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DEAN'S PAGE

I am very happy to place the first issue of the Law Faculty Journal, Delhi Law Review, before the public. The idea of publishing the Law Faculty Journal was conceived exactly a year ago, little realising that in a year's time the dream will turn into reality. The publication of the Journal has been made possible by an initial grant from the University of Delhi and generous contributions made by the teachers of the Faculty. I am grateful to the University as well as my colleagues for such a generous gesture.

I offer no apology for adding one more to the already existing list of journals because, in my opinion, this Journal is going to be unique in character. No Law School, much less Delhi Law School, will be worth its name without a journal projecting the research work of the Faculty. The primary purpose of this Journal is to focus attention on the burning legal problems as perceived by a discriminating Faculty.

Though we are not very ambitious in our plan—which has the modest beginning—our aim is to gradually develop it into a first rate journal containing scholarly articles, case comments and current legal problems to be written and commented upon by the academic community. If law is to achieve social engineering in a backward, but developing economy, the academic community must play its role to pinpoint the role of law in a changing society. The role of law has a special place in our democratic Constitution consistent with our goal of a socialistic pattern of society. The development of law assumes increasing importance to bring about the desired changes. I am sure the Delhi Law Review will keep that goal constantly in view.

The Faculty of Law is proud of its humble contribution made to the cause of law. We have proud privilege of seeing four of our former colleagues seated on the Bench of Delhi High Court. The latest to be elevated to the Bench is Justice Avadh Behari Rohatgi who look oath of his office on 7th March, 1972. Our former Dean, Professor P.K. Tripathi was appointed member of the Law Commission of India. Incidentally, he is the first law teacher in India to be appointed a full time member of the Law Commission.

In the end, I must thank my friend and colleague, Dr. P. S. Sangal, Editor of this Journal, who has worked ceaselessly and untiringly to make this venture a success.

K. B. Rohatgi
Dean

EDITORIAL

I am very happy to place this first issue of Delhi Law Review in the hands of our readers. Starting a journal from a scratch is a stupendous task and I hardly realised the extent of the difficulties that would beset my way when I accepted the responsibility of being the Founder Editor of this Journal. As the time at our disposal was short and the odds to reckon with were many, I hope the readers will not mind any shortcomings they may find in this issue.

Looking around, there are some developments in the field of law which deserve a mention here. On the international scene, United Nations Conference on Trade and Development (UNCTAD III) is deliberating at Santiago in Chile for devising ways and means for getting a fair deal from the developed to the developing countries. At Santiago, developing countries are expressing their grievances against developed countries by accusing the latter of showing signs of aid fatigue in their assistance programmes for the third world, of trade protectionism, of monopoly in shipping resulting in drainage of foreign exchange from developing countries, etc. The problems awaiting solution there are many and the measure of success of UNCTAD III is any body's guess. It appears to me that, in the ultimate analysis, remedy lies not in looking to the rich for help but in evolving a machinery for self-help among developing countries themselves. In this regard, conscious efforts should be made by the developing countries to make their economies complementary and not competitive, so that among themselves one may provide market for the other country's goods. Regional economic communities should be set up in Asia, Africa and Latin America on the lines of European Economic Community but improving upon its shortcomings. Unification of commercial laws of the developing countries will also be a helpful step towards facilitating increased economic co-operation among developing countries.

At home front, pursuant to the 24th and 25th amendments to the Constitution, many laws are going to be enacted by the Parliament as well as by State Legislatures for ushering in a society based, more and more, on principles of socio-economic justice to the people. Article 31 C introduced by the 25th amendment has given large powers to the Parliament and the State Legislatures to curtail fundamental

rights of the people for giving effect to the directives embodied in Articles 39 (b) and 39(c). But as the language of these directives is very wide and general, there is considerable scope for abuse of power. It is hoped that the Parliament and the State Legislatures will, by their conduct, show to the people that the ouster of judicial review from this area by the 25th amendment has not made them irresponsible and power-drunk.

The Monopolies and Restrictive Trade Practices Commission has been in the news ever since it was set up in 1970. It appears the Government is not happy about the way the Commission is interpreting the provisions of the Monopolies and Restrictive Trade Practices Act, 1969. Probably for this reason, the Government proposes to appoint some more persons as members of the Commission. It is suggested that laws generally and laws with socio-economic accent such as the MRTP Act, in particular, should be interpreted keeping in view the wider socio-economic context so that the purpose of the law is promoted.

A problem worrying many business families in Delhi is of facing eviction proceedings when the head of the family who became a statutory tenant after the expiry of the usual eleven month rent note dies leaving his widow and minor children. It causes great hardship to the widow and the minor children to be deprived not only of the person who earned bread for them but also of the premises where he carried on his business. My attention was drawn to this hardship by, among others, an article, entitled, "Need of Reform in the Definition of Tenant under the Delhi Rent Control Act, 1958," published in March 1972 issue of the All India Rent Control Journal by a brilliant student of this Faculty, Mr. Narendra Kumar Rohatgi. It appears to me that there is clear need for the legislature to do something in the matter to ameliorate the plight of these unfortunate widows and minor children.

I place on record my deep gratitude to my esteemed friend, Professor K. B. Rohatgi, Dean, Faculty of Law, who helped me at every step. On behalf of the Journal Committee and on my own personal behalf, I wish to thank Professor Rohatgi also for substantial financial help to this Journal. I also thank my other colleagues for financial help to the Journal. In this connection, my colleagues Miss Veena Bakshi, Mr. Mata Din, Mr. Kanwar Lal, Mr. S. L. Maini and Mr. Govind Misra deserve special mention. Thanks are also due to Mr. Ravi D. Sharma, our Research Fellow, who helped me in my work.

We take this opportunity to congratulate our former Dean, Professsor P. K. Tripathi, on his appointment as a member of the Law Commission of India. We also congratulate our former colleague, Mr. A.B. Rohatgi on his appointment as a Judge of the High Court of Delhi. The reply given by Mr. Justice Rohatgi to the reference made at his swearing in ceremony is so full of kind references to this Faculty that we thought it was in the fitness of things to include that reply in this Journal just after this editorial.

P. S. Sangal
Editor

REPLY READ BY MR. JUSTICE AVADH BEHARI ROHATGI ON 7TH MARCH 1972 TO THE REFERENCE MADE AT THE SWEARING IN CEREMONY OF HIS LORDSHIP.

My Lord the Chief Justice, My Brother Judges, President of the Bar, Central Government Standing Counsel and Additional Standing Counsel for Delhi Administration :

I am greatly over-whelmed by the touching reference which has been read today. Central Government Standing Counsel and both the Additional Standing Counsel for the Delhi Administration are my old students and I can well imagine their partiality for me. But Mr. President, your reference has made me think whether I deserve all the praises that you have so generously showered on me.

