I.R. 1979, All 135.

are believed to be the intermediate castes like *Ahirs*, *Kurmis* and *Koiries* whose pre-independence backwardness has sufficiently been lightened by post-independence agrarian reform measures.¹⁰ A report submitted by R.K. Hebsur,¹¹ amply highlighted the phenomenon of backlash and caste riots in Uttar Pradesh and Bihar and its absence in Southern States of Karnataka and Tamil Nadu. The historical timings of the introduction of OBC policies, says Hebsur, had a tremendous bearing on the reaction of the groups adversely affected by such policies.¹² In Bihar, Uttar Pradesh, Gujarat and Madhya Pradesh, the reservations for OBCs was, for the first time introduced during the 1977-1979 Janata *interregnum* and was not the culmination of any backward classes movement as in the South. The upper castes faced with sudden threat of loss of status dominance or "rank disequilibrium"¹³ reacted sharply over the increased opportunities of the backward castes. In contrast, the long history of backward classes movement and introduction of the reservation policies in phased manner in the Southern States has prevented the sudden reaction of the upper castes who have learnt to live with the system of communal reservations over the years. The reactions over the reservation policies have also depended on the political strategy in devising the reservation schemes. For instance, in the State of Karnataka and Tamil Nadu the upper castes have been divided either politically or by reservation schemes. In Karnataka the Lingayats have been eliminated from the OBC list while the major segments of the Vokkaliga community have been declared backward. This has prevented an alliance between the two communities to react over reservation policies. Just until twenty years ago, these two communities had been the major beneficiaries and had ruled the State.¹⁴ In Tamil Nadu also, every major caste group has been divided into advanced and backward classes, diminishing the possibility of the dominant castes to make a common cause to retaliate against the OBC quota.¹⁵ This is in total contrast with the situation in the Northern States of Bihar, Gujarat or Uttar Pradesh where all major caste groups have been designated as forward enabling them to unite and exert retaliatory pressures to thwart the uprising of the intermediate castes.¹⁶

10. See Parmanand Singh *supra* n. 8 at 80-84.

11. R.K. Hebsur 'Reservation for the Other Backward Classes : Comparative Study of Four States' in REPORT OF THE BACKWARD CLASSES COMMISSION (B.P. Mandal, chairman) Vol. 4, Part II, 131-164 (1981) (Hereafter as Mandal Report).

12. *Id.* at 144.

13. *Id.* at 141.

14. *Id.* at 153.

15. *Id.* at 147-50.

16. *Id.* at 145.

Another difference is that unlike in Tamil Nadu and Karnataka, where there is very less cleavage between the OBCs and the SCs and STs, in the Northern States of Bihar, Madhya Pradesh, Gujarat and Uttar Pradesh, there is a sharp cleavage between the peasant castes and the Untouchables. If the upper castes feel threatened by the rising aspirations of the middle peasant castes, the latter also feel threatened by the uprising of the Untouchables. The fundamental cleavage between the OBCs and the Untouchables has facilitated the upper caste backlash. The caste conflicts over reservation issue, thus depend on caste composition, caste mobilization and the political strategy in devising the policies.

When in 1978 the Gujarat government introduced the OBC category comprising 82 castes and communities (on the recommendation of Bakshi Commission, 1976), the reservation issue did not provoke any violent protest. In 1981 Rane Commission was appointed to consider the representation of those castes and communities which considered themselves 'backward' but were not included in the Bakshi list. The Commission reported in 1983 that income and not caste should be the basis for determining social and educational backwardness. Applying the economic tests of backwardness, it specified 63 occupational groups as eligible beneficiaries and recommended 18 per cent hike in reservation in addition to the existing 10 per cent ordered under the Bakshi proposals. The Rane commission also recommended an income ceiling to eliminate the better off from the listed groups. It decried caste test of backwardness as perpetuative of caste system and vested interest in backwardness.

The Rane-report was lying among the dead files for nearly fourteen months because the government wanted a list of castes and communities and the income test of backwardness was not acceptable to it.¹⁷ The report was dramatically activated in January 1985 as soon as the assembly elections were announced.¹⁸ The government promptly declared the enhancement of OBC quota from 10 to 28 per cent accepting the 18 per cent hike proposed by Rane Commission. Ironically, the beneficiaries yet remained to be identified.¹⁹

17. See Parmanand Singh and V.C. Mishra *Supra* n. 2.

18. See Meenakshi Jain "Rise of a Political Caste in Gujarat" *The Times of India* (Delhi) July 22, 1985; A.S. Abraham "Caste-War in Gujarat" *The Times of India* (Delhi) June 14, 1985.

19. Professor Baxi reports that in 1984 out of 675 seats in medical colleges, 7 per cent (47 seats), 14 per cent (94 seats) and 10 per cent (67 seats) were reserved respectively for SCs, STs and OBCs but only 3.5 per cent for OBCs was actually filled, the rest of the seats went to higher castes. See U. Baxi, 'Reflection on Reservation Crisis in Gujarat' *Mainstream* (Annual) 8th, 15th and 22nd June, 1985, pp. 15-24.

The caste conflicts and political stalemates on the single issue of OBC reservations are only a particular kind of manifestation of the larger struggle and competition for power and social status. Sometimes these struggles manifest themselves in litigation; other times they manifest themselves in caste war. Too much politicization of reservation issue tends to create fierce competition among the various castes to seek inclusion in the OBC lists. This in turn results in the political abuse of the reservation device for wooing and winning the backward groups for political gains. These trends have become the most pervasive feature of political struggle and competition for power.

III. WHO ARE THE OBCs?

Marc Galanter has very aptly observed that the "question of who were the Scheduled Castes was debated and roughly settled before independence within the executive and without the participation of the courts. But who are the Backward Classes is a post-independence question, which the constitutional recognition of the category made one of all-India basis."²⁰ A close look at the debates of the Constituent Assembly on Article 16(4) gives the impression that the backward classes were not merely economic groups but historical social categories whose backwardness was associated with discriminatory social structure of the Indian society.²¹ The delegates from Southern States took a leading part in the debate due to their pre-independence experience of caste and communal quotas: A representative from Mysore referred to the then prevailing Mysore practice where the backward classes included every one except the Brahmins.²² The delegate from Madras referred to the Madras practice where the term included numerous castes and communities among the Backward Hindus.²³ The delegate from Bombay, K.M. Munshi referred to the Bombay practice of including a broader category of socially, economically and educationally backward classes besides SCs and STs.²⁴ The delegates from the Northern States, however, believed that the backward classes meant only the Untouchables.²⁵ Munshi assured the House that these classes included SCs and STs in addition to socially and educationally backward classes.²⁶ One speaker echoed the doubt that the term was ambiguous and

20. Marc Galanter *supra* n. 6 at 186.

21. 7 *Constituent Assembly Debates* 701-2.

22. T. Chinniah *Id.* at 689-90.

23. Ismail Saheb *Id.* at 692.

24. *Id.* 696-97.

25. H.N. Kunzru *Id.* at 680; A.B. Gurung *Id.* at 685; R.M. Nalvada *Id.* at 686.

26. K.M. Munshi *Id.* 697.

would become a "paradise for lawyers",²⁷ while others feared that the system of reservation might put a premium on backwardness and impair the efficiency in administration.²⁸ Ambedkar clarified that Article 16(4) was designed to serve as a happy formula to reconcile the competing claims of equalities²⁹ and that a wholesale reservation in service would be incompatible with the principle of equality of opportunity.³⁰ He believed that the OBCs will be determined at State level³¹, while some members³² thought that it would be the President-appointed Backward Classes Commission, which would conclusively determine the criteria of backwardness. Later, while defending Article 15(4) in Parliament, Ambedkar reiterated: "What are called backward classes are ... nothing a but collection of certain castes."³³ K.T. Shah's³⁴ suggestion to add the word "economically" was rejected by Nehru on the ground that the words "socially and educationally backward classes" were bodily lifted from Article 340 and the word "economically" would cause a lot of confusion.³⁵ Nehru conceded that giving recognition to castes and communities went against formal equality yet an exception to this was necessary to overcome historical injustice.³⁶

There is little doubt that at the time of the making of the Constitution it was generally agreed that the OBCs would be castes and communities who were backward due to historical reasons.³⁷

Even the Kaka Kalelkar Commission³⁸ continued to defend the use of caste as the predominant factor in determining social and educational backwardness, as the Indian society was not based on economic structure but on the medieval concepts of *Varna* and social hierarchy.³⁹ The evils of

27. T.T. Krishnamachari *Id.* at 699.

28. L.N. Misra *Id.* 673; Damodar Swaroop *Id.* 679.

29. B.R. Ambedkar *Id.* at 701-702.

30. *Ibid.*

31. *Ibid.*

32. K.M. Munshi *Id.* at 697.

33. *Parliamentary Debates* Part II, Vol. XII Column 9006.

34. *Id.* Col. 9815.

35. *Id.* Col. 9830. Nehru clarified that the need of Article 15(4) arose because of the furor created in Madras and other parts of South India over the Supreme Court's invalidation of Madras reservation scheme in *State of Madras v. Champakam Dorairajan*, A.I.R. 1951 S.C. 226, *Id.* Col. 9615.

36. *Id.* Col. 9616.

37. For a detailed account of the history of OBCs see Marc Galanter *supra* n. 6 at 154-179.

38. Parmanand Singh *supra* n. 8 at 80-107.

39. *Report of the Backward Classes Commission, Government of India* (Kaka Kalelkar, Chairman) 3 Vols. (1955).

Id. Vol I, 41.

caste system could be combated by measures adopted on castelines.⁴⁰ The Commission listed 2,399 castes and communities as the recipients of reserved seats in educational institutions, and government services. At the last moment, the Chairman, Kaka Kalelkar, dissented, emphasizing economic test of backwardness as the caste test was repugnant to the ideals of secularism and of a casteless society.⁴¹ The Union Government agreed with the Chairman's refusal of the commission's proposals and rejected the report as being caste-oriented and inimical to an egalitarian society.⁴² The State governments were requested to draw their own lists using the test of income and occupation instead of caste.⁴³

Just at the time, the Union government was launching a nationwide campaign for economic test of backwardness, the Supreme Court of India, in *M.R. Balaji v. State of Mysore*⁴⁴, intervened and struck down an expansive Mysore reservation scheme for its exclusive reliance on caste criterion. *Balaji* highly commended economic test of backwardness and joined hands with the Centre. *Balaji* was widely hailed as completely outlawing caste in the selection of OBCs. This decision also marked the judicial predominance over the governmental policies of reservation for OBCs. Such policies were subjected to close and rigorous scrutiny by the courts to find compliance with the legal prescriptions. The courts began to demand recent socio-economic data for determining socially and educationally backward classes.⁴⁵

Under the pressure from the judiciary many State governments using the category of OBCs, were compelled to appoint commission to identify socially and educationally backward classes. A brief analysis of the work of major commissions would reveal that despite the judicial resistance most of the commissions have classified OBCs by employing caste and communal units. Let us first take the position in Karnataka. As a result of *Balaji* the government shifted to income and occupation test of backwardness which was highly commended in *Chitralekha v. State of Mysore*⁴⁶ for

40. *Id.* at 39.

41. *Id.* at XIV.

42. *Memorandum on the Report of the Backward Classes Commission, Ministry of Home Affairs, Government of India*, 1-5 (1956).

43. The Centre repeatedly objected to the use of caste test as perpetuative of communal divisiveness. By 1965 it was almost clear that any all India list of OBCs was not mandated by the Constitution and hence Centre abandoned the idea of drawing such list. *Lok Sabha Debates Series 3*, Vol. 48, Column 3973-76 (Nov. 25, 1965).

44. A.I.R. 1963 S.C. 649.

45. *Hari Haran Pillai v. State of Kerala*, A.I.R. 1968 Ker. 42, *Triloki Nath Tikku v. State of Jammu and Kashmir*, A.I.R. 1967 S.C. 1283, *P. Sagar v. State of A.P.*, A.I.R. 1968 A.P. 165.

46. A.I.R. 1964 S.C. 1823.

completely eschewing caste and communal considerations. Soon many people of Karnataka, began to realize that the new practice served yet another tool at the hands of the dominant Lingayats and the Vokkaligas to advance themselves at the expense of less articulate backward castes.⁴⁷ The Government under the chief ministership of Devraj Urs, capitalized the resentment of the backward castes over the major gains of reservations going only to the two dominant communities under the *Chitralekha* arrangement. A commission⁴⁸ under the chairman of L.G. Havanur was appointed in 1972 which reported in 1975 that the *Balaji-Chitralekha* view that "castes" could not be equated with "classes" was repugnant to idea underlying compensatory discrimination.⁴⁹ The commission propounded the doctrine of equality of castes.⁵⁰ Several examples were given to prove that the word "classes" in the Indian context has historically been linked with "castes".⁵¹ The result of the massive survey conducted by the Havanur Commission was to designate 15 communities, 128 castes and 62 tribes as beneficiaries under Article 15(4) and 9 communities, 115 castes and 61 strikes as beneficiaries under article 16(4). The Brahmins, Bunts, Lingayat, Kshatriyas and Jains were excluded from the list. The commission recommended only 32 per cent reservation for OBCs (in addition to 18 per cent SC/ST quota). The government orders that followed during 1977 and 1979 added several groups to the list and as against 32 per cent as suggested by the commission, reservations were raised to 50 per cent sending the total reservation to 68 per cent,⁵² apparently in utter disregard of the settled legal limit of below 50 per cent. The Lingayats, discomfited by the new policy saw in the report and the orders a sinister move of the government to isolate their community and reduce their power and influence but no violent protests took place. The resentment manifested in a series of writ petitions culminating in *Vasanthi*.⁵³ The Venkataswamy Commission appointed by Hegde government conducted surveys to

47. *Nagan Gowda Committee* (1961) had excluded the Lingayats from the OBC list but under caste pressures the government had to include them. This list was invalidated in *Balaji*. *Supra* n. 44.

48. *Karnataka Backward Classes Commission* (L.G. Havanur, Chairman) vol. I, Part I (Main report) at ii, Chairman's covering letter.

49. *Id.* at v.

50. *Id.* at 60.

51. The definition by Lahore High Court in A.I.R. 1967 Lahore 340 is cited *id.* at 60-61. "The term class carries with it the idea of a readily ascertainable group having some element of permanence, stability and sufficiently numerous and widespread to be designated as a class. It is in this sense that the expression was commonly understood in this country..."

52. *Id.* Vol. I, 359-72.

53. *K.C. Vasanth Kumar v. State of Karnataka* A.I.R. 1985, S.C. 1495.

identify OBCs in Karnataka on the guidelines supplied by *Vasanth*.⁵⁴ The Chinnappa Reddy Commission (1990) has based its report on the population figure calculated by Venkataswamy Commission.

In Tamil Nadu, a commission⁵⁵ reported in 1970 that only 9 out of 105 castes listed as backward managed to create a virtual monopoly for themselves in government services and suggested their elimination from the list. Instead of their elimination, more castes were added in the list.⁵⁶ In 1979 in income ceiling⁵⁷ was fixed for enjoying the benefits but soon the government yielded to the vigorous protests by caste leaders and in February, 1980 the income ceiling was withdrawn. Reservations were also enhanced from 31 to 50 percent in addition to 18 per cent SC/ST quota raising the aggregate reservation to 68 percent. In Tamil Nadu there is "an under current of some disappointment on the part of the part of the weaker castes, against (a) the dominance of the Modaliars and Naidus, (b) the nine top backward castes and (c) inclusion of otherwise powerful castes in the OBC list."⁵⁸ The Ambasanker Commission's report submitted in February 1985,⁵⁹ became a source of intense debate in Tamil Nadu.

In Kerala, the proposals of a backward classes commission⁶⁰ applying economic test of backwardness was accepted by one government but rejected by another presumably under the pressure of some caste allies who were discomfited by income tests and income cut-offs.⁶¹ In Kerala, the benefits of educational reservations were given to listed castes and communities (recommended by Pillai Commission⁶²) and an income

ceiling was imposed for enjoying the benefits. But for reservation in services there was no such ceiling and a separate list was used.⁶³ Caste-class hierarchy was an inherent feature in socio-economic relations in Kerala.⁶⁴ The Andhra list⁶⁵ had fell from 146 communities to 92 communities and 25 percent seats were reserved for them. Bihar,⁶⁶ Uttar Pradesh,⁶⁷ Gujarat⁶⁸ Punjab⁶⁹, also maintained a list of castes and communities and Jammu and Kashmir maintained the list of caste, occupational and territorial groups.⁷⁰ In Kerala, a law has been passed to overcome *Mandal's* insistence on the elimination of creamy layers and benefits of reservation is given without any income cut off. The Kerala's Scheme is apparently unconstitutional but it has remained unchallenged so far.

The random profile of State practice shows regional variations in selecting the OBCs. But "castes" and "communities" are by and large, the "classes" deemed backward who are selected on the basis of low social standing, low level of income, low level of literacy, low level of occupation

63. Rule 14, *Kerala State and Subordinate Services Rule 1958* specified 9 communities and reserved 40 per cent posts for them.