First in this reply I would like to speak of my students—old and new—who have studied at the Faculty of Law in the University of Delhi during the last quarter of a century. My association with the Faculty of Law goes back to the year 1946 and since then many of those who are present here today have come in contact with me. I came across during the years from 1946 to 1972 in my classes many students who are now members of the Bar—some of them are well established in the profession and some of them are promising young men of the junior bar waiting for their turn to make a mark in the profession. The years spent by me with them at the University have been years of sunshine and laughter. Some of those students have taken service in the subordinate judiciary and some of them have joined the profession of law. Those of them who joined the profession became my comrade in arms. They have opposed me in cases in court. In some matters there have been long arguments and heated debates. As in the court so outside they have shown me the same respect and unfailing courtesy which I got from them in the class room. I am glad that I shall see more of them in the years that lie ahead. I have taught them law and at the same time I have learnt, for to teach is to learn. I take this opportunity to express my truest gratitude to my students and the University for their long endurance.

The relationship between the Bench and the Bar places a great responsibility on both. While it is the duty of the courts to show all patience and courtesy to the members of the Bar in the discharge of their arduous duties of assisting, it equally requires that the Bar should do their duty to the Court. This duty consists in putting the case fairly whether it be on facts or on law. I feel, therefore, that

if there is patience and courtesy on the part of the Bench and full preparation, fair presentation and conciseness in examination of evidence and in arguments on the part of the Bar, the work of the courts would go on smoothly and quickly and some of the complaints of which we hear so much these days about delay in the administration of justice will disappear. I am convinced that "truth is best discovered by powerful statement on both sides of the question".

Cases do from time to time arise where a Judge realises that his decision cannot fail to be embarrassing to those in authority in the State. Nevertheless he cannot let that fact influence him. He must by his oath perform the duties of his office without fear or favour, affection or ill-will. May the Judges ever be true to that oath !

I will now say something about my Lord the Chief Justice. He has, as has been said with truth, an uncanny ability. I too share this view. How he made his judicial appointments or, to be more precise, recommendations for judicial appointments, I have always wondered. The immediately preceding judicial appointment made in January this year as well as my own were made from men of the University. It may be a strange coincidence. It may be that he is partial to the University men. This is indeed a secret which the Chief Justice has kept to himself. I venture to think that it may be a secret from the Chief Justice himself.

I enter upon the duties of my office with hopes and fears. My hope is that the Chief Justice will guide my steps in the discharge of my judicial functions. If this is so and I have no doubt that it will be so, I take comfort in the thought that my fears may be liars.

I will in the end express my sincere thanks once again to you, Mr. President, the Central Government Standing Counsel and the two Additional Standing Counsel for the Administration for the noble sentiments they have expressed about me in this reference.

GOVERNOR'S DISCRETION—MAKING AND UNMAKING OF THE SVD AND UF MINISTRIES INDUCED BY TO-AND-FRO DEFECTIONS

*M. C. Jain Kagzi**

Since after the Fourth General Election in 1967 we have witnessed many a development in the working of the system of responsible government in the several States of the Indian Union. The monopoly of power possessed and enjoyed for about two decades by the Congress Party both at the Centre and in the States, except in Kerala, and occasionally, in Orissa (Congress-Gantantra Coalition 1959) proved to be only a mixed blessing. Undoubtedly it helped to keep the country together, but the one party rule both at the Centre and in the States with no chance for any other party to provide an effective opposition, much less, an alternative government in any State had its own perils. The thick shade of its unchallenged even though faction-ridden rule kept hidden from the eyes the signs of stresses and strains to which the federal parliamentary system was imperceptibly being subjected to, and which became symptomatic only following the Fourth general election, and more so, after the Congress split in 1969. The position seemed worse following the mid-term election in the five States in the North, namely, Haryana in 1968, and Bihar, Punjab, Uttar Pradesh and West Bengal in February, 1969. The prolonged centrally-controlled one party rule gave rise to certain unwholesome operational trends, distortions and aberrations which affected the fuller growth of responsible political behavioural patterns in conformity with the rules of constitutional law and conventions of democratic parliamentary government. The all India ill knit party organisation blurred the quasi federal character of the Union and brought about one party rule weakened only by intra party factional animosities. Though it could impose no unified system, yet under the weight of its unified monolithic organisation the Constitution retained federal structure only in form, and seemed completely centralised in practice. Because of the monolithic structure, unified organisation and all India standing of its central leadership eclipsed in a measure the federal form of the Union, and arrested the processes and growth of any vigorous functioning of the parliamentary system. Because its predecessor the All India Congress had in the main voted for the Constitution and nearly all its leaders had put

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their signatures on the Constitution, the Party did not in terms violate the Constitution and pretended strictly to have maintained the forms of the established system. Without its intending it, and only due to the political fact of its unchallenged position the federal parliamentary system was in effect suspended. It grew up like a big banyan tree providing shelter to any one whosoever chose to stand underneath it without having bothered for the uncovered ground under it for hardly a blade of grass would grow thereunder. The institutions of the Planning Commission, the National Development Council, the Conferences of the State Governors, the Chief Ministers and frequent meetings of Ministers holding similar charges in the several States provided convenient agencies for implementation of centrally oriented and directed polices in the spheres of economic planning, taxation, industrialisation, development and education etc. The over dependence of the State upon the Union for finance and resources caused by the mechanics of planning retarted the already slow pace of the federal experiment. The functional experience of working of the parliamentary responsible government was still less reassuring. The distinction between the Party and the Government was thined. The formation of Government, selection and appointment of Ministers in the several States were deemed intra Party matters, and were irrevocably habitually and finally decided upon by the Central Party High Command. The choice of persons for the offices of the State Chief Ministers and or the membership of the State Councils of Ministers would be made by the Party President, and then the appropriate parliamentary wing of the State unit of the Party would only formally adopt that decision in a meeting chaired more frequently than not by an emissary of the Central High Command. The Chief Minister's list of persons who would be formally recommended for appointment as members of the State Council of Ministers was prepared at Delhi with approval of the central leadership and party bosses. The notorious instance of this state of affairs was the Kamraj Plan under which several Members of the Union Council of Ministers, to include, Shri Lal Bahadur Sastri, Shri Morarji Desai, Shri Jag Jiwan Ram and Shri S.K. Patil were called upon to submit their resignations; and many State Chief Ministers, for instance, Shri C. B. Gupta and Shri Binodanand Jha, respectively, the Chief Ministers of Uttar Pradesh and Bihar were withdrawn from the various State Governments. Severally they submitted their resignations to the Prime Minister Nehru who was given full discretion to accept them. Every step taken in the matter was constitutionally wrong and betrayed the design to wean the parliamentary wing of the Party of persons who would not see eye to eye with the aging Prime Minister. Under the Consititution the Union Ministers should have resigned to the

President of India, and the State Chief Ministers to the concerned State Governors in whose pleasure they held their respective offices. The convention that a State Chief Minister should not be removed as long as he held the majority support in the State Assembly by virtue his leadership of the legislature party was disregarded in the wake of intra Party adjustments and purges. An inquiry was instituted against Shri Kairon while he still was the Chief Minister of Punjab by the President, and a probe was ordered in case of the Orissa Ministers by the Central Government ignoring the respective State Governors in whose pleasure the Chief Minister and the Ministers held their several offices. The inquiry should have normally been ordered by the Punjab Governer in the case of the State Chief Minister. The removal of the non-Congress Nambudripad's Ministry in Kerala earlier while it still enjoyed majority support in the Assembly foreshadowed the difficulties likely to arise in face of different party complexion of the State Governments as compared with that of the Union Government. The Congress out of office in a State would be very watchful from New Delhi of the goings-on in that State. In matters of legislation, law and order, education it would require of the State Government strict compliance with the directions of the Central Government. The Kerala episode was only a solitary event like which many more were to be witnessed after the last election.