64. P. Sivanandan "Caste and Class and Economic Opportunity in Kerala" XIV *E. P. W.* 475 (1979).

65. *P. Sagar v. State of A.P.*, supra n. 45, struck down an Andhra list containing 112 communities. As a result *Manohar Prasad Backward classes Commission (1970)* specified 92 communities which was upheld in *State of A.P. v. U.S.V. Balaram*, A.I.R. 1972 S.C. 1374.

66. The Bihar list comprised 128 castes and communities out of which 92 were designated as Most Backward, 26 percent seats and posts were reserved for them.

67. *Chote Lal v. State of U.P.*, A.I.R. 1979 All. 135 struck down the U.P. list containing 59 communities as being based on a pre-independence list. The court ordered the setting up a commission to investigate into the social conditions of the state.

68. *Bakshi Commission (1972)* reported in 1976 that there were 82 caste and communities as OBCs and 10 percent reservation was recommended for them. In 1978 the Government implemented the report. *Rane Commission (1981)* reported in 1983 that instead of caste test, income and occupation test should be applied and applying economic tests 63 occupational groups were designated as OBCs. An increase of 18 percent reservation was also recommended. Only those whose annual income was less than Rs. 10,000 were eligible to apply for reserved posts. The announcement of 18 percent like in the quota in January 1985 led to widespread and prolonged agitation in Gujarat leading to the removal of the Chief Minister, Solanki, in July 1985.

69. The Punjab list contained 14 castes and communities, constituting 2 percent of the State's population as OBCs. See *Mandal Report Part I*, Vol. 1, p. 10.

70. In Jammu and Kashmir, the Kashmiri Pandits who constituted only 2 percent of the State's population had the preponderance in services. This led to a widespread agitation by other communities to have their proportional representation in services. In 1956, the Government introduced a pattern of communal allotments but the Supreme Court intervened and declared communal quotas as opposed to the Constitution. *Tripathi Nath Tripathi v. State of J and K*, A.I.R. 1967 S.C. 1283, *Tripathi Nath v. State of J and K*, A.I.R. 1969 S.C. 1.

54. See REPORT OF THE KARNATAKA THIRD BACKWARD CLASSES COMMISSION, GOVERNMENT OF KARNATAKA Vols. I and II (1990).

55. REPORT OF THE BACKWARD CLASSES COMMISSION, GOVERNMENT OF TAMIL NADU (A.N. Sattanathan, Chairman) 3 Vols. (1971). The nine elite castes are Vadugas, Veerakodi - Vellalals, Gavaras, Sourashtrians, Thuluvu-Vellalals Devangas, Sozhia - Vallalals, Agha mudiyans, Sadhu Chettis, V.G. Prasad Rao "Caste Factor in Tamil Nadu" *The Time of India* (Delhi) March 9 and 10 1981.

56. R.K. Hebsur *Supra* n. 11 at 149.

57. The income ceiling was fixed by Ramchandran ministry in 1979 *Id.* 144.

58. R.K. Hebsur *Supra* n. 11 at 149.

59. A.S. Abraham "Turnoil over Reservations : Backward Classes in Full Cry" *The Time of India* (Delhi) April 12, 1985.

60. *Report of Backward Classes (Reservation) Commission; Government of Kerala* (P.D. Netur, Chairman) 2 Vols. (1970).

61. The report was accepted by Achuta Menon ministry but rejected by Vasudevan Nair ministry.

62. REPORT OF THE COMMISSION FOR RESERVATION OF SEATS IN EDUCATIONAL INSTITUTIONS, GOVERNMENT OF KERALA (G. Kumar Pillai, chairman) (1966). 91 Communities are eligible beneficiaries. An income ceiling of Rs. 10,000 per annum had been fixed and 25 percent seats were reserved. See *K.S. Jayasree v. State of Kerala*, A.I.R. 1976 S.C. 2381.

and so on. There is an increasing tendency to put income ceilings to exclude the better off members from the listed groups.

The controversial Mandal Commission had also strong preference for the historic view on the meaning of OBCs. It has specified 3,743 caste and communal groups⁷¹ as "classes" comprising about 52 percent of the population of India. It wanted to recommend reservations for them in proportion to their ratio in the population⁷², but in deference to the legal limitation only 27 percent reservations had been recommended by it.⁷³ The central theme of the report was to highlight the evils of *Varna* social structure and the exploitations growing out of it since ages. The Commission believed that the caste standing of a person summed up his social and economic position. It said that in the traditional social structure the social backwardness was a direct consequence of caste status of a person⁷⁴ and although some features of the caste system have weakened in ritual front, "it has more than gained in the political front".⁷⁵ After extensive citations from the decisional law, the Commission favoured the *Rajendran*⁷⁶ view that castes and classes were synonymous and severely criticised the *Balaji* and *Chitralakha*⁷⁷ view that castes could not be equated with classes. The Commission stated that there was a "close linkage between caste ranking of a person and his social and educational status"⁷⁸ and thus "the lower ritual caste status of a person has a direct bearing on his social backwardness".⁷⁹ It, however, made no attempt to eliminate the well-off from the listed groups. On the contrary it justified the "elite benefits" as providing a psychological spin off⁸⁰ among the members of the groups in the achievements of its better off members and as providing a symbolic sense of group participation at the higher echelons of public life.⁸⁰ *Balaji*'s insistence on the comparability of the OBCs with the SCs and STs was also refuted by the Commission which thought that *Balaji* represented the "most conservative view on the relevance of caste for determining social backwardness and on synonymity between "classes" and "castes."⁽⁸¹⁾

71. MANDAL REPORT Part II, Vol. VI, 173-274.

72. MANDAL REPORT Part I, Vol. I, 57.

73. *Id.* 58.

74. *Id.* 17.

75. *Id.* 20.

76. *P. Rajendran v. State of Madras*, A.I.R. 1968 S.C. 1012.

77. *Chitralakha v. State of Mysore*, A.I.R. 1964 S.C. 1823.

78. MANDAL REPORT Part I, Vol. I, 62.

79. *Ibid.*

80. *Id.* 57.

81. *Id.* 26, 167.

IV. JUDICIAL RESPONSES

The reservation policies in favour of OBCs have been subjected to close judicial scrutiny ever since the famous case of *Balaji*.

*Balaji*⁸² had struck down a Mysore reservation scheme on many counts. The Mysore order suffered from many vices - excessive reservation, exclusive use of caste test, classification of backward classes into backward and more backward classes, inclusion of about ninety percent of the populations as the eligible beneficiary and many others. The Court, speaking through Justice Gajendragadkar, viewed wholesale reservation as undermining the standards and efficiency in professions. Reservations should be "reasonably below" 50 percent so that sufficient places are available for open competition.⁸³ Only those communities could be treated as educationally backward classes who were "well-below" the State average of literacy implying that the number of beneficiaries should be less than half of the population.⁸⁴ For determining social backwardness, it should be ensured that the backward classes in the matter of their backwardness are comparable to the SCs and STs.⁸⁵ The Court agreed that in relation to Hindus caste status of a person could be one of the possible measures of backwardness to be used in conjunction with other non-communal tests such as poverty, occupation, place of habitation etc.⁸⁶ Caste status, could however, in no circumstance, be the sole determinant of backwardness.⁸⁷ Social backwardness was on the ultimate analysis, the result of poverty to a very large extent and social backwardness which resulted from poverty was likely to be aggravated by considerations of caste to which the poor citizen might belong but that only showed the relevance of both caste and poverty in determining social backwardness.⁸⁸ The court showed its hostility to the creation of layers or strata among the backward classes and emphasised the element of absolute backwardness so that "really backward classes" were the beneficiaries.⁸⁹ Since the aim of reservation was to overcome rooted inequalities, the backward classes should be both socially and educationally backward.⁹⁰ All these guidelines were supplied by the court to prevent the reservation clauses from

82. *Balaji v. State of Mysore supra* n.44.

83. *Supra* n. 44, 662-63.

84. *Id.* at 660.

85. *Id.* at 658.

86. *Id.* at 659.

87. *Ibid.*

88. *Ibid.*

89. *Id.* at 658.

90. *Ibid.*

expanding into a regime of caste and communal allotments.

Balaji undoubtedly opposed the exclusive reliance on caste standing in determining social backwardness but is tolerated communities (including caste groups) as "classes" under Article 15(4).⁹¹

"It is for that attainment of social and economic justice that Article 15(4) authorizes the making of special provisions for the advancement of the communities therein contemplated, even if such provisions may be inconsistent with the fundamental rights ..."

While developing the tests of educational backwardness the Court observed⁹²

"Only those communities which are well-below the State average can properly be regarded as educationally backward classes ..."

It seems clear the *Balaji* allowed communities as classes or units of classification whose social and educational backwardness could be measured by multiple tests, caste standing being only one of the tests.

But in *Chitralekha*,⁹³ Justice Subbarao "explained" *Balaji* by saying that "castes" could not be "classes" in any circumstance and in developing these responses the distinction between caste as a unit and caste as a measuring rod was completely blurred.⁹⁴

"If the makers of the Constitution intended to take caste also as a unit of social and educational backwardness, they would have said so as they said of the Scheduled Castes and the Scheduled tribes. The juxtaposition of the expression "Backward Classes" and "Scheduled Castes" in Articles 15(4) also leads to a reasonable inference that the "expression" classes is not synonymous with "castes."

In approving an arrangement based on income and occupation, the Court modified *Balaji* by saying that caste was not a compelling test of backwardness and therefore backward classes could be designated by exclusive economic tests. Justice Subbarao perhaps neglected that the question regarding 'classes' and 'castes' was not whether the two could be "equated" but rather whether "classes" could be composed of caste and

91. *Id.* at 664.

92. *Id.* at 660.

93. *Supra* n. 46.

94. *Id.* at 1833 (emphasis added)

communal groups.

The notion propounded by *Chitralekha* was, however, shortlived. In *Rajendran*,⁹⁵ the Court upheld a caste-based classification of OBCs and asserted that the aim was not merely to eliminate economic inequalities but to overcome disabilities arising out of past social discrimination. That in India classes were understood in terms of caste groups was stated thus: "It must not be forgotten that a caste is also a class of citizens and if the caste as a whole is socially and educationally backward, reservation can be made in favour of such caste..."⁹⁶ In *Periakaruppan*⁹⁷ and *Balaram*,⁹⁸ *Rajendram* was applied with full vigour. The concern expressed in *Chitralekha*⁹⁹ to exclude the prosperous segments from the OBCs list, was also diluted in *Balaram* where the Court observed that a caste as a whole could be treated as backward class "notwithstanding the fact that few individuals in that group may be both socially and educationally above the general average."¹⁰⁰ Contrary to the *Balaji* "well-below the State average" test of educational backwardness, the Court in *Balaram* upheld the inclusion of several communities in the list whose educational attainments were slightly higher than the State average.¹⁰¹ Not only this, the Court also disputed the *Balaji*'s comparability with SC/ST standard and relaxed it by saying that the OBCs need not exactly be similar to SCs and STs.¹⁰²

Only a year later, the Court the *Janki Prasad*¹⁰³ quickly reverted to the *Balaji* posture, holding that the comparability test was a fundamental requirement as the SCs and STs exemplified the real social and educational backwardness and served as a model for classifying OBCs.¹⁰⁴ The Court was willing to commend the income tests and the income ceilings applied to caste and communal units but it rejected the notion that poverty alone could be the conclusive test of social and education backwardness.¹⁰⁵ An exclusive economic test would encompass a vast majority of India's population and an "untenable situation may arise because even in sections which are recognised as socially and educationally advanced there are

95. *Supra* n. 76.

96. *Id.* at 1014-15.

97. *Periakaruppan v. State of Tamil Nadu*, A.I.R. 1971 S.C. 2303.

98. *Supra* n. 65.

99. *Supra* n. 46 at 1834.

100. *Supra* n. 65 at 1395-96.

101. *Id.* at 1397.

102. *Id.* at 1395-96.

103. *Janki Prasad v. State of J and K*, A.I.R. 1973 S.C. 930.

104. *Id.* at 938-39.

105. *Id.* at 937.

large pockets of poverty.¹⁰⁶ An exclusive poverty test was again disapproved in *Pradip Tandon*¹⁰⁷ in reply to an argument that all people from rural areas of Uttar Pradesh were uniformly backward. The Court reiterated the view that poverty was rampant in whole of India and perhaps more so in affluent classes.¹⁰⁸ But reservation in medical colleges for candidates coming from Hill and Uttarakhand areas of Uttar Pradesh was upheld under Article 15(4). *Pradip Tandon* was in striking departure from the all the earlier rulings that caste could be one of the measures of backwardness to be applied along with other neutral indices. The Court here, held that caste could not be made even one of the factors of social and educational backwardness. Justice A.N. Ray clarified that the "socially and educationally backward classes of citizens are groups other than groups based on caste" and that "neither caste nor race nor religion can be made the basis of classification."¹⁰⁹ Only a year later, Ray C.J. (as he then was) changed his heart in *Jayasree*¹¹⁰ where after citing *Balaji* and subsequent decisions, he readily agreed that caste standing could be one of the tests of backwardness, although it could not be the exclusive test. Both caste and income were relevant.¹¹¹ The Court highly commended Kerala's means-cum-caste/community test of backwardness and agreed that with the economic advancement the social disabilities were also dispelled and therefore the State should strive to eliminate the well-off from the listed groups by fixing income ceilings.¹¹²

All the rival readings of the reservation clauses and the idea underlying compensatory discrimination were neatly crystalized in the debate within the Supreme Court in *Vasanth*¹¹³ on the meaning of OBCs. Chief Justice Chandrachud commended means-cum-caste/community test of backwardness and wanted that the OBCs should be comparable to the SCs and STs.¹¹⁴ Justice Desai interpreted *Balaji* as recommending exclusive economic tests.¹¹⁵ He believed that caste test entailed lions' share problem and also impeded the goals of secularism and of a casteless and classless society. Praising the approach of the Rane Commission in completely eschewing communal tests in favour of economic tests; Justice Desai

106. *Ibid.*107. *State of U.P. v. Pradip Tandon*, A.I.R., 1975 S.C. 563.108. *Id.* at 568.109. *Id.* at 566-67.110. *Supra* n. 62.111. *Id.* at 2386.112. *Ibid.*113. *Supra* n. 53.114. *Id.* at 1498, 99.115. *Id.* at 1500, 1505.

concluded: "The only criterion which can be realistically devised is the one of economic backwardness ... If economic criterion ... is accepted, it would strike at the root cause of social and educational backwardness, and simultaneously take a vital step in the direction of the destruction of caste structure, which in turn would advance the secular character of the nation."¹¹⁶

Justice Sen also deplored "caste-oriented policy of reservations and wanted it to be "economically based."¹¹⁷ He, therefore, allowed communal *units* and *classes* whose backwardness, should be measured predominantly by poverty test.¹¹⁸ But "caste or sub-caste or a group should be used only for purpose of identification of persons comparable to the Scheduled Castes and the Scheduled Tribes."¹¹⁹ He recommended the setting up of a permanent National Commission for Backward Classes for reviewing the whole policy since the courts were ill-equipped to perform the task of identifying the OBCs.¹²⁰

Justice Reddy equated social and educational backwardness with low social position and equated *castes* with *classes*: Social hierarchy and economic position exhibit an undisputable mutuality. The lower the caste, the poorer are its members. The poorer the members of a caste, the lower the caste.¹²¹ Justice Reddy came close to saying that caste standing of a person was the sole determinant of social backwardness.¹²²

"One may without hesitation say that if poverty be the cause, caste is the primary index of social backwardness so that social backwardness is often readily identifiable with reference to a person's caste."

Justice Venkataramiah was also critical of *Balaji* for not giving "adequate importance to the evils of caste system"¹²³ and to the history of the reservation clauses. He attributed the meaning of "classes" to the expression "classes" in Article 338(3), which was in the nature of the explanation to the definition of SCs and STs.¹²⁴ Applying the rule of *ejusdem generis*, he defined OBCs as castes, communities and races.¹²⁵ He

116. *Id.* at 1507.117. *Id.* at 1530.118. *Ibid.*119. *Ibid.*120. *Id.* at 1531.121. *Id.* at 1512.122. *Ibid.*123. *Id.* at 1546.124. *Ibid.*125. *Ibid.*

argued that this interpretation was confirmed by the history of Article 16(4) where Ambedkar equated classes with castes and communities.¹²⁶ He pointed out that the word 'classes' was substituted in the place of "communities" just at the last moment. Therefore the OBCs are those "who belong to castes/communities which are traditionally disfavoured and which have suffered societal discrimination in the past."¹²⁷

The above analysis reveals a variety of judicial opinions on the meaning of OBCs. On the question of determining socially and educationally backward classes, the Supreme Court has vacillated; sometimes allowing communal quotas, other times preventing them; sometimes emphasising the elimination of historic disparities, other times emphasising the elimination of economic inequalities. The constitutional commitment in favour of OBCs, thus remained ambiguous and dithering and continued to be a source of dismay and resentment.

V. THE MANDAL JUDGEMENT: A CRITIQUE

As is well-known, the implementation of Mandal Commission Report by the V.P. Singh government in August 1990 gave rise to unprecedented violent disturbances and political warfare. In *Indira Sawhney v Union of India*¹²⁸ a nine judge bench of the Supreme Court examined the validity of the government order reserving 27 percent jobs for socially and educationally backward classes (OBCs). Six judges (M.H. Kania CJ, B.P. Jeevan Reddy, M.N. Venkatchaliah, A.M. Ahmadi (as he then was) S.R. Pandian and S.B. Sawant JJ) upheld the government order provided the well-off sections among the backward classes were eliminated from the benefits of job reservation. Three Judges (Kuldip Singh, T.K. Thommen and R.M. Sahai JJ) wrote dissenting judgments fully rejecting the Mandal Report and its reasonings. It is not possible here to dwell in detail all aspects of the *Mandal* case. We attempt here to comment on the main principles laid down in this case.

(a) Backward classes can comprise castes and communities

Justice Reddy (with whom Kania CJ, Venkatchaliah and A.M. Ahmadi concurred) clearly held that since caste is a social class, caste as a whole can be designated as a backward class under Article 16(4). He took the view that caste status is a predominant test of backwardness among Hindus. For non-Hindu communities, occupational groups could be units of classification. These Judges would prefer to start with caste groups as

126. *Id.* at 1545.

127. *Id.* at 1548.

128. *Supra* n. i.

units of classification and then apply to them other relevant criteria of social backwardness such as income, occupation, place of residence, educational achievement etc. Justices Pandian and Sawant also endorsed the use of caste groups as units of classification for designating backward classes. Surprisingly, Justice Pandian is the only judge who does not believe in the elimination of creamy layers. It makes no difference to him if some members of the backward classes are affluent and economically well-off. Apparently, he fully approves the approach of the Mandal Report. The dissenting Judges insist on economic test of backwardness and altogether reject the caste test. To Sahai J, the test of social acceptability, traditional occupation, educational backwardness and poverty should be applied to all occupational groups regardless of castes and communities. Kuldip Singh J also says that castes and classes are not synonymous. To him the test of under representation is the predominant and sole test of backwardness under Article 16(4). Thommen J argues that since the aim of reservation is to remedy prior inequities, exclusive economic test would be impermissible under Article 16(4) but he also discards caste as the predominant test of backwardness.

It is thus clear that in the *Mandal* case six out of nine judges have upheld the use of caste groups as the basis of backward class classification and have also approved the use of caste standing as the predominant test of social backwardness.

(b) Backward classes in Article 16(4) are not similar to socially and educationally backward classes in Article 15(4)

In the *Mandal* case the majority overruled the *Balaji* holding that the beneficiaries of Articles 15(4) and 16(4) are the same. These six judges say that the accent of Article 16(4) is on social backwardness rather on educational backwardness. Their argument is that Article 340 which uses the expression "socially and educationally backward classes" is related to Article 15(4) as was clarified by Jawaharlal Nehru in his speech in Parliament while introducing the First Amendment in 1951. Since Article 16(4) uses the expression "backward class of citizens" and there is no reference of this expression in Article 340, the former Article would cover wider category of socially backward classes who are severally under represented in the services under the State. Justice Reddy and Pandian, therefore approve the Mandal approach in giving 12 out of 22 points to the factor of social backwardness and only 6 points to the factor of educational backwardness. The implications of the *Mandal* ruling will be to empower the government to make an expansive category of backward classes for the job reservation policies.

(c) *Backward Classes need not be comparable to the SCs and STs*

Balaji and subsequent cases applied the requirement of comparability of OBCs to SCs and STs in order to resist the expansive listing of OBCs. The *Mandal* case overrules *Balaji* on this point also and fully endorses the *Mandal Reports'* approach. This again is a retrograde step. *Balaji's* insistence on conjunctive reading of social and educational backwardness and also on the comparability of OBCs with SCs and STs was intended to identify really backward classes which has been nullified by the *Mandal* case.

(d) *Creamy layers must be eliminated*

Except Pandian J, all the remaining judges uniformly insist on the elimination of creamy layers from among the designated backward classes. The court directed the government to set up a commission for identifying the criteria for the elimination of creamy layers. In compliance with the court's direction, the government appointed Justice Ram Nandan Committee which submitted its report in 1993. The Central government also identified the criteria for such elimination. When the States of Bihar and Uttar Pradesh defied the Central government's criteria the Supreme Court quashed the schemes formulated by these States on the ground that the criteria laid down by these states were inconsistent with the *Mandal* case.¹²⁹

(e) *Article 16(4) permits classification of backward classes into 'backward' and 'more backward classes'*

On this issue also *Balaji* was overruled by the majority in the *Mandal* case. In *Balaji* it was held that classification of backward classes into 'backward' and 'more backward' would entail several layers of backward classes each of which might claim the benefits of reservations. Such 'relative tests', according to *Balaji* would be impermissible as they would substantially deprive the really backward groups from the benefit of compensatory discrimination. In the *Mandal* case the majority recommended the sub-classification on the ground that even among the backward classes some may be more backward than others. The present author agrees with this view because if the backward classes have to be protected against open competition, there is no reason why the most disadvantaged should not be protected against relatively advanced sections among the backward classes.

¹²⁹ See *Ashok Kumar Thakur v State of Bihar* (1995) 5 S.C.C. 403.

(f) *Article 16(4) is not an exception to Article 16(1)*

The *Mandal* case reaffirms the *Thomas*¹³⁰ position that Article 16(4) is not an exception to Article 16(1) but an instance of classification implicit in Article 16(1). But the majority also held that Article 16(4) is exhaustive of the power of reservation in favour of backward classes and no preference of any kind would be permissible for them under clause (1) of Article 16. This in our submission goes against *Thomas* which permitted preferences for backward classes under Article 16(1). The *Mandal* case in fact overrules *Thomas* and accepts the dissenting opinion of Beg J in *Thomas* that Article 16(4) exhausted all exceptions made in favour of backward classes and that no preference can be given to them under clause (1).

(g) *Reservations are impermissible in promotions*

In the *Mandal* case the court's majority held that Article 16(4) does not permit reservations in promotions. Overruling all previous judgements the Court held that reservations at every stage of promotions would inevitably undermine the efficiency of administration mandated by Article 335. Reddy J held that once the backward class of citizens enter the service through reserved quota, the efficiency of administration demands that these members too compete with others and earn promotions like others. Crutches cannot be provided throughout one's career. Pandian J, held that reservations are concerned with initial recruitment or at the initial stage and not at the time of promotions. Sawant J believed that reservation in promotions would result in unnecessary frustration, demoralization, heart-burning, lack of interest in work and constant hostility in administration. Kuldip Singh J argued that the aim is to provide reservation to a class and not individuals and promotions involve individuals. In promotions backward classes as a collectivity are no where in picture. Only individuals are in picture. Sahai J, gave example of a medical student who had been admitted through reserved quota but had to pass the medical examination without any relaxation in standards.

With respect to the SCs and STs the *Mandal* judgment has been rendered ineffective by a constitutional amendment in 1995. This amendment adds a new clause 4-A to Article 16 which provides:

Nothing in this article shall prevent the state from making any provision for reservation in matters of promotion to any class or classes of posts in the service of the State in favour of the Scheduled Castes and Scheduled Tribes, which in the opinion

¹³⁰ *State of Kerala v. N.M. Thomas* (1976) 2 SCC 310.

of the State, are inadequately represented in the services under the state.

It seems unclear why the government in a great hurry brought about an amendment to the Constitution to nullify *Mandal*. The evil of reservation in promotion had been abolished by the Supreme Court and everyone hailed such a move but the same evil has been revived by the politicians, apparently for political reasons. It is clear that the *Mandal* ruling on this issue would still be applicable to OBC reservations. However, the constitutional validity of Article 16(4) A is pending before the Supreme Court.

(h) *Reservations for the poor among the advanced sections is impermissible under Article 16(4)*

The Court in *Mandal* made it abundantly clear that the aim of article 16(4) is to remedy the historic wrongs and not simply to help the poor among all sections of the society. The court's reasoning is that all poor people from advanced sections were not socially backward because social backwardness was due to caste inequities and past discrimination. There is a difference between a poor who has been a barber and a poor who has been a priest. This is why the Court quashed the order issued by the Narsimha Rao's government to reserve 10 percent posts for economically backward from all sections of the society.

(i) *Reservations cannot exceed 50 percent*

Every judge in the *Mandal* case quoted with approval the speech of Dr. Ambedkar in the Constituent Assembly in which he had stated that the reservations ought to be confined to a minority of posts or appointments. Therefore all the nine judges uniformly held that aggregate reservations under Article 16(4) cannot exceed 50 percent. This, however, could not be an inflexible rule and in certain special circumstances reservations could exceed 50 percent. It is clear from the *Mandal* opinions that the ceiling of 50 per cent would apply only to Article 16(4) reservations. There could be additional reservations for non-backward classes under Article 16(1). It means that reservation under Article 16(4) combined with reservations under Article 16(1) can very well exceed 50 percent. What happens then to Ambedkar's speech that reservations should be confined to the minority of posts?

VI CONCLUDING REMARKS

In contributing to the meaning of equality as mandating substantive equality or equality of results, the court in the *Mandal* case has not considered the question that the vast compensatory responsibilities be-

stowed by it to the government will give rise to the problem of resources and priorities in fulfilling the competing commitments. Nor have they considered the question of relationship between reservations for backward classes and compensatory measures for otherwise handicapped groups. What will be the quantitative limit of reservations? What will be the position if reservations for backward classes combined with reservation for other disparate groups raise the total beyond 50 percent leaving very little for open merit competition? What are the legitimate social goals in the pursuance of which the notion of merit can be broadened or enlarged? How to design the compensatory policies so that the benefits filter down to the most backward with fewest resources and advantages? Professor Marc Galanter very rightly reacts:¹³¹

"In a setting of chronic shortage, an enlarged commitment to remedy all undeserved difficulties betokens a commendable generosity of spirit. But it also raises the question of priorities and allocation of scarce resources, including attention. Government's authorization to pursue substantive equality is vastly greater than the resource that will conceivably be available to it... Will not the commitment to the lowest social group - especially where these are perceived to receive massive benefits - be overwhelmed by governmental response to be better-placed claimants on its compensatory attentions?... The sense of the regime of formal equality qualified by a singular exception to alleviate disparities derived from position in the traditional social hierarchy is liquidated or dissolved into a general and unfulfillable commitment to substantive equality."

The enlarged commitment to equality and removal of social disparities will not automatically transform the Indian society. The Court can only erect broader notions of policy and produce legal doctrines favourable to the disadvantaged and the deprived. Still the beneficiaries have to depend upon the State patronage. The judges cannot take the initiative to compel the government to live up to its commitments. Even the courts have not been able to play an affirmative role to see that the policies are properly designed and implemented, that the benefits really flow to the really needy and the disadvantaged.

The current debate on reservation issue amply dramatizes that it is beyond the courts to rescue the reservation power from political abuse and distortions. The multiple and competing principles on equality and compensatory discrimination have facilitated selective reading of the legal

131. See, Marc Galanter *Supra* n. 6 at 392.

doctrines and have enabled the commissions and governments to choose those which are favourable to them.

Reservations involve social costs and impinge heavily on the careers of merited applicants, provoking resistance and resentment. Much of the resistance and resentment can, perhaps be minimized by either diluting or widely spreading the social costs by measures aiming at the enhancement of overall competitiveness of the beneficiaries, (like added educational facilities, measures to improve favourable home environment, coaching, training etc.). But the political leadership has not found the improvement in the existential conditions of the poor and the deprived to be of much electoral advantage. Symbolic enhancement of reservations or expansion of beneficiary groups have proved to be more politically gainful to beguile the wider public that too much is being done for the victimised and the oppressed. The harsh reality, however is that reservations produce only illusory benefits. For instance the system has succeeded only in creating a small elite among the backward classes and has not helped in achieving group mobility. Group mobility can be achieved only when a group possesses a high degree of cohesion and its leadership is able to perceive the interest of the whole group. But the individuals who move up through reservation suffer from an identity crisis and are quite often reluctant to identify themselves with their castemen and thus fail to play the representative role underlying the idea of compensatory discrimination.

The Indian experience teaches us that the quota system is only a shortcut and crude strategy of social reconstruction which, if mismanaged, will lead the society to traumatic tensions. In democracy, groups yield political power and a government confronted with the demands and pressures for compensatory attention from all sides cannot withstand a fierce onslaught without giving something. Once a society, decides to distribute scarce resources and opportunities on the a basis of group identity, groups are strengthened and benefits once given can never be withdrawn. More and more groups would proliferate and public patience will be exhausted by the runaway expansion of reservation device. By definition 'reservation' is a temporary measure to achieve equality, to be complemented by long range developmental measures which, when begin to produce results, the reservations can be slowly withdrawn. What is needed today is that the State should divert more and more of its resources to increase the overall competitiveness of the beneficiaries rather than to stick to 'reservations' as the only best means to promote equality. Unless the number of beneficiaries is reduced and bounded, the system will always carry the threat of

expanding into a regime of communal quotas. Therefore, until other betterways to combat discrimination are devised, the people of India must learn to live with bitter and regular social conflict over the reservation policies.

It is, however, worthwhile to mention here few judgments of the Supreme Court which seek to prevent the runaway expansion of reservation device to the extent of completely constricting the merit principle of equality. In *Preeti Srivastava v. State of M.P.*¹³² a five Judge Bench of the Supreme Court speaking through Justice (Mrs) Sujata V. Manohar has held that at the level of super specialisation in medicine there cannot be any reservation because any dilution of merit at this level would adversely affect the national interest in having the best possible people at the highest level of professional and educational training. The Court went on to say that reservation in favour of backward classes was as much in the interest of the society as the protected groups. At the same time there may be "other national interests, such as promoting excellence at the highest level and providing best talent in the country with the maximum available facilities to excel and contribute to society which have also to be borne in mind."¹³³

Justice (Mrs) Sujata V. Manohar noted that the observations of Justice B.P. Jeevan Reddy in the *Mandal* case against reservations in certain higher echelon posts and services were made in relation to job reservations under Article 16(4) read with Article 335. As is well known Article 335 requires that the claims of the SCs and STs in public services will be considered by the state consistent with maintenance of efficiency in administration. No considerations of efficiency in professions is mandated under Article 15(4). Her lordship however, ruled that admission to super specialities courses in medicine amounted to recruitment to posts and services in the hospitals and therefore the principles embodied in Article 335¹³⁴ equally applied to Article 15(4) reservations.

She maintained that "even otherwise under Article 15(4) the special provision which are made at this level of education have to be consistent with the national interest in promoting highest level of efficiency, skill and knowledge amongst the best in the country so that they can contribute to national progress and enhance the prestige of the nation."¹³⁵

132. A.I.R. 1999 SC 2894 (Dr. A.S. Anand C.J. and Sujata V. Manohar K. Venkataswami, V.N. Khare and S.B. Majumdar JJ).

133. *Id.* of 2920.

134. *Id.* at 2921. On this point Justice S.B. Majumdar dissented holding that the principle of Article 335 cannot be applied to Article 15(4) and is relevant for Article 16(4) only. *Id.* at 2939.

135. *Ibid.*

The Supreme Court's ruling in *Preeti* will have a far reaching consequence for the schemes of admission to post-graduate courses in professional courses like law, management and engineering courses. At present the SC/ST candidates in these courses are obtaining reserved seats even on zero mark so that the reserved seats do not go unfilled. It is quite likely that on the strength of *Preeti* it might be asserted that no candidate of reserved category should be admitted to these professional courses without securing the minimum qualifying marks.

Another decision of a five judge Bench of the Supreme Court which will have far reaching consequence for reservation is in respect of promotion for the SCs and STs. In *Ajit Singh II v. State of Punjab*¹³⁹ the Court held that the roster point promotees (reserved category) cannot count their seniority in the promoted category from the date of their continuous officiation in the promoted post *vis a vis* the general candidates who were senior to them in the lower category and who were later promoted. On the other hand the senior general candidate at the lower level, if he reaches the promotional level later but before the further promotion of reserved candidate he will have to be treated as senior, at the promotional level, to the reserved candidate even if the reserved candidate was earlier promoted to that level. In so holding the court overruled its earlier decisions in *Union of India v. Virpal Singh*¹⁴⁰ and *Jadgish Lal v. State of Haryana*.¹⁴¹

Most significantly the Court in *Ajit Singh II* reaffirms the principle laid down in *C.A. Rajendran v. Union of India*¹⁴² that the Articles 15(4) and 16(4) do not confer any fundamental right to reservation. These provisions did not impose any constitutional duty to provide for reservations; they simply enabled the State to depart from formal equality and provide reservation for backward classes, and confer a discretion on the state.¹⁴³ According to the Court right to be considered for promotion is a fundamental right of every individual under Article 14 and 16(1). Declaring the right to equality as a personal or individual right the Court ruled:¹⁴⁴

139. (1999) 7 SCC 209.

140. (1996) 2 SCC 715.

141. (1995) 6 SCC 684.

142. (1997) 6 SCC 538.

143. A.I.R. 1968 SC 507.

144. The present author has also maintained that Articles 15(4) and 16(4) do not confer any fundamental right to reservation. See P. Singh *Fundamental Right to Reservation, A Rejoinder Supra* n. 5. But for a contrary view see M.P. Singh, "Are Article 16(4) or 15(4) Fundamental Rights?" (1994) 3 SCC (Jour) 31-41.

144. *Supra* n. 139 at 227.