Following the fourth general election non-Congress Governments were formed in several States, namely, Bihar, Kerala, Madras, Orissa, Punjab and West Bengal. The hitherto unchallanged hold of the Congress Party touched a low in these States ; and, because of its intra party factions and defections from its ranks it also lost the hold of Haryana, Madhya Pradesh and Uttar Pradesh in no time. It could hold on Rajasthan only precariously ; and could remain in office with any comfortable legislative majorities merely in Andhra Pradesh, Assam, Jammu and Kashmir, Gujarat, Maharastra and Mysore. Its dislogement from power in some of the most important and bigger Northern States administered a shock too severe to be absorbed by the whole polity. It created a sense of political vacuum, because, the Congress Party was not replaced by any other well knit party as the DMK in the Tamil Nadu and a strong UF in Kerala. Those put in authority there were so many stray combinations of various splinter smaller parties, the Congress defectors and independents. Their character varied from State to State, and in any one state the SVD (Samyukt Vidhayak Dal) and UF (United Fronts) composition changed from day to day. The various UF and SVDs were strange alliances of hitherto warring party factions ; and groups

of to-and-fro defectors and required crude manoeuvering and repeated unashamed attempts to lure the independents so as to keep their numbers larger than the aggregate of the continually changing numbers of the Congress, uncomfortably placed in opposition. Their sole single purpose was to band together so as to keep the Congress Party away from the seats of power. Adversity made stranger bed fellows. The compulsions of the situation made them temporarily give up their conflictual ideologies, principles and even constitutional norms and conventions. Strangely the left Communists, the Swatantras and the Jan Sanghis found themselves in the same company in West Bengal, Haryana, Punjab, Madhya Pradesh and Uttar Pradesh. The Akalies and the Jan Sanghis who were hitherto at daggers drawn on the issue of the Punjabi suba and Punjabi language superficially patched up their differences in the Punjab, fed themselves on hatred for the Congress Party, and were motivated by the common desire to keep it at bay from power. They preoccupied themselves with a tirade against the Union Congress Government. This could provide only but a weak basis for unplanned coalition in the absence of any commonly accepted ideology and economico-political programme. The artificially built-in combinations could only be temporary and transitory expedients. The numerical majorities as against still the largest single Congress groups of legislators in several State Assemblies could not be maintained for long and their tactless machinations sent away those who dishonestly thought had not received their due at the hands of the SVD leaders, and, fraudulently, went back to the Congress. The unabatted defections very often from the SVD to the Congress, and, only occasionally, from the Congress to the SVD side continued unabated. It was no wonder that in no time their different constituents began to fall out due to growing political opportunism crude casteism and unashamed greed for power which provided false motivations for much too frequent to and fro defections accelerated by pricked vanity, wounded pride, ill-got gains, personal vandetta, caste preferences, narrow linguistic chauvinism and communalism. It would need no prophet to say that this would give rise to political instability and chaos ; and except in Kerala, Madras and Orissa these non Congress Governments would not last for long time.

The Gurnam Singh Ministry in the Punjab narrowly escaped from being toppled soon after taking office, but thanks to the unprincipled defectors it regained a working majority till, finally, a good number of the Akalies led by Shri Lachman Singh Gill defected from the SVD and formed a separate party, the Progressive Party in alliance with the Congress Party. The latter formed a minority Government with the perceptibly held-out support of the Congress

Assembly. The Haryana non-Congress rag-bag Government formed by Rao Birendra Singh after defections from the Congress Party and fall of the Sharma's Ministry was manoeuvered into office and kept precariously into it while the unwholesome defector's game continued to be played crudely and openly. The money and office played attractive bates for the fencers in both the camps. Occasionally, things were confused, because, of the uncertainty caused by the unending process defections and too much repeated to and fro crossings of the floor with accompanied confusion made worse confounded, so much so, that it would be any body's guess if the defectors were *aai rams* or *gai rams*. Unable to preach the virtue of political decipline the Governor recommended the President's rule as the only way to clear the situation.

Instead of pre-election manifesto the Governments were formed often on the basis of post election minimum programme and common points said to be agreed among the constituent parties and groups forming a U.F., SVD, or a coalition. Their working started strange divisive trends in political life and a process of unprincipled diversity set in many parts of the country. A Chief Minister was no more a leader of a well knit legislature party. His office was an object of unashamed bargaining and horse trading among the constituents of the Front. When selected he was expected only to act formally and was hardly left with any discretion to select his team. He found a list of Ministers and their respective portfolios ready-made prepared after much wranglings among the contending aspirants. Merely formally he submitted it to the Governor who mechanically. inducted the persons whose names were set-out in the list in office The Chief Minister was merely a *primus inter pares*. He was immediately and irresistibly answerable to the Front and its High Command. Important decisions were invariably taken by the Front's coordination committee and not by the constituted Council of Ministers. The latter was down graded into a secondary formal body while power lay outside it. The Minister owed their first responsibility to their respective party bureaus rather than to the Council or the Chief Minister. They resented any discussion of, much more so interference into the affairs of their portfolios and departments both at cabinet meetings and with the Chief Minister who as with Shri Ajoy Mukherjee would have no control over the affairs of his government. The powerful among them like Jyoti Basu of the CPI (M) would actually defy him and his orders, and would unhesitatingly enter into public controversies in matters of scope of his authority. For instance, Shri Basu publicly rediculed the Chief Minister Shri Mukherjee for certain action the latter took in respect of affairs of the Police Department. In case the Chief Minister came

from the dominant constituent his position was a little different. He would not only look into the working of other departments, but he could also actively interfere in their day-to-day affairs. In the interest of his temporarily dominent group he would pick up the Ministers belonging to one party constituent for public ridicule and charge them of corruption over the head of the cabinet or Council of Ministers. If they could not be humbled in this manner he would threaten them with enquiries and then demand their resignations. In Kerala the Chief Minister Shri Nambudripad of the CPI—M treated his CPI colleagues in some such manner.

Much inter-factional ado was made in Punjab and Haryana ; but it seemed heavens would fall in West Bengal State with the removal of the Left dominated U.F. Ministry headed by Shri Ajoy Kumar Mukherjee. Lest the proper prospective be missed and the things get confused the situations in various States should briefly be described here.