Preeti is also notable for prescribing norms for relaxation of standards for reserved category candidates in the admission test for admission to post-graduate courses in medicine. The Supreme Court ruled that minimum qualifying marks are mandatory even for reserved category candidates and there should not be much disparity between the qualifying marks fixed for general category candidates and reserved category candidates. The difference in minimum qualifying marks should be the same as for admission to M.B.B.S. Courses e.g. 35 percent for reserved category and 45 percent for general category.

The Court has propounded a new principle for reservations under Article 15(4) thus:

"Any special provisions under Article 15(4) has to balance the importance of having at the highest level of education students who are meritorious and who have secured admission on their merit as against social equity of giving compensatory benefit of admission to the Scheduled Castes and Scheduled Tribes candidates who are in a disadvantageous position. The same reasoning which propelled this court to underline reasonableness of a special provision and the national interest in giving at the highest level of education, few seats at the top of the educational pyramid only on the basis of merit and excellence, applies equally to a special provision in the form of lower qualifying marks for the backward at the highest level of education."

Most importantly the Supreme Court in *Preeti* overrules its two earlier judgments¹³⁷ which held that prescribing no minimum qualifying marks for the reserved category candidates would have no impact on standards of education and a reserved category candidate getting even zero mark could be admitted. The Court also rejected the argument that if minimum qualifying marks for the reserved category candidates was insisted many reserved seats may remain unfilled. The purpose of higher medical education according to the court was not to fill the reserved seats by lowering the standards, but to "ensure that the reserved category candidates having the requisite training and calibre to benefit from post graduate medical education rise to the standards which are expected of persons possessing post graduate medical qualifications, are not denied this opportunity by competing with general category candidates."¹³⁸

136. *Id.* 2906.

137. *State of M.P. v. Kumari Nivedita Jain* (1981) 4 SCC 296, and *Ajit Kumar Singh v. State of Bihar* (1994) 4 SCC 401.

138. *Id.* at 2918.

"Article 16(1) provides to every employee otherwise eligible for promotion or who comes within the zone of consideration, a fundamental right to be "considered" for promotion. Equal opportunity here means the right to be "considered" for promotion. If a person satisfies the eligibility and zone criteria but is not considered for promotion, then there will be a clear infraction of his fundamental right to be "considered" for promotion, which is his personal right."

The implications of the above observation is the reversal of *State of Kerala v. N.M. Thomas*¹⁴⁵ that Article 16(1) itself mandates compensatory discrimination or substantive equality. Affirmative action, according to the court, should not result in reverse discrimination. The need therefore, is to balance the fundamental rights under Article 16(1) and the rights of the reserved candidates under Articles 16(4) and 16(4)A. Adequate representation in promotion for SCs and STs under Article 16(4)A should not adversely affect the efficiency in administration. Since a reserved category candidate does not compete in merit competition, he cannot claim seniority over the general category promoted candidate even if the reserved category candidate has been promoted earlier in time.

Despite the aforesaid judicial concern for balancing the policy of reservations with merit principle of selection, the political practice is degenerating the entire policy to absurd levels. Certain communities with political clout are trying to enter into the reservation pool. For example, in December 1999 the BJP government in Rajasthan included the Jat community in its OBC list. The Congress ruled government in Delhi did not lag behind and immediately announced the inclusion of Jats in the OBC list. Then the BJP led government at the Centre has added 126 more castes in the Mandal list apparently to woo the OBC voters. The Centre is also considering the demand of the Scheduled Castes leaders to amend the Constitution so as to nullify *Ajit Singh II* on promotions for reserved category. The central government has also promised the Southern States of Tamil Nadu and Karnataka to nullify the 50 percent reservation limit set by the *Mandal* judgment by amending the constitution. The Samajwadi party is demanding the increase in OBC quota from 27 per cent to 54 percent in proportion to the OBC population.¹⁴⁶ The obsessive fascination of the politicians to expand the reserved category in our submission, has nothing to do with social justice for the historically deprived groups. Rather the aim is to include new claimants to the OBC pool in order to maintain a balance of power or power equations among various castes and communities, which is totally against the scheme of the constitution.

145. *Supra* n. 130.

146. See Ajaz Ashraf. The Amnesia of the Elite. *The Hindustan Times* Delhi, December 12, 1999.

THE RIGHT TO HEALTH CARE : NEED FOR ITS CONVERSION INTO A STATUTORILY ENFORCEABLE BASIC HUMAN NEED — AN INDIAN PERSPECTIVE

Dr. B. Errabhi*

I. INTRODUCTION

As the international community gets itself prepared to enter the next millennium, it is bound to face the daunting task of assuring and providing adequate health care to its ever growing population. Although the right to health (including its concomitant aspect of health care) has been internationally recognized and provided for as a fundamental basic human right, the national strategies devised and adopted by the nation - states for its realization have not measured up adequately to the importance of this human right.

It is a matter of fulfillment and satisfaction that the international community has quite a few significant achievements to its credit in the field of health. The conquest of small-pox, a deadly disease, the dramatic increase in the life expectancy and the global increase in the public expenditure for health care have been some of the outstanding achievements of the present century. However, these achievements pale into insignificance when appreciated in the context of the formidable problems and obstacles which the states have to encounter and surmount in their efforts to strive for the attainment of the international goal of better "health for all by the year 2000". The most formidable problems that confront the members of the international community, both the developed and the developing, are the challenges posed by the newly emerging infectious diseases like AIDS, tuberculosis, malaria, cholera, etc. and non-communicable chronic diseases such as cancer, circulatory diseases, metabolic and hormonal imbalances and mental disorders.¹ It may be appreciated that while the developed world has been able to rid itself of most of the infectious diseases, the developing world is fighting, with its back to the wall, the "double burden" of these infectious as well as chronic

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1. See THE WORLD HEALTH REPORT, 1977, Page V. (Message from the Director-General).

diseases. Failure to combat these diseases by appropriate innovative national health strategies would bring to naught the spectacular achievement of increased longevity of the world's population, for, the achievement of increased longevity without corresponding increased 'health expectancy' would be an exercise in futility.² Therefore, the concerted global action to improve the quality of life of the world's people by improved system of health care is not only an urgent international need but also an imperative international necessity in the next century.

The international community has to fight on a global scale the twin enemies of infectious as well as chronic diseases. This can be done only by providing effective and comprehensive health care programmes, on a priority basis, in the national jurisdictions of the member countries. These programmes should address effectively not only the problem of providing health or medical care for the individual but also the problem of providing healthy living conditions such as clean water, clean air, safe food, adequate housing, sanitation facilities, immunisation and firmly established health services. This is really a formidable international obligation and a testing challenge to the developing countries which cannot be met without the cooperation and help of the developed countries. It is in this context that the ideal of the establishment of "New International Economic Order" (NIEO) becomes an international fundamental in the 21st century.

The developing countries, particularly African and South Asian countries, should pull up their sleeves to take their health care commitment seriously. These countries should strive to translate the international human right to health care into an enforceable basic human need in their national jurisdictions by appropriate constitutional and legislative measures so that the right may not remain a distant mirage.

In this paper an attempt is made to examine the efficacy of the Indian Constitutional and legislative strategies shaped and adopted to transform the human right to health care into an enforceable basic human need in the country against the backdrop of global legislative and administrative strategies aimed at improving the health expectancy of the world's people.

II. THE RIGHT TO HEALTH CARE: INTERNATIONAL INCORPORATION AND ENFORCEMENT

The right to health care, as an international human right, is founded on the edifice of the prescriptions of the United Nations Charter, the Interna-

2. *Ibid.*

tional Bill of Rights, the Convention on Elimination of All Forms of Discrimination Against Women, 1979, the U.N. Convention on the Rights of the Child, 1989, etc. Therefore the members of the international community are expected to build their health care strategies on this edifice.

(A) The Scheme of the United Nations Charter

The human rights provisions of the United Nations Charter do not explicitly deal with health as a human right. The Charter declares that the promotion of respect for human rights and fundamental freedoms for all without distinctions based on race, sex, language or religion is one of its fundamental purposes of the establishment of the United Nations Organisation.³ To achieve this purpose, the United Nations is charged with the responsibility to promote, inter alia, higher standards of living, full employment, conditions of economic and social progress and development, and solutions of international economic, social, health and related problems.⁴ In similar vein, the member states are obligated to pledge themselves to take joint and separate action in cooperation with the U.N. Organization for the achievement of the declared purposes.⁵ Thus, the United Nations which is charged with the promotion of respect for human rights has to function through the General Assembly which is entrusted with this function.⁶ It is a matter of common knowledge that the resolutions of the General Assembly on this subject are not legally binding. Consequently, many member states have not thought it appropriate and necessary to respect and observe human rights in their national jurisdictions. Nevertheless, the international legal obligation to promote respect for, and observance of, human rights, as enshrined in the U.N. Charter is significant in one sense, for, it serves to remove the subject of human rights from the exclusive domestic domain and to transform it into a subject of international concern.⁷ This has paved the way for the adoption of not only the universal Declaration of Human Rights by the U.N. General Assembly but also the conclusion of various international multilateral human rights instruments by the U.N. as well as its specialised Agencies and various regional inter-governmental organisations.

3. United Nations Charter, Article 1(3).

4. *Id.* Article 55.

5. *Id.* Article 56.

6. *Id.* Article 13 (b).

7. Thomas Buergenthal, "International Human Rights Law and Institutions" in Herman L. Fwen Zalida Puelma and Susan Schoellconner (eds), *RIGHT TO HEALTH IN THE AMERICAS: A COMPARATIVE CONSTITUTIONAL STUDY*.

B. The Scheme of International Bill of Rights

Pursuant to the clarion call of the U.N. Charter for the promotion of "human rights and fundamental freedoms" the international community through the U.N. General Assembly adopted on 10 December, 1948, the Universal Declaration of Human Rights. This was followed up later by the conclusion and adoption of two important International Conventions on Human Rights which came into force in 1976.

(i) The Universal Declaration of Human Rights

The adoption of the Universal Declaration by the U.N. General Assembly brought human rights revolution in the world, thereby marking the ushering in of a new era in the mankind's struggle for freedom and human dignity. The Declaration Proclaims that all human beings are born free and equal in dignity and rights⁸ and that they are entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised.⁹ A significant feature of the Universal Declaration of Human Rights is that it proclaims and recognises the importance of not only civil and political rights but also economic, social and cultural rights. Of these, individual rights to social security, to work, to protection against unemployment, to rest and leisure and to protection against torture and cruel and inhuman treatment are some of the important rights the enjoyment of which depends on the efficacy of the right to health and health care. Coming to the crucial provision of the Declaration which expressly recognises the right to health, Article 25 reads:

- "1. Everyone has the right to a standard of living adequate for the health and well being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection."

The rights proclaimed by the Declaration are not absolute as they are subject to the authority of the member states to enact laws limiting the exercise of these rights solely for the purpose of securing "due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a

8. The Universal Declaration of Human Rights, 1948, Article 1.
9. *Id.* Article 28.

democratic society."¹⁰ It may be appreciated that while the Declaration proclaims that all members of the society are entitled to the realisation of the economic, social and cultural rights which are indispensable for enjoyment of man's dignity and development of his personality, their actual realisation has been made dependent on the availability of resources at the disposal of the member states.¹² And the right to health is no exception to this basic premise.

(ii) The Scheme of International Covenants on Human Rights

Although the International Covenants on Human Rights were adopted in 1966, they came into force only in 1976. The instruments were designed to transform the principles proclaimed in the Declaration into binding treaty obligations. Not all states are parties to these Covenants. While the Covenant on Civil and Political rights incorporate mainly the "first generation" classical human rights which are negative in nature, imposing only negative obligations on the state's parties, the Covenant on Economic, Social and Cultural Rights which is more relevant in the context of present discussion embodies the "second generation" human rights which are positive in scope and character, imposing positive and affirmative obligations on the state's parties. The latter instrument embodies the right to health, comprehensively in Article 12 which declares:

1. The State's Parties to the Present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by the State's parties to the Present Covenant to achieve the full realisation of this right shall include those necessary for:
 - (a) the provision for the reduction of the still birth rate and of infant mortality and for the healthy development of the child.
 - (b) the improvement of all aspects of environmental and industrial hygiene;
 - (c) the prevention, treatment and control of epidemic, endemic, occupational and other diseases;
 - (d) the creation of conditions which would assure to all medical service and medical attention in the event of sickness.

10. *Id.* Article 29 (2).

11. See supra note 7 at p. 6.

12. *Id.* at p. 7.

The Covenant also enumerates several other rights which have a bearing on the right to health and health care.¹³

(a) Nature of Obligations created by the Covenants

While the Covenant on Civil and Political Rights creates immediate negative legal obligations on the states parties, the Covenant on Economic, Social and Cultural Rights only requires a progressive implementation of positive obligations by the states parties within the scope of their available resources. The Covenant requires each state party to take positive "steps... to the maximum of its available resources, with a view to achieving... progressively the full realisation of the rights... by all appropriate means, including particularly the adoption of legislative measures."¹⁴

It may be appreciated that the Covenant on Economic, Social and Cultural Rights which seeks to create positive obligations for the states parties in the field of health care suffers from major inadequacy as it does not envisage the setting up of an adequate and effective machinery for the enforcement of human rights obligations under the Covenant. It only provides for a reporting system which requires the member states to file periodic reports with the United Nations Economic and Social Council [ECOSOC]. The member states are expected to indicate in their reports the measures taken and the progress made in achieving the observance of the rights. These reports are reviewed by the ECOSOC and the U.N. Commission on Human Rights in the light of the information received from the various Specialised Agencies. Similar procedure is followed with regard to health care obligation in which case the reports are supplemented by the information received from the World Health Organisation which plays a major role in the promotion of the implementation of the right to health proclaimed in Article 12 of the Economic and Social Covenant.

(c) Other Important Human Right Instruments

There are other human rights instruments within the U.N. system which supplement the international bill of Rights. Some of these have been concluded and adopted under the auspices of the U.N. itself. Thus, the International Convention on the Elimination of All Forms of Racial Discrimination, 1966 imposes on member states a more effective positive obligation with regard to health care. Article 5 of this Convention requires the state's parties, among other things, to guarantee the right of everyone, without discrimination as to race or colour, or national or ethnic origin, to

13. See Articles 10(3) and 11, International Covenant on Economic, Social and Cultural Rights, 1966.

14. *Id.* Article 2(1).

equality before law, notably in the enjoyment of the right to health and medical care.

Similarly, the Convention on the Elimination of All Forms of Discrimination Against Women, 1979 in Article 12 requires states parties, *inter alia*, to "take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on the basis of equality of men and women, access to health care services, including those related to family planning." The same provision specifies that women be ensured "appropriate services in connection with pregnancy, confinement and the post natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation."

It may be mentioned that the various human rights treaties suffer from major short comings in their enforcement. This, however, does not minimise their importance and significance, for, the right to health, as recognised and guaranteed in these instruments, has given legal and political legitimacy to the claims for its enforcement.¹⁵ The right to health has become, like all other human rights an internationally recognised legal right, prompting many domestic legal systems to provide for their automatic judicial enforcement. A classic example of this phenomenon is the Indian legal system where the Indian Supreme Court has accorded judicial recognition and importance to various human rights embodied in the international instruments to which India is a party.¹⁶

III. THE RIGHT TO HEALTH CARE : OTHER INTERNATIONAL EFFORTS FOR ITS REALISATION

The last three decades of the present century have witnessed significant developments in the field of international health. The historic 1979

15. See *supra* note 7 at p. 10.

16. See *Apparel Export Promotion Council v. A.K. Chopra*, A.I.R. 1999 S.C. 625; *Vishaka v. State of Rajasthan* A.I.R. 1997 S.C. 3011; *People's Union for Civil Liberties v. Union of India*, A.I.R. 1997 S.C. 1203; *D.K. Basu v. State of West Bengal*, A.I.R. 1997 S.C. 610; *Sheela Barse v. Secretary, Children Aid Society*, A.I.R. 1987 S.C. 656 and *Prem Shanker v. Delhi Administration*, A.I.R. 1980 S.C. 1535.

In *Apparel Export Promotion Council v. A.K. Chopra*, A.I.R. 1999 S.C. 625, the Indian Supreme Court, while dealing with the issue of sexual harassment of women at work places in the light of International Instruments seeking to protect the dignity of women, observed: (at. 634).

"These International Instruments cast an obligation on the Indian State to gender sensitise its laws and the Courts are under an obligation to see the message of the International Instruments is not allowed to be drowned.... The Courts are under an obligation to give due regard to International Covenants and norms for construing domestic laws more so when there is not inconsistency between them and there is a void in domestic law".

International Health Conference, organised jointly by World Health Organisation [WHO] and UNICEF at Alma Ata [the then USSR], added a new vigor to the idea of primary health care which would have far reaching implications for the developing countries.¹⁷ The Alma Ata Conference adopted "Primary Health Care" (PHC) as a key approach for the attainment of the goal of health for all by the year 2000.¹⁸ The importance of the Alma Ata Health Conference lies not so much in inventing the idea of primary health care but in forcefully advancing and promoting the concept that health development can take place only as an integral part of each country's individual socio-economic development process.