The Government formed by the CPI (M) dominated United Front took office soon after the election. Although the Bangla Congress leader and an ex Congress-man Shri Ajoy Kumar Maukherjee was the Chief Minister, he was merely a ralling force, and *de fecto* authority lay with Shri Joyti Basu whose special position was recognised by making him the Deputy Chief Minister and allotment of important portfolios to other comrade Ministers of the left Communist Party. The choice of Shri Mukherjee was dictated by sheer practical and political considerations, as also, for reasons of his acceptability by other constituents of the United Front besides his age and experience. It was no wonder that he sat on a musical chair. Occasionally he showed his resentment too : once by asserting over the *Nexalbari episode*, and, again by showing his annoyance when Shri Basu took the decision about *Calcutta Tramways* take-over without even consulting him and the Cabinet. This perhaps was the reason for his secret and abortive deal with the Congress party followed by an empty threat to submit his resignation. Finally ground under his feet slipped, and the most anxious moments were given to him by Dr. P. C. Ghosh and 17 others who defected with him, thus making the U F Government virtually a minority government. The pulls of devisive forces were strong and would tear the U. F. asunder. What would keep them together was the fear of loss of office, the shared animosity for the Congress and a stage managed confrontation with the State Governor on an allegation of his acting for the party in power at the Centre and on directions of the Minister of Home Affairs in the Government of India. Every act of the Governor was deemed *mala fide*, suspect, nay, hostile. The seeds of a plan for operation toppling were immediately allegedlly unearthed when the Governor

Dharma Vira advised the Chief Minister to call the State Assembly into session without any loss of time as it seemed pretty obvious to him on the basis of information in his possession that the U F had been reduced to a minority group, and was no more in a position of commanding the majority support in the Assembly. Shri Mukherjee, more so, Shri Basu smelled the rat of hostility and central intervention and asked for time and held lesieurely consultations with his colleagues. They met protested and contended that the Assembly could not be convened "as soon as possible" as asked for by the Governor. They also maintained that the Government could not be dislodged till the Assembly met on a future date convenient to the U F., namely, December 18, 1967 (nearly a month thence). However, the Governor felt satisfied and concluded that constitutional government could not be run under circumstances and conditions of defections and open hostility of the rump what was left of the U.F., and made up his mind that he would brook no delay in the matter. A conflictual situation of the first order was thus precipitated. The obvious issue was whether the Governor could insist upon calling a meeting of the Assembly on an earlier date suggested by him, or would sit by as the Chief Minister and other recalcitrant Ministers disagreed with him as to the necessity of an early session. The deadlock so created left two alternatives. The Governor could watch the sitution till the U F Government manoeuvered a majority in the Assembly by forcing defections from the opposite camp, and faced the Assembly at its convenience. Or, else he could assert himself and remove the Ministry for its reluctance to call an early session of the Assembly. After a careful assessment of the circumstances, and as he put it, in the larger interests of the State he chose the second alternative ; and on 21 November, 1967 he removed from office the UF Government. At the same time he appointed Dr. P. C. Ghosh as the new Chief Minister, and on his advice installed a new Council of Ministers. As advised by the new Chief Minister he recalled the Assembly to meet on 29 November, 1967. The out-going U. F. would not take this lying down, and decided to frustrate the session of the Assembly. Having lost the majority in the Assembly it decided to wreck it from outside in a wholly unexpected, unheard of and boisterous manner. Before any business could be transacted, the Speaker Bannerjee unexpectedly read out a statement from the chair saying that the removal of the U. F. Ministry was a wrong, and the new minority Ministry could not be recognised as being lawfully in office. And, calling of the session on the advice of the new Government was an unconstitutional act on the part of the Governor. He added that the Governor had no power to do all he had done ; and therefore, the new Ministry could not provide th

lawful Government in the State. He followed it up by abruptly adjourning the House *sine die*. His conduct was wholly unusual, uncalled for and unwaranted, constitutionally speaking, and wholly indefensible conventionally. Inspite of advice given to h'm he did not possess any power to make a statement on the subiect he chose to speak upon in the manner and at the time at which he did it.

The course of events in Bihar and Madhya Pradesh was not any the less edifying. The Misra Government in the latter State fell following large-scale defections from the State Congress Assembly Party. Under the synthesising influence of the Rajmata Sindhia of Gawalior the opposition groups factions and parties were united into one SVD and a spectacular demonstration of its numerical majority was staged before the Rashtrapati in New Delhi. Shri Misra wanted to appeal to the voters and so advised the Governor to dissolve the Assembly, but refrained himself from doing so on being advised to the contrary by the High Command. This unwise attitude meant loss of the State to the Congress. Nevertheless, it was a proof, if any needed, of its undemocratic practice and in the matter and helplessness inherent in unwillingness of its reconciling to loss elsewhere. The dissolution in this case would have served a much needed deterence to the would be defectors. The result was a premium put on the ugly game of defection. The first Government following the Misra's ouster fell within one fortnight. The Misra's immediate successor, the SVD man, Raja Naresh Chandra of Sarangarh went out, and another, this time Shri G. N. Singh, the the defector to the SVD stepped in.

The various SVD and UF Governments in the North failed to provide stable administration in any State, except perhaps momentarily in Madhya Pradesh. They were formed out of post election compromises, and were made of various ill assorted parties who fought the election in opposition to one another. They suffered from ideological perversities, group rivalries and were not more than mere marriages of convenience. Their Governments were very often led and headed by the princes among the defectors from the Congress such as Shri Charan Singh in U.P., and UF such as P. C. Ghosh in West Bengal. They were weakened by inter contradictions and were thought of mere temporary arrangements till one or other of their constituents was in any position to takeover. The horse trading in portfolios was common among them. A group claimed that its size should be reflected by the importance of the portfolios held by its nominees and precedence accorded to them among the members of the Council of Ministers. In certain cases the importance of a bigger partner was stressed by making its leader Chief Minister, or if that could not be done by calling him Deputy Chief Minister,

e.g. Mr. Karpoori Thakur in Bihar, Mr. Jyoti Basu in West Bengal. Important personalities too did not go unrecognised. The Ministers were not appointed keeping an eye of the volume of business and work for the Council of Ministers, but with a view to accommodate factions and defectors. This made the size of the Councils unduly large unwieldly and wholly unsuited for team work. The wranglings and goings-on within the Government became the talk not only in the streets of the State capitals, but also in the fields of the remote villages. The advantage was taken by the restless Congressmen too eager to get back to the seats of power. They were never reconciled to loss of office, and lost no time in fishing in the troubled waters. They induced defections back to their fold, from the SVDs promising to give the defectors their support and backing, even if, they stood separately. The result was formation of the Congress supported minorty governments in Bihar, Punjab and West Bengal. The expedient did not work and Mir Jaffar Governments fell one by one like so many houses of cards, and the States passed one after another under the President's rule to be followed by the mid term poll.

The elections were held in Haryana in 1968, and in Bihar, Punjab, U.P. and West Bengal in February, 1969. The position did not improve in any way. The voter did not renew faith in the Congress. He rejected the SVD's too. The Ministers of Bihar and Punjab were defeated. His vote was in greater or lesser measure just a renewal of the mandate of 1967. Unmistakenly, he disapproved the antics of defectors.

The fast moving events in various States, particularly, Bihar, Haryana, Punjab and West Bengal raised a strom of controversies on several constitutional issues relating to the formation, continuation in office and removal of the coalition Governments, the Governor's discretion in respect of selection of the Chief Minister, his obligation to accept the advice of the Chief Minister and the Council of Ministers, the right of the Speaker to question the Governor's action leading to removal or a SVD or UF Government and installation of an other Government and the position as also powers of the Governor for making and unmaking of Ministries. These have already caused much damage to the institutions of parliamentary State Government, the popular Assembly, and, particularly, to the offices of the Chief Minister, the Speaker and the Governor. The whole basis of the Union-State relations has been shaken. The non-Congress parties, combined in all sorts of ill assorted fronts and dals as against the Congress Party still in power in the Union regard the Governo ran imposition. A misplaced feeling seems to be held by them that he being a functionary of the President might be a little biased in favour

of the Gongress Party, might in a measure be unfair to them, and worse still, might apply higher standards to judge their claims to assume power and to continue to do so than he has done hitherto with respect to the Congress Party. This has led them to say that in the Governor : Chief Minister equation the former is a cypher. He possesses only husk of power but no grains of authority. He should act under all circumstances whatever as the Chief Minister and his colleagues want him to act. He should represent the State Government in the Darbar Hall in the Rastrapati Bhawan in New Delhi rather than be a symbol of the President's authority in the State capital. They claim that they can publicly express their annoyance on appointment of a person as the State Governor, if they do not approve of him, because, the outgoing Congress Government had consented to his choice, or may demand the recall of the man in office if they do not like him. The whole basis, motivation objective, purpose and significance of the various offices are disputed and questioned. The suggestions are made for establishing a new basis and a new pattern of the State autonomy, nay, autochthony. It is suggested that the Governor should be selected with prior approval and consent of the State Government and should be recalled when the latter demands it. It is further urged that a provision might be made for an elected Governor, and to contradict it it is said in the same vein that there should be absence of any discretionary power in him. Indeed it is thought that the Governor should have neither eyes, nor ears; and it would be a blessing if he is dumb too. He should keep the windows of the Raj Bhawan closed, and should not witness what goes on across in the street, or in the *maidan* on the other side of the road. In the matter of formation and continuation of a non-Congress coalition Government he should have no say whatever. If he acts in the matter in any way whatsoever he must be presumed to be doing so on the direction of the Union Government, nay, the Congress High Command. Certain of the constitutional issues have been sought to be raised even in the Supreme Court and the State High Courts; and were made the subject matter of petitions filed by Rao Birendra Singh in the High Court of Punjab and Haryana, and by Shri Lakhanpal in the Calcutta High Court. A proposal by the UF Government of West Bengal to refer the matter to the Supreme Court was not accepted by the President, because, it was felt that it raised only political issues and not questions of law or fact like which alone could be the subject matter of judicial proceedings. Nevertheless, the issues must be discussed, and the questions involved in in this respect should naturally engage the attention of the individual politicians and political scientists, lawyers, professors of law and other informed members of the community, and, of course, the press.

Hence the justification for a brief treatment of certain aspects of these matters with special reference to the position of the Governor.

The position and powers of a State Governor in the matter of making and unmaking of a Ministry should be gathered from the provisions of the Constitution read in the light of the accepted conventions, if any, in the background of the conflictual opinions and facts of our public and political life. Any habitual comparision with the position of a Governor of a British Indian Province under the Government of India Act, 1935 and guidance from the position of a colonial Governor of any of the past British territory should be avoided. Under the Constitution the State Governor is not elected by the inhabitants of the State. Instead he is an appointee of the President of India. His position is that of a functionary of the Union Gevernment. He is selected on the advice of the Central Government in the Ministry of Home Affairs ; although convention requires that the choice should be made in consultation with the Government of the concerned State. The convention has, it is said, often been disregarded, for instance, in connection with the appointment of Shri Kanungo as the Governor of Bihar. Nevertheless, when appointed he should be received as the head of the State. Any disrespect to the Governor-Designate, or hostile and cold reception on his arrival in the State Capital reflects upon the Presidant. The open hostility shown to Shri Kanungo by the Bihar Chief Minister and others could be dismissed only with contempt it deserved as undignified political behaviour.

A Governer has a double role to play. In his first capacity he is head of the State Executive ; and in his second role he is held bound to act as a high functionary of the President and should help preserve the sovereignty and territorial integrity of the Indian Union, and be the custodian of the Constitution in the State. *Lex Litera* the executive power vests in him, and can be exercised only in his name. Nevertheless, he is by and large intended to act constitutionally. He should exercise the executive power "directly or through officers subordinate to him in accordance with this Constitution". This mode of exercise of his powers is *expressis verbis* spelled out by the provision for a Council of Ministers responsible to the Legislative Assembly to give him aid and advice in exercise of his functions. He cannot dispense with the Council of Ministers at any time, and normally cannot act without it, except when expressly permitted to act in his discretion. The Council of Ministers must be constituted, and except during the period of the President's rule, there should be no time when such a body does not exist. Ordinarily it is composed of the Members of the Houses of the State Legislature who are collectively responsible to the Assambly, and whose office-

term depends on the condition of continual majority support enjoyed by them in the Assembly. Though *lex titera* the Chief minister and the Ministers hold their respective offices during the Governor's pleasure, yet they are not constitutionally responsible to him. While in office the Members of the Council of Ministers hold charge of different portfolios and are confidents of one another. They converse among themselves, and meet to consider and discuss the issues of policy, matters of administration of the affairs of the State and legislative proposals. The Chief Minister keeps the Governor informed of all decisions of the Council of Ministers, furnishes him "such information as" the latter may call for, and submits to the Council his advice and recommendations. The several Ministers too have direct access to the Governor, but they cannot assail the position of any of their colleagues and the Chief Minister. The Governor may not agree with individual Minister's advice, but normally should accept the Chief Minister's advice. He cannot, however, question the decisions of the Council of Ministers. He may require the Chief Minister to submit any matter on which a Minister has taken a decision, but which has not yet been considered by the Council. The ministerial advice is confidential and the question "whether any, and if so what advice" is given by a Minister in the affairs of the State cannot be enquired into by any court. The ministerial responsibility to the Assembly is joint and several. The Ministers are collectively responsible to the Assembly for the policies of the Government, the legislative proposals, tax measures and revenue demands. Their collective responsibility is immediate and continual ; and the Council of Ministers must as a body seek the confidence and the support of the majority in the Assembly and must retain it. The withdrawal of this support at any moment evident by adoption of a no confidence resolution, defeat of the Government on a substantial motion, or rejection of the tax proposals of the Government or a vote of grant is fatal to its continual existence. When this happens the Chief Minister should tender the resignation of the Council of Ministers, and advise the Governor to name another Chief Minister in his place, or seek a dissolution of the Assembly and make an appeal to the electorate. The Governor can accept the advice of the State Chief Minister and the Council of Ministers so long as the latter can hold their own on the floor of the Assembly. However, once the Ministry is defeated on a vote it is no longer in the position from which it can discharge its obligation of being "collectively responsible" to the Assembly and being able to advise the Governor. Therefore, the Governor should not, consistent with the duties of his office, act on the aid and advice of such a Council of Ministers, the Chief Minister and its Members.