Alma Ata Health Conference recommended that governments should encourage and ensure full community participation through effective propagation of relevant information and increased literacy. It also recommended that the governments should also ensure developments through which individuals, families and communities could assume responsibility for their health and well-being. The goal of health for all by the year 2000 through the primary health care required the member states not only to expand the essential health care facilities but also to organise and mobilise the participation by all and also to ensure joint action by all health related sectors of their governments. The World Health Organisation, one of the specialised agencies of the United Nations system, has played and continues to play a pivotal role in the promotion of the worldwide movement of accelerated health development. The WHO besides playing a key role in the eradication of 'Smallpox', has contributed in a significant measure to the health development in a number of other fields such as the training of health manpower, the promotion of health planning, the formation of key strategies for the control of many communicable diseases, the transfer of essential health technology and the exchange of information and experience between and among countries.¹⁹

It is submitted that it is time to have an assessment of the achievements since the adoption of the Alma Ata Declaration in 1979. It is unfortunate that most of the countries have not been able to implement the policies which were adopted in the World Health Assembly. There has been a growing gap between the international policy expectations and the national performances which needs to be addressed effectively at the international level. India is no exception to this scenario.

17. Evaluation of the Strategy for Health for all by the year 2000- Seventh Report on the World Health Situation Vol. 1 (WHO-1987).

18. *Ibid.*

19. V.T. Heart Gunaratne, *YOGAHI: TOWARDS HEALTH* (1980).

IV. INTERNATIONAL HUMAN RIGHT TO HEALTH: CONSTITUTIONAL AFFIRMATION IN INDIA

(A) *Constitutional Scheme of Fundamental Rights and Directive Principles*

The Indian Constitution proclaims in its Preamble, among other things, three most important and cherished constitutional goals of the nation which are justice-social, economic and political, liberty of thought, expression, belief, faith and worship; and equality of status and of opportunity. The same Constitution not only elucidates these goals in Parts III and IV but also adopts a two-fold strategy for their realisation and achievement. Thus, while Part III titled as 'Fundamental Rights' embodies and sanctifies the goals of 'liberty' and equality' by enumerating and guaranteeing certain individual freedoms which are made justiciable and thus enforceable against state encroachments, Part IV titled as "Directive Principles of State Policy" highlights the goal of social justice by enjoining the state to translate that goal into reality by necessary legislative action. It may be noted that while the scheme of Part III is to guarantee a set of justiciable negative rights which seek to impose negative obligations on the state,²⁰ the scheme of Part IV is to embody a set of unenforceable, imperfect, positive directives with a solemn declaration that these directives are nevertheless fundamental in the governance of the country and that it is the duty of the state to legislatively implement them.²¹

Articulating the nature of State's obligation under Part III of the Indian Constitution, Justice Mathew in *State of Kerala v. Thomas*²² observed:²³

"Fundamental rights as embodied in Part III of the Constitution are by and large, essentially negative in character. They mark off a world in which the government has no jurisdiction. In this realm it is assumed that citizen has no claim upon government except that he be left alone".

Accordingly, under the Indian constitutional scheme the State is under no obligation to provide the wherewithal by affirmative action for the

20. Jurisprudentially speaking, these rights are considered to be in the nature of "privileges" or "liberties" which the individuals can enjoy with no aims imposed on the state. (See Dias, *Jurisprudence*, pp. 23 to 25 and 28).

21. Article 37 declares:

"The provisions contained in this Part shall not be enforceable by any Court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws".

22. A.I.R. 1976 S.C. 490.

23. *Id.* at 516.

realisation and enjoyment of the various fundamental rights guaranteed in the Constitution. Even judicial intervention will be of no avail. This has been made clear by the Indian Supreme Court in the context of its discussion of the nature of the right to life as guaranteed in Article 21 of the Constitution. Thus, in *Bandhua Mukti Morcha v. Union of India*²⁴ Justice Bhagwati observed²⁵:

"This right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and particularly clauses (e) and (f) of Article 39 and Articles 41 and 42.... Since the Directive Principles of State Policy... are not enforceable in a court of law, it may not be possible to compel the State through judicial process to make provision by statutory enactment or executive fiat for ensuring these basic essentials which go to make up a life of human dignity."

To the same effect are the observations of Chief Justice Chandrachud in *Oliga Tellis v. Bombay Municipal Corporation*.²⁶

An unfortunate aspect of this feature has been that most of the fundamental rights have remained meaningless paper tigers to the vast majority of the people in India. This is so in spite of several judicial attempts to enforce some of the fundamental rights by obligating the State to give effect to them by necessary affirmative action by reading the Directive Principles into these fundamental rights.²⁷

Before leaving the aspect of the relationship between Parts III and IV of the Indian Constitution it may be mentioned that the Indian Apex Court has held that there is a constitutional harmony and balance between these

24. A.I.R. 1984 S.C. 802.

25. *Id.* at 811-812.

26. A.I.R. 1986 S.C. 180 at 194.

27. In *A.B.S.K. Sangh (Rly) v. Union of India*, A.I.R. 1979 S.C. 298, Justice Chinnappa Reddy observed: (at 335) "It follows that it becomes the duty of the Court to apply the Directive Principles in interpreting the Constitution and the laws. The Directive Principles should serve the courts as code of interpretation. Fundamental rights should thus be interpreted in the light of Directive Principles and the latter should whenever and wherever possible be read into the former."

Inspired by the spirit of this theme the Indian Apex Court in *State of H.P. v. United Ram*, A.I.R. 1986 S.C. 847, called upon the state to provide road facilities to the residents of hilly areas, for in its view "access to the road is access to life". In this context the Court observed: (at 856)

"Affirmative action in the form of some remedial measures, in public interest, in the background of the constitutional aspirations as enshrined in Art. 38 read with Arts 19 and 21 of the Constitution by means of judicial directions in cases of excessive inaction or slow action is permissible within limits".

two parts which was a basic structure of the Constitution and that the goals set out in Part IV could only be achieved without the abrogation of the means provided in Part III of the constitution.²⁸ The Court also held that these two parts together constitute the core of the Indian Constitution and combine to form its conscience.²⁹

(B) *The Right to Health : Constitutional Position*

Coming to the right to health in the context of the Indian constitutional scheme, it may be noted that the part dealing with fundamental right does not expressly mention the right to health in any of its provisions. The only right that is relatable to the right to health is the right to life guaranteed in Article 21 of the Constitution which declares:

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

The Indian Supreme Court by its innovative judicial interpretation has given a new content and scope to this right which has come to stay as sanctuary for human values. The Supreme Court has interpreted the right to life as embrace of the right to live with human dignity which includes the quality of life along with all the basic human needs such as food, clothing, shelter, safe drinking water, education and the health care.³⁰

In *State of Punjab v. Mohinder Singh Chawla*,³¹ it was declared that since the right to health was an integral part of the right to life the

In *Unni Krishnan v. State of A.P.*, A.I.R. 1993 S.C. 2178, the Indian Supreme Court, for the first time, held that Article 21 of the Indian Constitution which guarantees the right to life and personal liberty has positive or affirmative dimension also. In that case the main question was whether the right to education as a positive right requiring the State to provide the requisite educational facilities could be read into Article 21 of the Indian Constitution. Answering the question in the affirmative Justice Jeevan Reddy held that every child of this country had a right to free education until he completes the age of fourteen years. In this context he also held that the passage of 44 years since the commencement of the Constitution had transformed the unenforceable positive obligation envisaged in Article 45 relating to primary education into an enforceable positive individual fundamental right under Article 21 of the Indian Constitution (at p. 2197).

28. *Minerava Mills v. Union of India*, A.I.R. 1980 S.C. 1789, at 1807.

29. *Ibid.*

30. *Francis Coralie Mullin v. The Administration, Union Territory of Delhi*, A.I.R. 1981 S.C. 746, at 752-53; *Gian Kaur v. State of Punjab*, A.I.R. 1996 S.C. 946 at 952; *State of Punjab v. Mohinder Singh Chawla*, (1997) 2 S.C. 83; *Mr. X v. Hospital 'z'*, A.I.R. 1999 S.C. 495; *Chemeli Singh v. State of U.P.*, A.I.R. 1996 S.C. 1051; and *C.E.S.C. Limited v. Subhash Chandra Bose*, A.I.R. 1992 S.C. 573 at 585.

31. See *supra* n. 30.

government had a constitutional obligation to provide health facilities.³² Similarly, in *Mr. X' v. Hospital 'Z'*,³³ the Supreme Court held that the right to life "includes the right to lead a healthy life so as to enjoy all facilities of human body in their prime condition".³⁴ In a similar vein, in *Chemeli Singh v. State of U.P.*³⁵ it was held that the right to life implies the right to food, water, decent environment, education, medical care and shelter. These are basic human rights known to any civilised society. All civil, political, social and cultural rights... enshrined in ... the Constitution of India cannot be exercised without these basic rights".³⁶

The Indian Supreme Court has not only taken the right to life to new horizons but also, as seen in the earlier discussion, read some of the Directive Principles relating to basic human rights or needs into that right in order to transform negative duties of the state into positive and affirmative obligations.³⁷ This innovative judicial strategy is most needed in the field of health care. In India it is a national imperative to transform the non-justiciable state's duty to improve public health into a statutorily enforceable basic human right or need. This can be done only by judicial intervention which is necessary to sensitise the Indian government to the pressing problems of poverty, population explosion, environmental degradation and the appalling unhealthy conditions that are all pervasive all over the country.

(C) Right to Health: need for its Elevation as a Fundamental Right

It is submitted that in order to make judicial intervention in the field of health care more effective, it is necessary to elevate the right to health to the position of a fundamental right. If it is thought necessary to elevate the right to education to the status of a fundamental right,³⁸ there is no reason why the right to health should get a different treatment. Therefore, it is suggested that the right to education as well as the right to health care should be made fundamental rights by a suitable constitutional amendment. It is not appropriate to leave these basic rights to be drawn derivatively from the right to life. Such an

32. *Id.* at 85.

33. See *supra* n. 30.

34. *Id.* at 503.

35. See *supra* n. 30.

36. *Id.* at 1053. See also *Vincent v. Union of India*, A.I.R. 1987 S.C. 990; *State of Punjab v. Ran Labhaya Bagga*, (1998) 4 SCC 117; *Kritoskar Bros Ltd. v. ESI Corpn.*, (1996) 2 SCC 682 and *Paschim Bangakhet Mazdoor Samity v. State of W.B.*, (1996) 4 SCC 37.

37. See *Supra* n. 27.

38. See Constitution (Eighty Third Amendment) Bill, 1997.

elevation is necessary to achieve two-fold purpose. The first is that it become easier for the Supreme Court to compel the state to transform the right to health care into a basic human need. Secondly, the state can be mandated to enact a comprehensive health care law which is most needed to design and promote a viable health development strategy in the country.

(D) Transformation of Fundamental Rights into Statutorily Enforceable Basic Needs: Constitutional Scheme

A close examination of the scheme of Part IV of the Constitution indicates that it is this Part that is crucial to the goal of socio-economic development of the country. It is, by this part of the Constitutions that the state is obligated to transform all the international human rights, including the right to health, which the Indian constitution embodies and guarantees as constitutional rights, into legally enforceable basic needs³⁹. The State's obligation under this Part is however, unenforceable in the sense that any failure on the part of the state to translate the rights into basic needs by necessary supporting legislation would not entitle any judicial action. The extent of the state's obligation is made dependent upon the extent of the economic development of the country. This means that the individual's right to the enjoyment of all the basic needs, including the human need of health care which is the most basic need, would depend upon the effectiveness of the state's socio-economic development strategies. This would lead to the premise that the state cannot be constitutionally compelled to translate the constitutional rights to work, to education, to public assistance,⁴⁰ to just and human conditions of work and maternity relief⁴¹ and to living wage for workers⁴² into legally enforceable basic needs of the people. Similarly, the state cannot be compelled to transform its constitutional duties to raise the level of nutrition and the standard of

39. See *supra* n. 21.

40. Article 41 states:

"The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in cases of underserved want".

41. Article 42 of the Constitution declares:

"The State shall make provision for securing just and humane conditions of work and for maternity relief".

42. Article 43 provides:

"The State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and in particular, the state shall endeavour to promote cottage industries on an individual or cooperative basis in rural areas".

living and to improve public health⁴³ into legally enforceable basic needs of the people in the country.

(E) Right to Health: Strategy to Transform it into a Basic Human Need

As mentioned earlier, it is submitted that so long as the right to health remains a constitutional right, it will be a meaningless ceremonial paper tiger to the vast majority of Indians. It needs to be converted into an enforceable statutory right which process is a condition precedent for a constitutional or an international human right to get transformed into a legally enforceable basic human need in India.

Therefore, it is imperative that the Indian parliament should enact a comprehensive health care law dealing with preventive, protective and curative aspects of health care. In this respect India should be guided by the experiences of Canada,⁴⁴ the Switzerland⁴⁵ and Israel which have appropriate health laws in operation. The enactment of such a law is absolutely necessary to combat the formidable problem of health development in all its aspects in the country.

V. CONCLUSION

In conclusion it may be suggested that while the members of the International Community should take the Alma Ata Declaration much more seriously in order to bring their national health development strategies in harmony with its prescriptions, the Indian government should pull up its sleeves to come to grips with the goal of achieving health care for all by the year 2000. The Indian Government will have to take more effective legislative and administrative measures to make the Primary Health care program work more effectively. This is essential to combat and control the spread of AIDS and other infectious diseases in the country. There is need to have a comprehensive health care law enacted to deal with all aspects of health care in the country. This process is necessary as one can not expect the Supreme Court to ignore the constitutional scheme of fundamental rights and directive principles of state policy in order to transform the fundamental rights into basic needs.

43. Article 47 of the Constitution reads:

"The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties, and in particular, the State shall endeavour to bring about the prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health."

44. See Central Health Act, 1955.

45. Switzerland enacted its health law in 1961

46. Israel's health law is called The Patients' Rights Act, 1996.

HISTORICAL FOUNDATIONS OF DISABILITY DISCRIMINATION IN CLASSICAL HINDU LAW

Vinod Dixit*

The economic and social commission of Asia and Pacific at its meeting to launch the Asian and Pacific Decade of Disabled Persons 1993-2002, held in Beijing on 1st to 5th December 1992, adopted the Proclamation on the Full Participation and Equality of people with Disabilities in the Asian and Pacific Region. India was also a signatory to the Proclamation. In order to legally implement the Proclamation, the Indian Parliament passed the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act no. 1 of 1996 in 1995.

The Act seeks to provide for equal treatment to the physically and mentally disabled persons as well as persons disabled due to certain diseases. The Act provides for detection and prevention of disabilities, both physical and mental. It also seeks to address special difficulties felt by them in the spheres of education, employment, business and social services.

It is very strange that whereas the modern societies recognise that discrimination should not be practised against the disabled and as a matter of fact take steps to minimise such discrimination, the pre-modern societies on the other hand not only discriminated against the disabled but also justified such discrimination. The pre-modern societies discriminated against the disabled, perhaps, because it was justified at religious level. Hinduism, Islam as well as Christianity discriminated against the disabled at different levels.

In this paper we seek to establish the fact of discrimination in Hindu law specially in succession to property and then to analyse the social causes for such discrimination. Broadly discrimination against the disabled may be divided into the following categories.

(a) *Physical disability* — Blind, deaf, dumb and the deficient in any vital body limb such as hand and foot constituted this category. This category also included the impotent males.

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(b) *Mental disability* — This category includes the idiotic and the lunatics.

(c) *Disability due to disease* — This category specially includes the victims of leprosy because the disease resulted in ugliness and impairment of limbs. It was considered to be contagious in all its forms.

(d) *Assumed physical disability* — Sexual intercourse outside legal wedlock in certain circumstances disinherited women but not men.

First, we shall briefly examine the provisions of Hindu law, then try to find out the social causes particularly before 1850 when, with the passage of the Caste Disabilities Removal Act 1850, the process of reform of the Hindu law began. We shall seek to find the causes of disability discrimination with reference to primary archival and secondary data from Rajasthan of eighteenth and nineteenth centuries.

The pre-modern Hindu law discriminated against the disabled particularly in matters relating to succession to property on the following grounds (1) before 1928 when the Hindu Inheritance (Removal of Disabilities) Act came into force in the British India, (2) in native states either before the extension of this Act or till immediately before their Union with the dominion of India and (3) till the coming into force of the Hindu succession Act 1956 in respect of estates governed by the Dayabhaga law.¹ The persons who were discriminated were those who were —

- (1) Insane at the time succession opened.²
- (2) Born blind.³
- (3) Lame from birth.⁴
- (4) Deaf and dumb from birth.⁵
- (5) Infected with a virulent or ulcerous form of leprosy.⁶
- (6) Sexually impotent.⁷
- (7) In Mitakshara law, widows, if unchaste at the time of widowhood unless the husband had condoned the unchastity.⁸

1. Derrett - Introduction to Modern Hindu Law Oxford University Press 1963, 372-75.
 2. *R. Muthamnal v. Subramaniaswami*, A.I.R. 1960 S.C. 601.
 3. *Gunjeshwar v. Durga Prasad* A.I.R. 1917 P.C. 146.
 4. *Venkat v. Purushottam* (1903) I.L.R. 26 Mad.133.
 5. *Anukul v. Surendra* (1939) I.L.R.I Cal. 592.
 6. *Ramabai v. Harmabai* (1924) 51 I.A. 177, A.I.R. 1924, P.C. 124.
 7. Derrett-Introduction to Modern Hindu Law, 372-75.
 8. *Ibid.*

(8) In Dayabhaga law all unchaste women except in case of succession to stridhan.⁹

Hindu law discriminated against the disabled on two grounds (a) According to Baudhayana because they are incapable of transacting legal business¹⁰ (b) Mayne believes that there was discrimination against the disabled because they were unable to perform religious ceremonies¹¹ in spite of a contrary opinion expressed, in *Surraya v. Subamma*¹² by Sadasiva Aiyer J., depending on Dr. Julius Jolly,¹³ that discrimination was not on religious grounds as shudras who were not required to perform vedic rites were also excluded from inheritance on grounds on disability.