If he prefers to act on the advice of the Chief Minister who no longer commands the confidence of the Assembly, or has been disdisowned by it he must put himself in the wrong, and for this he might invite criticism of showing political preferences, or of taking interest in political manoeuverings, goings-on and schemings. In case the House is dissolved and an election ordered, the Chief Minister may be asked to continue in office and head a care-taker government.

The Governor should appoint the Chief Minister and the Ministers in accordance with the provisions of Article 164. A person selected for appointment to the membership of the Council of Ministers need not satify any special qualifications. He may not even be a member of the State Legislature at the time of his appointment. He can be a Minister for any period of six-consecutive months without being a member of the Legislature.[1] The same holds good for the Chief Minister in whose selection the Governor seems to have a good deal of discretion. The question of his membership qualification has been raised on a number of occasions. For instance, the appointments of Sh. C. B. Gupta in 1963 and Sh. T. N. Singh in 1969 in U. P. were impugned on the ground of their non-membership at the time of their appointment. It was contended that Cl. (4) of Art. 164 did not cover the case of a Chief Minister, because, it spoke only of "A Minister", and also that even if extended to the Chief Minister it provided only for post appointment non-membership disqualification, and, for that matter, did not sanction the appointment of a person who was not a member at the time of his appointment.

The Governor's discretion in appointment of a Chief Minister and Ministers cannot be challenged on the ground that the persons so appointed are not members of the State Legislatures at the time of their appointment. There is nothing which limits the Governor's discretion and choice only to persons who are members of the State Legislature. He can appoint even a non-member to be the Chief Minister, and this is covered by Art. 164(4); wherein word "Minister" includes Chief Minister. The appointment of the Chief Minister and the Ministers cannot be questioned, provided, the Assembly to which the Council of Ministers is collectively responsible endorses the arrangement and lends it its majority support.[2]

Nevertheless, the Governor has little choice in selection and appointment of a Chief Minister when the party position in the

1. Article 164(4).
2. *Har Saran Verma* v. *Tribhuvan Narain Singh*, A.I.R. (1971) SC 1331 ; *Har Saran Verma* v. *T. N. Singh*, A.I.R. (1971) All. 237 ; *Har Saran Verma* v. *C. B. Gupta*, A I.R. 1962 S. C. 301.

Assembly is unambiguous and clear. He should commission the leader of the majority party, front or dal, as the case may be, to form the Government. When one single party does not command the majority, he should normally give an opportunity to the leader of the largest single party in the Assembly, or the leader of a combination, coalition *Samyukt dal* enjoying a clear demonstrable legislative majority, or else, to any person who can form a minority Government likely to be supported by the largest single party to give it a majority support of the Assembly Members. When no such course is open, because, of the confused state of the party position and presence of a large number of Independents, or much too frequent to and fro defections so that no single party is in a position to claim a clear majority he should assess the situation as best as he can, and then call upon that person who according to his assessment and best judgment is in the best possible position to form the Government. No doubt this is a fearfully delicate task, and might involve the exercise of certain discretion in naming the first Chief Minister following a general election, a mid term poll, or in an unforseen contingency.

A clear instance wherein the Governor did not call upon the leader of the majority SVD to form the government was witnessed in Rajasthan following the general election in 1967. The combined non-Congre ss Samyukt dal submitted the list of its legislator-members and demonstrated its numbers on the lawns of the Raj Bhawan. Contrary to the generally followed practice the Governor did not accept the SVD claim, and instead tamporarily opted for the President's rule without advising dissolution of the Assembly. Thus time was siezed upon by the Congress, and it succeeded in its manoeuvres. A few defectors from the *dal* and ceitain independent fencers made up the numerical deficiency, and then Shri Mohan Lal Sukhadia could again be saddled in his seat of power as the Congress Chief Minister. The Governor's role would have been simpler had the SVD not been formed. He could straight way ask Shri Sukhadia as the leader of the largest single party to from the Government. It is not improbable that his choice may fall on a person who is leader of a numerically minority group of members of the Assembly, but, nevertheless, may have and enjoyed the majority support, because, any party might announce its decision to extend its support without formal participation in the formation and constitution of the Government. Though unstable and weak, yet such Government may be installed, if the Governor comes to the conclusion that this is the best thing under the peculiar prevailing conditions in the State.

The Governor's choice may not always fall on an elected member of the Lagislature, if he is satisfied that non of the elected

can deliver the goods. For instance, the Governor Shri Prakash named Rajagopalachari (Rajaji) the Chief Minister of Madras following the general election of 1952 in which the Congress failed to secure the majority, but unmistakenly still remained the single largest Assembly party. The Governor Padmaja Naidu named Shri Ajoy Mukherjee (then in Congress Party) the Chief Minister following the sudden death of Dr. B. C. Roy; the Tamil Nadu Governor Ujjal Singh appointed Shri Neduchezain the interim Chief Minister on the sad death of the Shri Annadurai (January, 1969); and the Uttar Pradesh Governor Gopala Reddy appointed Shri T. N. Singh. More often than not this might invite certain criticism from among the left-outs; for example Shri T. Prakasham bitterly resented the action of the Governor Shri Prakash who first nominated Shri Rajaji to the membership of the State Legislative Council, and, then appointed him the Chief Minister in his capacity as the leader of the largest single party in the Assembly. In 1963 the Uttar Pradesh Governor Gopala Reddy appointed Shri C. B. Gupta the Chief Minister, because, he was leader of the single largest Assembly party following the mid term poll in the State. In any case he should not falter so long as he acts judiciously and does not show political bias or preferences.

Any way, after the appointing of the Chief Minister, the Governor should cooperate with him, and should exercise no discretion in the matter of selection and appointment of the other Members of the Council of Ministers. When advised, he should appoint new Ministers, accept the resignation of a Minister on the recommendation of the Chief Minister, or remove one when so advised. The Chief Minister's privilege to recommend the names of persons for appointment as members of the Council of Ministers, and the acceptance of resignations of those disagreeing with him cannot be doubted, In the making his ministerial team he should have a free hand, and the Governor should stand by him, even if, occasionally, the privilege is slightly abused by him for political reasons and expendiency. He should not mind going along with the Chief Minister to reasonable lengths in the conditions that prevail and are made worse by immoral defections. If necessary, he should not object to his administering oaths of office to persons who can help the Chief Minister and strengthen and position of the Council of Ministers by ensuring the majority support in the Assembly. He should give the Chief Minister and his colleagues the benefit of doubt, and also time enough to assess and improve their position on the floor of the Assembly in accordance with accepted political norms. However, when absolutely desirable he should counsel against abuse of political office by practising nepoticism, opportunism, and inducing

unabated turncoatism among the legislators. In a word, the Governor's discretion in selection, appointment and removal of Ministers is not widely accepted. In this there is no ambiguity.