We prefer the opinion of Mayne to the judgement of the Madras High Court for several reasons (1) In Hindu law there is clear relation between right to succeed to property and obligation to offer pinda (2) the fact that the shudras are not obliged to perform vedic rights and still they also discriminate against the disabled does not prove that discrimination against the disabled is not partly based on religious grounds for it is quite possible that twice born Hindus may discriminate against the disabled on mundane and religious grounds whereas the shudras may practise such discrimination only on mundane grounds (3) Even dominant religious ideologies effecting mundane practices influence subservient groups though they may be debarred from performing religious rites associated with such ideologies. That is why the Shudra, though they are not allowed to perform vedic rites, may follow the twice born Hindus in discriminating against the disabled.

Then it is safe to conclude that Hindu law discriminated against the disabled on mundane as well as on religious grounds. The disabled were debarred from succeeding to the property because they were supposed to be incapable of managing the property as well as because they were also incapable of performing the religious rites associated with succession to property on grounds of disability.

But the basic question remains to be answered, Why did religion and society discriminated against the disabled on religious as well as on mundane grounds? Was there any relation between religious and mundane grounds of discrimination? We seek to find the specificity of grounds of discrimination in the dominant cultural traits of pre-capitalist India. This

9. *Ibid.*
 10. Mayne- Treatise on Hindu Law and Usage, 1953 (ed) N.C. Aiyer p. 713.
 11. *Ibid* p. 713.
 12. (1920) I.L.R. 43 Mad. 4, 14.
 13. Julius Jolly-Law and Customs Tr. from French by B.K. Ghosh 1928 p.182.

we will do with reference to data from Rajasthan of 17th and 18th centuries.

In pre-capitalist societies market forces were insufficiently developed. In these societies, surplus was extracted, not through market forces, but through extra-economic coercion. Therefore in these societies dominant culture was martial culture and its corollary, i.e. the culture of violence. At the time of establishment of paramountcy of the East India company in India, Rajasthan was also a pre-capitalist society with a dominant martial culture.¹⁴ This society was also a male dominated, patriarchal society. At least among the ruling elite i.e. among the twice-born castes, chastity of the women was an obsession. A known unchaste woman did not have any place in this society. We seek to find reasons for disability discrimination in the supremacy of martial culture and exclusion of unchaste women from inheritance in patriarchy including insistence on chastity. We also propose to show that there was some connection between supremacy of martial culture and insistence on women's chastity.

In pre-capitalist Rajasthan land was the most important means of production. Martial superiority was the device to keep land under control. The Rajputs have to compete with many tribes and caste groups who also specialised in bearing arms. To establish their superiority over others the Rajputs developed exaggerated notions of honour and shame. It was honourable to die in the battlefield and supremely shameful to retreat in the face of the enemy. Rajputs in many cases are known to have fought to the last man to death, instead of surrendering to the enemy, when beleaguered by a superior force. In cases such as these there was implicit warning to the enemy of the Rajput that they should think twice before attacking even a weaker Rajput force. The concept of honour and shame was an ideological device to keep Rajput martiality dominant.

But all rulers, howsoever despotic they might be, do not rely only on strength, they prefer to govern by popular consent. The brahmins played an important role in generating such consent. The Brahmin provided ideological and religious justification for Rajput (Kshatriya) rule but the brahmin never acted as an agent of the Rajput. Such role acquired an autonomy of its own. So that Brahmin may be heard and respected by all, he was ritually superior even to the Rajput.

The Rajasthan castes may be divided into three categories. At the top of the hierarchy were the higher castes, the twice born castes of Brahmins,

14. Dixit V.K., Dispute settlement Process in the non-state Legal System of Meenas of Rajasthan (Memoographed) pp. 53-70. (Read for a description of martial culture in Rajasthan).

Rajputs (Kshatriyas) Mahajans, etc. They were very arrogant of their ritual superiority. All the important political, social, religious and economic positions were occupied by them. We do not say that all members of the higher castes lived comfortable, affluent lives, many among them were very poor, yet the ties of kinship were so strong that all of them were conscious of their superiority. Next in hierarchy were the intermediary castes basically agricultural-caste—who were ritually clean but not as clean as the twice born. At the bottom were the untouchables who were ritually unclean. Intermediary castes and the so called untouchables were under privileged and did not suffer from arrogance of superiority.

Marx observed that State is the official resume of the society. On this analogy we propose to state that religion is also the spiritual resume of the society. Religion incorporates all that is best though not necessarily in moral terms in dominant social ideology of a contemporary society. It is not mere coincidence that most popular Hindu gods, i.e. Ram and Krishna were Kshatriyas and best specimens of martial culture. Primarily both of them were perfect soldiers and acquired supreme status (perhaps also godhood) because of possession of unprecedented martial qualities.

A soldier in order to be a good soldier must be mentally as well as physically perfect and blameless. In societies with dominant martial culture an ideal man must be mentally and physically perfect. In such societies indeed a mentally and physically disabled person is not even entitled to be called a full fledged man. If a mentally and physically disabled person is not fit to administer a kingdom, how can such a man administer an estate? We are making this assertion because the ideals associated with the dominant cultural groups invariably influence even the ideals of subservient cultures.

If Rajasthan Rajput fixed for himself very high standards of martiality, his woman should also be distinguished.¹⁵ That is why they fixed very high standards of sexual morality and matrimonial behaviour for their women. These women must be perfectly chaste. They were expected to be devoted only to one man. Pre-marital extra-marital and post marital sex was completely prohibited for them. Union between man and his wife was indissoluble. Ideally a widow, whose life after the death of her husband became completely meaningless, should commit sati. Then, why an

15. Dixit, V.K., Economics and Sociology of Bride price and Dowry in Eastern Rajasthan in International Journal of the Sociology of Law, London 1991, 19 pp. 341-354. (Read for an analysis of the position of women, in Rajasthan).

unchaste woman, who was considered to be most undesirable person, should succeed to any estate?

It is fair to conclude that the classical Hindu law discriminated against the persons with disability because physical and mental disability was not compatible with pre-capitalist dominant Indian idiology of a perfect man and against unchaste women as again in that social context an unchaste woman was a socially unacceptable woman. But in the modern industrial society supremacy of martial culture has been replaced by market forces or by the supremacy of culture of wealth. Obsession with chastity of women is also not compatible with liberty and liberation of modern women. This changed cultural context help us in removing discrimination against persons with disability.

TEACHING SUBSTANTIVE LAW THROUGH CLINICAL METHODS : AN EXPERIMENT IN THE LAW FACULTY OF DELHI UNIVERSITY

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I. LEGAL EDUCATION IN INDIA

The discourse on legal education in India has centered on the divide between professional and liberal education. Despite such divide it has been accepted widely that a law "student should be trained in the skills of lawyer and endowed with the accepted norms of professional ethics and a sense of social responsibility".¹

Apprenticeship and the Bar Examination were abolished in 1967. The abolition of apprenticeship was justified by scholars on the ground that learning of the apprentice was entirely on the sense of duty of her employer. The practical handling of clients or a case rarely happened as it remained the sole prerogative of the employer and not the apprentice.² Courses like 'Pleading, Drafting and Conveyancing', 'Practical Training', activities like mock trial and moot courts, programmes relating to Legal Aid have been used traditionally to provide a varied range of opportunities to students to learn practical aspects of lawyering and lawyering skills. However, majority of the law students pass out without any actual exposure to the practical aspects of the lawyering profession.

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1. Kagzi, M.C.J., "Certain Issues of Legal Education and National Development - Objectives, Medium and Methods," 2 *Delhi Law Review*, 179 at 183 (1973). While pointing the landmarks in this debate the *Report of the Curriculum Development Centre in Law*, University Grants Commission, (1990) at page 2 pointed out, "the 1964 Kasauli seminar on legal education (convened by Prof. G.S. Sharma), the 1972 Pune international seminar on legal education (convened by Prof. S.K. Agarwala), the 1964 Kasauli seminar on teaching of jurisprudence (convened by Professors G.V. Ajjappa and Upendra Baxi) were major efforts at rearticulation of legal learning and research in India. To these must be added: the 1975-76 UGC convened workshops on socially relevant legal education (leading to a report by Professor Upendra Baxi published in 1979) and the UGC 1981 Report on the Status of Teaching and Research in the Discipline of Law (prepared by Professors S.K. Agarwala and Mohammed Chouse)".

2. Bakshi, Veena, "Legal Education in India", Vol. No. 1, *Delhi Law Review*, 49 at 64 (1972).

absent.⁷ But in its additional report the CDC had pointed out that a course on practical training had to integrate:

- (i) a regulated volume of actual client representation by the student taking into account the needs of the student for exposure and the needs of the client for adequate legal service;
- (ii) an individualized teaching relationship between the teacher and the student aimed at identifying the personal needs of students for professional purposes and designing the programme to fulfil those needs;
- (iii) a training in technical law skills and ethics of professional responsibility;
- (iv) a programme aimed at integrating and synthesizing the different components of legal education;
- (v) training in strategy formulation in pursuance of social and individual client objectives.⁸

However, it felt 'that an adequate programme for practical training can only be formulated after a social audit of the present programmes is undertaken to enable it to identify specific remedial measures to bring the programme in line with its objectives. It adopts the assessment of existing programmes as a priority task for its continued further activities'.⁹

The Conference of the Chief Justices held in December 1993 also discussed matters regarding admission to law colleges, syllabus, training, etc. A High Powered Committee consisting of the chief justice and two other judges was constituted on its recommendation to suggest appropriate steps to be taken in the matter so that the law graduates may acquire sufficient experience before they become entitled to practice in the courts. In relation to legal education the High Powered Committee suggested, *inter alia*,

12. Rule 21 of the Bar Council Rules directing that every University shall endeavour to supplement the lecture method with case method, tutorials and other modern techniques of imparting Legal Education must be amended in a mandatory form and it should include problem method, moot courts, mock trials and other aspects and make them compulsory.

7. *Id.* Vol. II, pp. 363 ff.

8. *Id.* Vol. I, pp. iv to vi.

9. *Ibid.*

In the law faculties / colleges, where the Legal Aid Clinics are active, they operate mostly because of love of teachers and students and are not integrated in the regular curricula of the faculty.³ The students participating in such clinics do learn various skills required by a lawyer in the process but that is not the primary purpose of the clinic. The primary purpose of a Legal Aid Clinic, run by a Law Faculty, is perceived to be assistance to the poor in legal matters. Students participating in the activities of Legal Aid Clinic turn out to be more sensitive citizens and lawyers needed by the legal system but that is only an incidental consequence. The clinics have not been used for any systematic teaching of lawyering skills to students.

Falling standards of legal education and legal profession and making legal education more 'modern' and 'contemporary' to make it 'socially relevant', have been the subjects of concern for long. The 'principal moments' or trends have been summed up in the Report of the UGC's Curriculum Development Centre in Law (CDC)⁴ as follows:

In the first phase (roughly 1950-65), the principal theme was how best to transform legal education away from the colonial heritage, and in a way to Indianise it; in the second phase (roughly 1965-75) the emphasis was on sound reorganization of curricula and pedagogy towards professional legal education; in the third phase (1976-88) the focus shifted to 'modernization' of law curricula so as to make these increasingly relevant to the problems of a society and state in deep throes of transition.⁵

The CDC suggested a course on Practical Training in Law in addition to other twelve core courses.⁶ While the Report contains detailed contents of all the other twelve courses, the details of Practical Training were

3. Students and teachers participate in these activities on a voluntary basis. The clinic depends for its activities on the labour of love of teachers, willing to do extra work. The Faculty has yet not framed any rules for adjustment of teaching load of teachers involving themselves with legal aid clinic and its activities. Legal aid activities not being part of curricula, majority of the law students do not join the activities of the Legal Aid Clinic and pass out without any practical experience or exposure about how to handle a real case or what all happens before a case is decided or about the differential applicability of law to powerless. I have always felt concerned at the lack of any substantive practical training to students and the lack of a functional functioning of the legal aid activities but have felt constrained because of the large number of students and my own inexperience at the bar.

4. Hereafter called CDC.

5. Report of the CDC, n. 1.

6. *Id.* Vol I, p. 27.

13. (i) Participation in moot courts, mock trials and debates must be made compulsory and marks awarded, (ii) Practical training in drafting, pleadings, contracts can be developed in the last year of the study, and (iii) Students visit at various levels to the courts must be made compulsory so as to provide a greater exposure.¹⁰

Pursuant to these recommendations, the Bar Council of India reintroduced apprenticeship for a year under a senior lawyer as a precondition for enrolment as a lawyer from 2nd April, 1996.¹¹ The scheme has now been struck down by the Supreme Court as ultra vires the rule making power of the Bar Council of India under the Advocates Act.¹²

Some law faculties have had a course on Practical Training on similar lines for a long time for teaching the lawyering skills to students. For example, when I was teaching in the University of Jammu in 1983, Practical Training was a compulsory course for all the third year students for more than a decade. 10 students were assigned to a teacher. Every student was required to visit the court with a part time teacher for a specified number of days in the sixth semester, observe the proceedings and report her/his observations in writing in a register to be maintained for the purpose. The register carried 10 marks. 5 marks each were assigned for written and oral arguments on a moot problem. The students took a written examination in pleading, drafting and professional ethics for the remaining 80 marks. Most teachers and students felt that 20 marks were too little an incentive for the students to work real hard on the Practical Training component of the course. Such courses are considered to be very limited in their concept, content and actual practice.

Some other law schools are trying out different ways to teach the students the practical skills required by lawyers. An optional course in Clinical Legal Education and Practical Training for Profession of Law has been recently introduced for the sixth semester students of Campus Law Centre in Delhi. 50 marks are assigned for practical work and a written examination is held at the end of the semester for the remaining 50 marks. The practical training primarily consists of simulation exercises in the class

10. *V. Sudeer v. Bar Council of India and another*, JT 1999 (2) SC 141 at 171.

11. The rules provided that an advocate with 15 years of continuous active practice or an advocate designated as the senior advocate by the Supreme Court only could be a guide. Name of the guide of every trainee was to be approved by the Bar Council. The guide's consent was also required. The student was to maintain two diaries for keeping records of chamber and court activities. These diaries were to be periodically checked and signed by the guide and countersigned by the Enrollment Committee of the State Bar Council.

12. *V. Sudeer*, n. 10.

room and observation of proceedings and activities in the court and lawyers chambers. Professional lawyers are invited for giving lectures on various practical aspects of legal profession. The course focuses on the skills of client interviewing and counselling, negotiation, mediation, arguments, examination and cross-examination, legal research, issues relating to legal aid, public interest litigation, professional ethics and basic information relating to court structure, stages in cases, core documents, colloquial terminology, etc. Though the title of the course refers to Clinical Legal Education, there is no live clinic for the course. The activities of the legal aid clinic are limited and sporadic.¹³ Students participate in those activities on a voluntary basis.

The National Law School of India University, Bangalore, offers a variety of 'clinical courses', e.g., interviewing and counselling, trial advocacy, negotiation, mediations, etc. It also has a Rural Mediation Center and a Legal Aid Clinic. While the clinical courses are compulsory, participation in the Rural Mediation Centre and the Legal Aid Clinic is voluntary. Simulation exercises are used to learn the clinical skills but the opportunities of client interviewing, negotiation, mediation, fact determination, etc., are offered by the centre and the clinic. The placement programme of the National Law School does provide a closer clinical learning setting but without the close supervision of a teacher. The extent of 'supervision - feedback - improvement' cycle, typical of clinical education depends in this set up on the inclination, understanding and training of the person under whom a student is placed.

II. DEFINITIONS

'Practical training', 'clinical education' have become the current buzz words in legal education in India. Yet clinical education in the sense of 'learning by doing', i.e., by participating in live clinics and handling live cases and clients is not part of the curriculum of Law Faculties. In India, in fact, even a substantive debate on integration of legal aid clinics with practical training courses has yet to begin. In this scenario it is important to explore other methods of teaching which may be helpful in learning the skills required by a lawyer. This paper relates my experiment in use of clinical method of teaching so that the students, while learning substantive

13. Over the years the Legal Aid Clinic at the Law Faculty in Delhi held programmes like Lok Adalats, Legal Literacy Camps, Legal Awareness Campaigns, Layman's Law Pamphlets, Legal Aid to Destitute, Women and Children, etc. See, Kelkar, R. V., "Integration of Legal Aid Activities with the Statutory Structure and Functioning of the Law Faculty", Vols. 6 & 7, *Delhi Law Review* 90 (1977 and 1978); Sangal, P. S., "Legal Services Clinic: Director's Report, 1975-76", Vols 4&5, *Delhi Law Review*, 192 (1975 and 1976).

laws, may learn some of the skills necessary for lawyers. I think it important to share the many important lessons I learnt from this experiment.