The legality of his appointmant can be questioned neither in the State Assembly, nor in the State High Court, nor also in the Supreme Court. This aspect of the matter was raised with full fury in the West Bengal State. The Governor Dharma Vira removed the UF Government led by Shri Ajoy Mukherjee and appointed the defector Prafulla Chandra Ghosh to the office of the Chief Minister on 21 November, 1967. On an application for a rule *nisi* in a petition for a writ of *quo warranto* the Calcutta High Court, dismissing the petition for want of a *prima facie* case, held that the Governor could in making the appointment of the Chief Minister under *Article* 164 (1) act in his sole discretion.[3] The only question put to the Court herein was: Is the Governor's power to appoint a Chief Minister conditioned by any restriction created by this clause? In answer to it the learned Judge said :—

> "As I read article 164 (1) of the Constitution, I do not see anything—which imposes any restriction or condition upon the power of the Governor to appoint a Chief Minister. As to the appointment of other Ministers, the Governor is required to act on the advice of the Chief Minister. In my view, it is not possible to read into the Article a condition and a restriction which is not there, and for which there is no warrant in the Constitution itself."

Therefore, the appointment of a Chief Minister cannot be impunged on the ground that it is made without the advice of the outgoing Council of Minister. The contention raised in the case that the fresh appointment can still be challenged on the alleged ground of the illegality of removal of the outgoing Chief Minister, if established, would invalidate the appointment of the in-coming Chief Minister was at best imbibed with an inherent fallacy. The appointment of the Chief Minister is a separate act and must be delinked from the removal from office of the out going Chief Minister Its validity and legality cannot be examined in relation to the Governor's withdrawl of pleasure from the out going Chief Minister and Council of Ministers. The West Bengal Governor's order removing the U.F. Government was "beyond the scope of" the application for *quo warranto* in the case. The legality of the appointment of the new Chief Minister could not be doubted as the Governor could act in the matter in his sole discretion. His discretion could not in the absence of any *prima facie* case be challenged.

3. *Mahabir Prasad* v. *Prafulla Chandra*, A.I.R. (1969) Cal. 981.

The advice from a defeated Chief Minister or one removed from office otherwise to dissolve the Assembly too should be taken by him with a pair of tongs. If no group either singely, or collectively makes a claim to be in the position to form a Government, the advice to dissolve the Assembly may be accepted; but the acceptance of such advice inspite of a lurking possibility for formation of a new Government must clearly be unwise, and can land him in uninteruptedly changing party manoeuverings and troubled waters of the State politics, even though what he does would not be wholly unconstitutional. The advice for dissolution to be followed by a mid term poll does not seem to be binding. This is not to devalue the conventional right of the Chief Minister to be entitled to seek a repoll, but merely to counter any uuconventional attempt at denying a reasonable opportunity to the opposition parties claiming majority support *albeit* due to defections from the ranks of the party in office, or punishing those who on consciencious grounds cannot support the Government, and can no more be intimidated into submission. The convention cannot derive its validity any from unhealthy political norms. Any comparision with the British practice in this respect divorced of the prevailing situation in the States is not advisable in the special context of the smaller multi party system and the modified system of parliamentary government deemed to suit the States. If the Chief Minister is defeated on a vote he should immediately resign ; and while formally submitting his resignation, he should advise the Governor to dissolve the Assembly, if any reasonable chance of formation of another Government does not exist. But, it is not wholly settled yet, whether his advice in the matter should be compulsorily accepted by the Governor. The practice hitherto seems to be that the advice is not always binding. The advice in this respect was not given by Shri D.P. Mishra, the outgoing Congress Chief Minister of Madhya Pradesh ; but was given by Shri Gurnam Singh, but was not accepted by the Punjab Governor. If the Chief Minister is defeated because of sudden defections and wants an opportunity to form a second Ministry he should reasonably be given a chance to do so; and when commissioned to do so, he should not be treated shabbily by swearing in any other person before he reports failure in his efforts. Shri Gurnam Singh, the outgoing Chief Minister of Punjab scems to have had some genuine grievance when before the time given to him had expired, and, worse still while he was away from the State capital, the Governor, sworn-in the defectors' leader Shri Lachman Singh Gill as the new Chief Minister of the Congress supported minority

Government. If the Governor removes the Chief Minister and his Ministry because of clear loss of legislative majority he is not bound to seek any advice in the matter from the outgoing Chief Minister. In the nature things he should decide himself behind the back of the Council of Ministers. He can call upon any person who claims and satisfies him that he (the latter) can procure the majority support for his Government, if allowed to do so. On this aspect of the matter the question calling all our ingenuity is as to what should be the modalities which should be employed by the Governor to ascertain whether the Ministry in office has lost the majority support in the State Assembly. If the Governor must on some occasion act in this manner he must find himself, however unwillingly, in the tourmoil of politics. Even the most intelligent and shrewd person cannot pass out through the coal mine of politics without a blackish tinge on his face. Any decision he takes must invite embarrassment, charges of nepoticism and biased working for the Central Government. Not only this, his decision might be greeted by protest meetings, angry demonstrations, disturbed proceedings of the Assembly and what not. Neverthless, the Governor must not abdicate, and should act *a discretion*, trying at all times to be honest and fair to all conflictual groups in the assembly.

The power of the Governor to remove from office a Chief Minister, and thus dismiss the Ministers is legally discretionary. The Ministers and this must include the Chief Minister hold office during the pleasure of the Governor. His pleasure herein is not subject to any regulatory procedure as establshed in Article 311 in respect of his action against a civil servant. The pleasure clause in Article 164(1) is unqualified, and gives an unfettered discretion to the Governor. It is not qualified by an implied limitation as well. The questions the Governor should put to himself while exercising his discretion might include the following :—

1. Should he ascertain the rival claims on his own, or should he insist on calling of a meeting of the Assembly ?
2. What should he do, if the Chief Minister and his colleagues refuse to act on his suggestion ?
3. Should he dismiss the Ministry if it is unstable, because, its uncertain majority due to probable defections ; or should he dismiss it, if satisfied that majority of the Assembly Members are not behind it without giving the Chief Minister an opportunity to test his strength on the floor of the Assembly ?
4. Can the momentarily combined opposition claiming majority in the House ask the Governor to ascertain its claim and dismiss the Council of Ministers on its plea that the latter has lost the majority ?
5. Should the Governor ask the Chief Minister to resign, or urge him to summon the Assembly on a day suggested by him to test the strength of his party, U. F. or S. V. D. ?
6. Should the Chief Minister take his own time to call the meeting of the Assembly with a view to test his strength ?
7. Should the Chief Minister refuse to act as asked for, can the Governor dismiss the Ministry ?
8. Does Article 365 requiring the Union to ensure that State Government is run in accordance with the Constitution give any power to the President to instruct the Governor in matters of Ministry making ?