It is necessary to clarify here the way I have used the words, 'clinical education', 'practical training', 'clinical method', and 'clinical skills' in this paper. 'Clinical education' and 'practical training' though used interchangeably by some, connote different concepts. The concept of clinical education has been derived from the medical profession. A legal clinic, like the medical clinic, is expected to fulfill the dual functions served by a medical clinic, namely, diagnoses, analyses, planning and treatment of the problems of the client as well as education to the students. In this process, a live clinic is essential for clinical education. Mere existence of a legal aid clinic in a law school in which students participate voluntarily is not enough to call it clinical education. Nor does a course which uses clinical methods for imparting clinical skills qualify to be referred to as clinical education. In this sense, 'clinical education' necessarily refers to imparting of professional skills employing clinical methods in a clinical setting under close supervision and guidance of full time clinicians. 'Practical training' also has acquisition of professional skills by the students as its primary object, but a live clinic is not an essential part of this concept. Also, it may or may not adopt the clinical methods for imparting the skills.

'Clinical method' refers to the method of learning by doing. This method is an essential part of clinical education but may be used in a simulated setting also. The method used in a clinic for education has to be different from other methods of education, e.g., lecture, case method, problem method, etc. The primary aim of clinical method is on learning the skills required by a professional whether she is to become a doctor or a lawyer.

III. ABOUT THE LAW FACULTY IN DELHI AND ITS STUDENTS

The Law Faculty in Delhi consists of three law Centres, namely Campus law Centre (CLC), Law Centre I (LC-I) and Law Centre II (LC-II). The Faculty runs LL.B., LL.M., M.C.L., Ph.D. and D.C.L. programmes. In order to receive an LL.B. Degree, a student has to clear 30 courses (19 of these are compulsory) by taking a three hour written examination in five courses at the end of each semester. A new course may be introduced only after being approved by a couple of statutory bodies in the University and except for a couple of optional courses, all other courses are taught by two or more teachers depending on the total number of students in each course.

Currently CLC, LC-I and LC-II have 18, 26 and 15 full-time permanent teachers respectively. Another 21 full time teachers and fourteen part-time teachers are working on an ad-hoc basis. The Delhi University rules and regulations prohibit full-time law teachers to practice in courts though they may appear in legal aid matters and do chamber consultation. The part-time teachers are full-time lawyers with minimum five years experience at the bar. It is usually so arranged that the full time teachers teach substantive law courses and procedural courses are assigned to the part-time teachers. All the courses are taught through case method.

CLC, LC-I and LC-II admit 500, 600 and 400 students respectively in the first year of the three year (six semester) LL.B. and divide them ordinarily into groups of hundred for teaching purposes. The CLC holds its classes during the day while LC-I and LC-II hold their classes in the evening. Therefore, non-working students opt to take admission in CLC and the working students prefer LC-I and LC-II though it is compulsory for all LL.B. students to attend in each year at least 66% of the total lectures delivered.

IV. INITIATING THE EXPERIMENT

I taught Criminal Law along with other subjects in LC-I for eleven years through case method. The method expects the teacher and the taught to be equal partners in learning through discussion of the case. Reading of full cases also provided us with the opportunity of noticing certain procedural and evidentiary issues in addition to the issues of substantive law. We used to point out all the issues discussed in the case but would not devote much time on procedural and evidentiary issues because in the examination, questions will focus more deeply on the substantive law. Doubts would linger in the minds of few students who would want clarifications but the majority would be happy to go on with the course content. They were hard pressed for time divided among job, family and LL.B. and were not too keen on devoting time on something which was not required to pass the examination.

Two developments in the recent past, however, led to change in this scenario. First, LC-I which was located in a rented school building in the centre of the town, was shifted to the Law Faculty building in the University Campus in the North. The proportion of fulltime students increased as the present location was far off from where most offices were. There was demand for early classes from some students. So LC-I arranged for holding two shifts - one beginning at 4.00 P.M. and the other at 6.15 P.M. About 1/5 of the first year students opted for early classes initially, Now about 2/5 of the first year students come for these classes and they are

divided into two groups for teaching purposes. As the timing of early classes clashed with office hours, one presumed that majority of the students who opted for the 4.00 P.M. shift, were not working elsewhere.

Second, I attended the first Refresher Course on Clinical Legal Education organised by the National Law School of India University in collaboration with the University Grants Commission. This three week course was led by an international faculty from India, the U.S., Australia and England, and it was attended by 24 law teachers from India, Nepal and Bangladesh. There were wide ranging discussions on issues relating to the introduction, meaning, objectives, structuring, course content, evaluation, financing, etc. of clinical education apart from teaching of some of the skills like fact investigation, interviewing, negotiation, mediation, etc. The faculty used various innovative ways for teaching, e.g., simulation exercises, group exercises, problem method, games, etc. The participants differed on the desirability or feasibility of introduction of clinical courses in their respective Universities immediately but what they were unanimous about was that the teaching methods employed by this international faculty made the classes more interesting and ensured that not only everyone participated but did so actively.

I returned to Delhi enthused, thinking of ways and means of pursuing what I had learnt. I neither felt equipped to run a new course like trial advocacy or interviewing or negotiation, etc., nor the rules and procedure in Delhi University gave the freedom to introduce a course on one's own. I decided to integrate clinical methods with case method for teaching a substantive law course.

I had taught Criminal Law I to one group of first term students attending the 4.00 P.M. shift and had found the group very hard working and active compared to earlier batches. There was a marked difference in their response to learning beyond the course content and they preferred an integrated approach to substantive, procedural and evidentiary issues in a case. I was assigned the same group for teaching them Criminal Law II in the second semester. I decided to experiment my recent learning with them. I shared with them my reasons for the experiment and the plan. I wanted them to have a clear picture of how the substantive and procedural laws integrated to make one big whole and how they supplement each other. Short lectures and group discussions were to be common place, supplemented with many action oriented classes in which students will act out various roles including the accused, the police officers, witnesses, lawyers and judges. The action was expected to generate not only interest but also to highlight the importance of knowing the full facts of a case. We

were to hold moot courts on bail, legality of search and seizure, etc., and a mock trial involving examination and cross examination and arguments towards the end of the semester.

I cautioned them that if we will use a part of class time for all these activities, they would be required to put in a lot of time beyond class hours. I also told them categorically that they would not be evaluated on the skills I expect them to learn through these innovative experimental classes. They will take the traditional written examination at the end of the semester on the topics prescribed for the course. They still willingly agreed to be the guinea pigs! The experiment was initiated with the following objectives:-

- The students will learn the substantive law and will become aware of the various processes and proceedings involved in deciding a case.
- The classes will be more interesting.
- Students will participate more actively and more students will participate.
- Students will self learn more and feel more confident of their abilities.
- They will be exposed to and acquire some of the skills required by a lawyer, e.g., fact investigation, sifting of relevant facts, critical appraisal of facts, drafting, argumentation, communication, etc.
- They will learn how to do research for a case.

V. THE COURSE AND THE CLASSES

Criminal Law-II consisted of two parts. Part I dealt with (a) general principles of criminal liability, namely, *mens rea*, attempt, joint and group liability, conspiracy, abetment and (b) general defences, namely, private defence. Part II dealt with Criminal Procedure relating to arrest, first information report, investigation, search and seizure, bail and fair trial.

I chose the facts of *State of Maharashtra v. Mayer Hans George*,¹⁴ as the core facts and planned to cover the whole course with little alterations and additions to them. I decided to reconstruct various events from the point of arrest of an accused till conviction or acquittal with the help of simulation exercises, documentation, interim applications and arguments thereon, mock trial, etc. This case related to a German national going from Zurich to Manila, who was found carrying 34 kilograms of gold hidden in

his jacket when his plane landed in Bombay. On being questioned, he disclaimed any ownership of the gold and stated that he had no interest in it. In the statement that he made to the customs authorities after being apprehended, he said that some person not named by him, met him in Hamburg and engaged him on certain terms of remuneration to clandestinely transport gold from Geneva to places in the Far East. He had accomplished that and many more such assignments and received the agreed money. The law in India previously did not require a transit passenger to declare the gold carried by her/him. But a new recent notification required such gold also to be declared about which the accused did not know. He was arrested by the custom officers and prosecuted for violation of law under the Foreign Exchange Regulation Act.

The case was used in the course to teach the principle relating to *mens rea* for imposing criminal liability. I chose the facts of this case as they had the potential to cover most of the topics in the course. The law relating to arrest, search and seizure and bail were integral to the facts of this case. The maxim *actus non facit reum nisi mens sit rea* and issues regarding fair trial were to be argued during his trial.

I needed to think how to bring in the issues of joint liability, conspiracy and anticipatory bail. I could have introduced the identity of his employer, but then it would have raised issues of territorial jurisdiction and conflicts due to multiplicity of municipal laws, etc. I had to discard that option as I did not think that a first year student could have handled all that. Nor the time at our disposal would have permitted it. Such a course would have still left the aspect of anticipatory bail untouched. So I added an accomplice, not only to cover the topic of joint liability and conspiracy but also to add new challenges to students preparing for the final mock trial. The students working as the police officers were briefed with the information that a diary recovered from Mayer Hans George contained the name and address of one Ram Swarup who also was on the same flight, wearing a similar looking jacket, but without the pockets and any gold. During a search of his house, the police discovered a register which contained details of his various secret dealings with known smugglers including one with M.H. George. I had intended to ask the students whether M.H. George may be convicted for attempt or can he raise the plea of private defence by altering the perspective or inserting certain assumptions. For example, assuming that M.H. George was under the territorial jurisdiction of another country having the same law against gold smuggling, could he be charged for attempt in the country? Similarly, as the accused had not embarked from the plane when the custom officers patted him and took him down, could

he have used force to prevent them from doing so in the exercise of his right of private defence, assuming that the plane belonged to a foreign airline and the law recognised passengers on board as being in foreign territory?

I planned my first class of 95 minutes. In the first ten minutes, I would explain the plan of the class giving role hand outs to the accused and the custom and police officers. In the next fifteen minutes, I was to give a mini lecture on law relating to who can arrest, who can be arrested, how arrested, arrest with or without warrant and rights of the arrested person. The drama of arrest would take ten minutes. Thereafter, for next forty minutes students would identify the legal questions involved and whether any rights of the accused had been violated. Ten minutes would be devoted on evaluation of the event, i.e., whether the participants performed it right or deviated from facts, and the last five minutes for attendance. I prepared the role hand-outs for the students who were to play the accused and custom and police officers. I also jotted down the legal questions which I expected the students to raise and I was all set for the class.

The class started and continued for sixty minutes as planned, but had to be cut short thereafter due to a staff meeting. The students who played the roles of police officers and custom officers were given the task of preparing the first information report and the recovery memos.

All the students present in the class were apparently more alive, interested, excited and curious due to the drama in the class, but I came away quite dissatisfied. I was uncertain whether without any alternative formulation and hypothetical problems-solving and discussion with the students, the mini lecture was comprehended fully by all students? Only about half of the legal issues were raised by students and that too with active prompting from me. I felt that I had spent too much time with little gain in terms of knowledge of the substantive procedure. I feared whether the drama in the class distracted their attention from legal issues to acting capabilities of the participants. Most of all, I was not sure if the students saw the purpose of it although they seemed willing to wait and see.

For the next topic, I changed the strategy. I asked them to prepare *Nandini Satpathi*¹⁵ from the case material relating to the right of the accused to remain silent. In the beginning of the class, I told them that M.H. George had refused to answer any question asked by the police during investigation and was being prosecuted for the offense of refusing to answer public servant authorized to question under the Indian Penal Code

(as had happened in *Nandini Satpathy*). I presented to them the contentions raised in *Nandini Satpathy* as the contentions of the prosecution against M.H. George. Then I asked the students to argue the case in defence of M.H. George. Some were ready to begin, but majority looked at me bewildered, "But Ma'am, you said we would discuss *Nandini Satpathy*!"

In the whole of the last semester, they had been narrating the relevant facts and issues in the case, raising the contentions on either side and learning the reasons for the decision and its implications, etc. before applying their learning from the case to various hypothetical problems. Majority had not understood the change in the tactic. So I decided to be more explicit. We went through the rigmarole of facts, issue, procedural history, contentions, written and hidden reasons, its impact, etc. and returned to M.H. George's prosecution. The students saw the point.

After that the pattern was set. I notified the schedule of future classes - the days on which we would discuss the prescribed cases and the days on which they would use those cases for arguing matters in continuing progress of M.H. George's case. The students gave their names in advance and teamed up to prepare arguments on matters relating to bail, anticipatory bail, bail on failure to file charge-sheet within the prescribed period and legality of investigation continued beyond the specified limit. Some students volunteered to be judges in those hearings. In all twenty two students volunteered to be the active participants in these practical exercises.

During the hearing on bail application, one team of lawyers was comparatively quite weak and they were not getting much help from the observers also. I decided to help them and formulated some arguments for them. The judgement came in our favour though our arguments were not as strong as those of our opponents. Students themselves identified the psychological advantage my team gained by my joining. They could relate to our earlier discussion on cases about the differential manner in which judges refer to counsels of different standing. By the next class a proper order was to be presented by the students who had agreed to be the judges in the bail matter. They refused bail to M.H. George and wrote down their reasons for doing so. The other students successfully applied their knowledge relating to law on bail and tore the judgement to pieces as it refused bail on irrelevant facts. This proved to be an important lesson in self learning and peer critiquing.

There were other problems to sort out. The counsels for M.H. George had prepared their case for grant of bail on the ground that the

arrest itself was illegal. I felt that this was a plea much beyond a hearing on bail. They should concentrate on matters which weigh in the grant or refusal of bail. But then I myself had never even watched a bail hearing, leave apart handled one. Doubts lingered as to what actually the lawyers do in such hearing. So I invited a lawyer to the class to share his practical knowledge. He introduced us to samples of recovery memo, charge sheet, typical forms used in the lower courts, the usual illegalities in arrest to watch out for, etc.

The students playing the role of police officers visited a police station to be familiar with the format of first information report, the difference between the daily diary and the F.I.R. register, the differences in the entries in these two registers, and so on. We also had to continuously keep refining the details of our case. What was the time frame for our M.H. George - 1965 or 1996? Lot of legal provisions had changed in this period and sticking to one time frame would have its own limitations. So we kept track of both periods to gain comparative understanding. Many students who joined the class late or irregularly were puzzled who was this Ram Swarup whose house had been searched, documents seized and was seeking anticipatory bail? The facts of M.H. George in the case book contained no such reference! The scheme and background of the classes had to be explained repeatedly.

I usually lost control over time and the class once the students became active participants in moot courts. I tried to moderate time and channelise direction of discussion but did not succeed every time. An innovative or irrelevant plea required more time to explain as well as respond. Some students took more time than others in articulating and communicating. Most of the time we were behind schedule and I had to keep fixing extra classes.

By the time we completed the part dealing with procedure, I knew that the active participants loved playing the lawyer. Some of them were reading much beyond their case material, researching new case law and were, in fact, consulting their lawyer parents, siblings or friends. But I had many nagging apprehensions. Was the depth and understanding emerging from the experiential classes at the cost of volume of knowledge required to be covered from the examination point of view? For how long will these classes continue to hold the interest of the students in view of the extra workload without any immediate credit? What is the level of comprehension of students who are not active participants in these exercise? It was time to have a structured feedback from students.

VI. FEEDBACK

I prepared a questionnaire containing three parts (See Annexure). Part A sought information about the student's reason for joining LL.B., frequency of attending classes and whether she/he was my student in the first course on criminal law. Their name, gender or roll numbers were not asked to ensure anonymity and frankness in their response. Part B used a scale of five responses of strongly agree, agree, neutral, disagree, and strongly disagree with 5, 4, 3, 2, 1 marks allotted to each response respectively for cross checking the responses. Question Nos. 11, 12, 14 and 16 were negatively worded while other questions from numbers 4 to 15 were worded positively for cross checking the responses and their suggestion for improvement in (a) the teaching method, (b) coverage of course content and (c) any other aspect related to the course or the classes.

38 students were present on the day the questionnaire was given to them after explaining to them its purpose. The responses showed that 25 of these students had joined LL.B. with a view to join practice. Six said that they were interested in law while seven gave other reasons. No one in this group had joined LL.B. to earn marks for promotion in her/his job. All those present, with the exception of five students, claimed to have attended more than 50% classes. Thirteen of them had attended more than 70% of the classes. Two out of the 38 were not my students earlier while another two did not answer this question.

The fact that majority had joined the course for becoming lawyers, perhaps explained the highly positive response given by the students favouring use of clinical methods even though it required much more time and work on their part. The responses of the students to questions 4 to 17, when tabulated, produced the following results.

Response of students to questions 4 to 17 of the questionnaire

Students were asked to respond to a scale of five as follows:

Sr. Statement in brief No.	No. of students choosing the prescribed scale				
	Strongly agree	Agree	Neutral	Disagree	Strongly Disagree
5	4	4	3	2	1
4	5	4	3	2	1
Clinical Method - more interesting	10	23	4	1	

5	More self learning	11	18	7	1	-	1
6	More learning	13	17	5	2	1	-
7	Immediate application of learning	6	25	3	4	-	-
8	More students participate	9	15	8	5	1	-
9	Require more class-time	13	21	4	-	-	-
10	Requires more home preparation	5	12	5	5	-	1
11	Not as useful as the time spent	1	6	10	15	6	-
12	Unreasonably more workload	4	14	5	12	3	-
13	Mock trial ought to be conducted	13	15	5	5	-	-
14	Less confident compared to last semester	7	5	10	9	7	-
15	Adequate course coverage	5	13	11	7	1	1
16	More focus on examination needs	9	13	1	10	5	-

Part C:

The overall teaching was evaluated on a scale of seven as follows:

Excellent	V good	Good	Satisfactory	Not satisfactory	Poor	Very Poor	No Answer
7	6	5	4	3	2	1	
11	7	10	2	3	1	-	4

The above table shows that the majority found the classes to be more interesting compared to my earlier classes using only the case method for teaching. They seemed to welcome the opportunity for self-learning and learnt more. While 24 students felt that there was increased participation of students in the class, a number of students, in answer to item 18, suggested ways and means for encouraging others who were not actively participating in the class. Even though the opinion seemed divided on the unreasonableness of the workload compared to other subjects, majority still wanted the experimental classes to continue culminating in the mock trial of the accused. It only showed that even those who felt that the

workload was unreasonable, did not mind it so much as to ask for stopping use of clinical methods and were willing to put in the extra work required for holding the mock trial.

However, the pattern of response of the students to statements Nos. 14 to 16 made me think about the advisability of continuing with my experiment. Response to statement 16 showed that the approaching examinations have come to weigh with the students. Their response was not unequivocal on the adequacy of the course covered till then or on their confidence level from the examination perspective. Even though 28 out of 38 students had favoured continuation of the clinical method for teaching the remaining course and only 5 were against it, I felt that the majority of the students were beginning to feel pressurised for time though they were still fascinated with the idea of holding a mock trial. I feared that if I persisted with the mix of clinical and case methods, the interest and enthusiasm sustained till then of all except the hard-core active students in the group will wither away. The suggestion for postponement of the mock trial for post examination period found easy acceptance. Hence, it was decided that during vacation after the examination the interested students will prepare their case strategy, witness and written arguments in consultation with me and other professional lawyers. A demonstration mock trial will be held in the beginning of the next semester so that competitive mock trials may be initiated in future. Part I of the course was decided to be covered by case method.

CONCLUSION

The students who had participated in this experiment gave a very positive feedback but generalisations on this basis were difficult to make. The number of students responding to the questionnaire as also the number of participant in the experiment was too small compared to the total strength of students in the Law Faculty or for that matter even in LC-I. This sample also could not be called representative of all the students of LC-I as more non-working than working students were concentrated in this group. Further, as this experiment was conducted for the first time even with the full-time students in the Faculty, no predictions could be made with certainty regarding the response of other batches of full time students in other centres or in LC-I, without repeating the experiment with similar results.

I have moved to Campus Law Centre after that and have used case and clinical methods. I have continued with moot courts and group discussion in the classes but done away high drama of actual occurrence. That took away precious class time without as much benefit. The response to moot

courts in the class room continues to be positive. During the first time my feedback to the students was limited to the substantive coverage of the topic in their presentations. I have extended the scope of such feedback now to include skills of communication, body language, voice modulations, etc. The students have been able to see the benefit of that directly and volunteer to participate in the moot courts in the class room more willingly. Some of them have now started asking for specific feedback on their presentations. It indicates to me an increasing interest in the class room.

The Law Faculty at Delhi being my *alma mater*, I have been brought up on the case method of teaching law and continued to teach by case method till I was exposed to clinical methods of teaching. I combined the case, problem and clinical methods for the first time during 1995. It being the first time, both me and my students took longer to get our act together, made many a mistakes and did not feel confident of our capabilities at all times. There were moments of despair but many more of joy and exhilaration. I abandoned the experiment midway by a very conscious decision. I was confident that in due course with more experience and planning, multi-method of teaching would result in more interesting and interactive classes producing better law scholars and lawyers. I took support from the feedback from students who experienced the different teaching methods. All the students planning to join the bar found these classes to be more interesting and useful. They worked much harder before the classes and participated actively in mock hearings in the classes even though they knew that no credit was to be added in their result for the extra work.

I consider the pedagogical lessons from this experience important for imparting better legal education. It provides ground for opening a debate on the desirability of introducing multiple methods for teaching law and on the feasibility of integrating legal education with legal aid for the mutual benefit of the students and persons in need of legal aid.

With this recent experience, two courses of action seem possible and both can be adopted simultaneously. One is introduction of multiplicity and integration of various teaching methods for teaching law. The Law Faculty in the University of Delhi has been a nodal institution introducing changes for betterment of legal education in India. It introduced the case method as long ago as 1966-67 replacing the lecture method. It also provides to its students the essential exposure to legal scholarship and practical aspects of law in operation by its scheme of employing full-time and part-time teachers. It is time now for it to introduce clinical methods for teaching all laws. The clinical method of teaching will offer more opportunities for acquiring and improving practical skills during class

room teaching. Its successful implementation though would require extensive training of law teachers in the innovative clinical teaching methods. In addition, collaboration among teachers, members of the bar and enforcement machinery in teaching one course should be encouraged to provide a very enlightening and enriching learning opportunity for students as well as the collaborators.

Secondly, legal aid clinics should be entrusted to teachers on full-time basis and must also become an integral part of the law faculties. Separate clinics in Criminal Law, Environmental Law, Family Law, Juvenile Justice, Consumer Protection, etc. may be run by a law faculty by appointing additional new members if the resources permit. Otherwise, rules may be evolved for rotating the exclusive responsibility of running the legal aid clinics to existing teachers and integrating their activities in the main curricula. All the students intending to join the bar must be required to opt for at least one such clinic. Such a measure will ensure continuous and quality legal aid to the poor and much needed clinical education to the students.

ANNEXURE

QUESTIONNAIRE FOR THE FEEDBACK FROM STUDENTS

(LL.B. II TERM SECTION A, 1995 BATCH)

ON THE INNOVATIVE TEACHING METHOD IN CRIMINAL LAW II

I want to have your opinion on the different way of teaching I have adopted for this course. Please do not write your name or roll number anywhere while responding to the questionnaire to ensure anonymity and free and frank response.

Part A

Please tick the answer which is correct in your case

1. You have joined LL.B. because
 - (a) you want to practice
 - (b) it will improve your chances of promotion
 - (c) you are interested in the subject
 - (d) Any other, please specify

2. How many classes have you attended in Criminal Law?

- (a) 100%
- (b) 50% - 70%
- (c) Less than 50%

3. Were you in Section A in the 1st Term also?

- (a) Yes
- (b) No

Part B

For each statement in Part B you should indicate the extent to which you agree with it by writing down the appropriate number at the end of the statement. The scale is:

Strongly agree	Agree	Neutral	Disagree	Strongly Disagree
5	4	3	2	1

4. I find the clinical method of teaching more interesting compared to case method.
5. The clinical method makes me learn more on my own.
6. I am learning more in this method compared to case method.
7. It allows me to immediately apply what I have learnt.
8. This method has encouraged more students to participate in the class.
9. It requires much more class time.
10. It requires much more home preparation.
11. It is not as useful as the time spent.
12. The work load is unreasonably more compared to other subjects.
13. We should hold mock-trial of Mayer Hans George.
14. I am feeling less confident to take exam in this course compared to last semester.
15. Part II of this course has been adequately covered.
16. The teaching should focus more on the examination needs of the students.

Part C

17. All things considered, how would you rate the teaching in this subject. (Circle one of the numbers)

Excellent	Very Good	Good	Satisfactory	Not satisfactory	Poor	Very Poor
7	6	5	4	3	2	1

18. Any suggestions for improvement in the -

- (a) Teaching method
- (b) Coverage of course contents
- (c) Any other aspect related to the
 - (i) class
 - (ii) course

CONTROL OF WATER POLLUTION IN INDIA : JUDICIAL ENFORCEMENT

*Mrs B. Aruna Venkat**

I. INTRODUCTION

Of all the natural substances on earth, water is perhaps, the most unique. It is present in fixed amount which circulates from land to the oceans, to the atmosphere and back again. Water, being essential to life, is the most manageable of natural resources. It is capable of diversion transport, storage and recycling. All these properties give to water its great utility for man. Man by his ability to control and use water has provided a better life to himself through flood control, storage for use during dry periods, dependable and pure domestic and industrial supplies, increased agricultural production for irrigation, increased fisheries production, energy from hydropower, transportation and facilities for recreation. Man's use of water alters the hydrological circle and influences environment both positively and negatively. One of the most worrying negative effects on environment is due to deterioration of water resources in quality due to pollution. Therefore, it is absolutely necessary to control water pollution as water is a scarce commodity. It is getting scarcer everyday as communities, industries and agriculturists discharge their filth, muck and harmful wastes into water streams. As regards the importance of water, the Central Board for Prevention and Control of Water Pollution states:

"The fresh water that is so essential to our lives is only a small portion of the earth's total water supply, it is only about two percent of the total. Nearly all of this, however, is locked in the masses of ice caps, glaciers and clouds; and constitute about 1.998 per cent of the total. The remaining small fraction of fresh water has accumulated over centuries in the lakes and underground supplies of the world. Almost 85 per cent of the rain falls directly into sea and never reaches land. The small remainder precipitates on land. It is this water that fills the lakes, wells, underground supplies and keeps the rivers flowing and the latter constitutes only 0.00008 per cent of the total. Humanity is left

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with only one-spoonful of sweet water for every five liters of total water".

Alas, humanity is not able to preserve this small percentage of invaluable water resource free from pollution.

The term "pollution" in the context of water pollution is used differently by different laws. In some enactments pollution has been described as "Poisoning of Water". Some other enactments explain water pollution as rendering it "less fit" or "not fit" for consumption by persons and animals. The "throwing of rubbish" in waterways is similarly taken as causing pollution. According to Water (Prevention and Control of Pollution) Act, 1974, "Pollution" means such contamination of water or such alteration of the physical, chemical or biological properties of water or such discharge of any sewage or trade effluent or any other liquid, gaseous or solid substance into water, whether directly or indirectly, as may or is likely to create a nuisance or injuries to public health, safety or to domestic, industrial or agricultural or other legitimate uses or the life and health of animals or plants or of aquatic organisms."²

The position of water resource in India is really alarming. Investigations by Central and State Boards for prevention and control of water pollution show that the major sources of pollution of our natural water courses including coastal waters are the discharge of community waste from human settlements. Most of the community and industrial waste water goes straight into water courses rendering them unfit for most uses. This is evident from the Statement of Objects and Reasons of the Water (Prevention and Control of Pollution) Bill, 1974, which reads:

"The problem of pollution of rivers and streams has assumed considerable importance and urgency in recent years as a result of the growth of industries and the increasing tendency to urbanisation. It is, therefore, essential to ensure that the domestic and industrial effluents are not allowed to be discharged into the water courses without adequate treatment as such discharges would render the water unsuitable as source of drinking water as well as for supporting fish life and for use in irrigation. Pollution of rivers and streams also causes increasing damage to the country's economy".

1. See the Annual Report of the Central Board for the Prevention and Control of Water Pollution of 1978-79, p. 1.
2. Section 2(e), Water (Prevention and Control of Pollution) Act, 1974.
3. See the Statement of Objects and Reasons of the Water (Prevention and Control of Pollution) Bill, 1974.

II. PREVENTION AND CONTROL OF WATER POLLUTION : LEGISLATIVE MEASURES

A) *The Water (Prevention and Control of Pollution) Act, 1974*⁴

In order to achieve the above objects, the Water Act, 1974 was enacted. The Water Act, 1974 has been passed to combat the most rampant water pollution in the country. It represented India's first attempt to deal comprehensively with an environmental issue. Parliament adopted minor amendments to the Act in 1978 and revised it in 1988 to more closely conform it to the provisions of the Environment Act, 1986. Since 'Water' is a subject in the State List⁵ under the Indian Constitution, the Centre had to enact the Water Act under Article 252 (1)⁶ of the Constitution. It is comprehensive in its coverage, applying to streams, inland waters, subterranean (ground) waters and sea or tidal waters. The main objects of the Act are:

- (i) To provide for the prevention and control of water pollution and maintaining of wholesomeness of water (in streams or wells or sewer or on land);
- (ii) To establish Central and State Boards with a view to carrying out the above purposes; and
- (iii) For conferring on, and assigning to such boards, powers and functions relating there to and for matters connected therewith.

To achieve these objectives the Water Act requires that no person shall knowingly cause or permit any poisonous, noxious or polluting matter determined in accordance with such standards as may be laid down by a board to enter (whether directly or indirectly) in any stream or well.⁷ Further, it imposes a prohibition on a person to discharge sewage or trade effluent into a stream without consent of the Board.⁸ It is interesting to note that the standards for the discharge of effluent or the quality of receiving waters are not specified in the Act itself. Instead, the Act enables State Boards to prescribe their standards.⁹

4. Hereafter called the Water Act, 1974.

5. Entry 17 of the State List, 7th Schedule of the Indian Constitution.

6. Under this provision, if two or more States are desirous that with respect to any particular matter in the State List there should be a single Act which would apply in those states, they can invoke the aid of Parliament to make such an Act for them.

7. The Water Act, 1974, section 24.

8. *Id.* sections 25 and 26.

9. *Id.* section 17 (g).

The Act defines Water Pollution very liberally so as to include such contamination of water or such alteration of physical, chemical or biological properties of water or such discharge of sewage, trade effluents or any other kind, solid or gaseous substance into water which is likely to render it harmful or which might cause injuries to public health or public safety, or to the life and health of animals, plants or acquirable organisms or which obstructs the domestic, commercial, industrial or agricultural use of water.¹⁰

The Water Act establishes Central and State Pollution Control Boards. The Central Board may advise the Central Government on water pollution issues, coordinate the activities of State Pollution Control Boards, sponsor investigation and research relating to water pollution, and develop a comprehensive plan for the control or prevention of Water Pollution.¹¹ The Central Board also performs the functions of a State Board for the Union Territories. In conflicts between a State Board and the Central Board, the Central Board prevails. Since 1982, the Central Board has been attached to the Union Government's Department of Environment, Forest and Wild Life.

The Act provides for a permit system or "consent" procedure to prevent and control water pollution. The Act generally prohibits disposal of polluting matter in streams, wells and sewers or in land in excess of the standards established by the State Boards.¹² A person must obtain consent from the State Board before taking steps to establish any industry, operation and process, any treatment and disposal system or any extension or addition to such a system which might result in the discharge of sewage or trade effluent into a stream, well or sewer onto land.¹³ The State Board may condition its consent by orders that specify the location, construction and use of the outlet as well as the nature and composition of new discharge. The State Board must maintain and make public a register containing the particulars of the consent orders. The Act empowers a State Board, upon thirty days notice to a polluter, to execute any work required under a consent order, which has not been executed. The Board may receive the expenses for such work from the polluter.¹⁴

Other functions of the State Boards specified by the Water Act include:¹⁵

10. *Id.* Section 17.
11. *Id.* Section 16.
12. *Id.* Section 24.
13. *Id.* Section 25.
14. *Id.* Section 30.
15. *Id.* Section 17.

1. Planning a comprehensive programme for prevention, control, and abatement of Water pollution in the State.
2. Encouraging, conducting and participating in investigations and research of water pollution problems.
3. Inspecting facilities for sewage and trade effluent treatment, and
4. Developing economical and reliable methods of treatment of sewage and the trade effluents.

The Act gives the State Boards the power of entry and inspection to carry out their functions.¹⁶ Further, a State Board may take certain emergency measures if it determines that an accident or other unforeseen event has polluted a stream or well. These measures include removing the pollutants, mitigating the damage and issuing orders to the polluter prohibiting effluent discharges.

The 1988 Amendment Act introduced a new Section 33A which empowers State Boards to issue directions to any person, office or authority, including orders to close, prohibit, regulate any industry, operation or process and to stop or regulate the supply of water, electricity or any other service. The State Boards can also apply to courts for injunctions to prevent water pollution under Section 33 of the Act. Under Section 41, the penalty for failure to comply with Court Order under section 33 of a direction from the Board under Section 33A is punishable by fines and imprisonment.

The 1988 Amendment Act also increased the powers of the Central Board relative to the State Boards. Under Section 18 of the Act, the Central Government may determine that a State Board has failed to comply with Central Board directions and that because of this failure an emergency has risen. The Central Government may then direct the Central Board to perform the functions of the State Board. Further the 1988 Amendments modified Section 49 to allow citizens to bring actions under the Water Act. Now a State Board must make relevant reports available to complaining citizens unless the Board determines that the disclosures would harm "public interest".

(B) *Some problems of enforcement*

1. According to section 33A, the power to issue direct orders given to Pollution Control Boards may result in a decrease of Section 33 actions against polluters. However, the courts are still involved in enforcing

16. *Id.* Section 23.