The limitations of space and scope of these pages must forbid answering these questions separately. Nevertheless, certain aspects of the matter must be examined below. In the situations created by the large scale party defections or in the confusion and uncertainty caused by the disunited 'united' fronts and ill assorted *Dals* the Governor's responsibility increases, and, so relatively, his obligation to act in his discretion. The changing party alignments in the Assembly must often unexpectedly throw him in the whirlwind of party conflicts. When satisfied that the party in power has lost the majority support *albeit* because of defections, he should advise the Chief Minister to seek a vote of confidence forthwith. After he has lost the support his Government can no longer remain responsible to the Assembly, and therefore, cannot be harboured. The principle that the Governor should act on the aid and advice of the Chief Minister and his colleagues does not put a premium on political irresponsibility and expediency. The competency to tender advice to the Governor must be taken to have been lost when the Council of Ministers looses the capacity of being collectively responsible to the Assembly. The two capacities are two facets of the coin of parliamentary responsibility and one cannot be separated from the other. Once the Government has manifestly become irresponsible to the Assembly, having lost the majority support, the Governor is not bound to act on its advice. He has the clear obligation to speak to the Chief Minister, and seek his cooperation to restore the governmental responsibility to the popular House. If the Chief Minister and his colleagues manoeuvere to hold on, they must be acting improperly, nay, unconstitutionally. Any attempt to remain in office and reluctance shown in offering a formal resignation without any loss of time in so doing are opposed to the conventions of democratic responsible parliamentary government. When the political situation is rendered wholly uncertain, because, the unpredictable behaviour of the Members of the Assembly who indulge in defections and fence sitting, frequent floor

crossings and political turncoatism for lure of money and office the system is put to ridicule in the market place. The situation becomes abnormal; and it is absolutely imperative that correctives are immediately and instantly applied. If this is not done the normal rules and conventions for tenure of the Government must be unconstitutionally suspended, nay, irrepairably impaired. The Governor should ask the Chief Minister to ascertain his actual position by calling the Assembly at the earliest convenience without waiting for the regular sitting of the Assembly scheduled to be held on some distant day. He should, in the first instance, avoid coming to any conclusion about the position of the Government himself unless the instability and uncertainty make the functioning of the government demonstrably undemocratic and manifestly unconstitutional. He should pursuade the Chief Minister to do the unavoidable ascertaining at the date suggested by him, if not entirely inconvenient to the latter. If the latter irresponsibly refuses to comply, and apparantly does so without good cause the Governor's obligation is clear. After being satisfied to his best judgment that the Chief Minister and members of his team have lost the majority and are unreasonably and designedly reluctant to face the Assembly, he can remove the Chief Minister and his Council of Ministers. Nevertheless, he should do so only sparingly when the situation must go out of hand if he does not act. There must be clearly compelling reasons for him to act on his own. He should act only when considering his higher responsibilities he must exercise his discretion on the basis of information in his possession, or if on the basis of his personal assessment the continuance in office of the Ministry must bring about an institutional disaster. His factual assessment and satisfaction, and not mere suspician or a wishpering compaign carried on by certain adverseries of the Government should provide the *raison d etre* for his action. If possible he should not remove the Ministry, unless the Chief Minister and his colleagues are totally averse to call the Assembly within a reasonable time, no matter later than the date suggested by him, provided, the constitutional requirement that the next session of the Assembly should be held within six months following the last day of the sitting in the next preceding session is not violated. Mr. Santhanam seems to concede the possibility of the Governor calling for a sitting of Assembly, if the party or group in power evades the verdict of the Assembly. The Governor should know that the dismissed Chief Minister and his colleagues must make political capital out of their unceremonial removal and would ask the public that the removal of the Council of Ministers is motivated; and also in an appeal to the voters they must call upon them to restore them back so that with their fresh mandate they might complete

their slogan dusted socio-economic objectives and poorly conceived political purposes.

Whether the action of the West Bengal Governor, Shri Dharam Vira in dismissing the Ajoy Mukherjee's U. F. Ministery on 21 November, 1961 can be justified on any of these grounds must be a matter of opinion. The second of the two grounds stated above, at any rate, did not exist. The permitted inter sessional period had not expired and would not have run out before the date insisted upon by the Government. The Government was not perceptibly averse to face the Assembly, although it wanted to call its sitting on a date by which, it thought, it would improve its position politically and restore its numerical strength by winning some of the defectors from its rank back into its fold. Whether it would have actually been able to restore its legislative majority might be any body's guess. Under circumstances, and on first principle, the Governor should not have exercised his prerogative to dismiss the Council of Ministers unless his action was motivated by considerations of public safety and security of the State, and unless he thought that he would have failed in his duties had he not acted with dispatch. If this were so, it would have been another matter. The other question that is raised in this connection is that the Governor should have not sworn in another minority Ministry. Instead he should have reported to the President and advised a take over by him. It was not a mere coincident that a thousand miles away in the North West the President's rule was imposed over Haryana on the same day under comparable circumstances. The only answer to the question why the West Bengal Governor acted contrary to the Haryana Governor seems to be that the ugly certainty that the Ghosh's Ministry in West Bengal would be supported by the Congress Party (N) and the majority support in the Assembly would otherwise be not possible; and the no such alternative was open in case of Haryana State. The other answer that can be given is that each of the concerned State Governors had two alternatives. Either he could recommend the President's rule, or if expedient commission an alternative Government. The choice between these alternatives could be his and his alone, of course, considering the general political conditions in the State, as also, the desirability of not disrupting parliamentary process. In West Bengal the U. F. Government could be salvaged out of the troubled waters, but it was thought that could not be done in Haryana. This was, at best a matter of the Governor's own opinion and a political decision arrived at in consultation with the Union Government. Perhaps imposition of the President's rule in one State was not considered politically expedient, while in the other it was deemed unavoidable. The imposition of the President's rule must have involved the Union Government, and the latter did

not want to show up in Calcutta for practical reasons, while they thought it expedient to do it in Chandigarh. The Governor had to ascertain whether the Central Government would accept his recommendation for the President's rule before he made a report on the affairs of the State. If the President's rule was not thought expedient politically or otherwise by the Central Government, the Governor had to help himself. He was left with no alternative but to swear in another Ministry. Whichever way the Governor acted he could not be questioned, except politically. The matter fell within his discretion and his decision was legally final and irreversible. The legality of his action could not be doubted on the ground that he ought, or ought not to have acted. The outgoing Chief Minister, much less, any other person could not challenge it in the State High Court, or in the Supreme Court. One could have no vested right to the office of the Chief Minister. It was a mere political office without any term terminable without cause. The matter could not even be a subject of any proceeding of the Assembly. In case the Governor had removed one Ministry and sworn in another he could not be censured by the Speaker, or the assembly. Nor any no-confidence could be expressed in him, because, he was not responsible to the Assembly. The Members of a Council of Ministers held office during his pleasure, and the House had no capacity to review any exercise of his discretion in the matter. The Speaker had no authority to express any opinion in the matter either. He could not make a statement to the effect that the Governor had acted wrongly, and that the new Government installed by him was not the lawful government entitled to advise him to summon the Assembly. The manner in which the Speaker of the West Bengal Assembly adjourned the house *sine die* before it could take up any business after making a statement that the newly formed Ghosh's Ministry was illegally constituted was *ex facie* an usurpation. The Speaker prevented the House from meeting and taking up the formal pending business, and thus retarded the normal parliamentary process. He was vested with no authority to pronounce upon the legality or otherwise of the change in government, or propriety of the Governor's action. He should only express his dissent, if the House was equally divided by giving his casting vote on a motion of non-confidence in the new Ministry. More he could not do. It was no surprise that he received no approval even from those who were sympathic to the U. F. Government and regretted their removal. Even one of his kind, the Speaker of the Punjab Assembly did not choose to follow his example, and, rightly, said that he had no say in the matter of change of Goverment in his State. He acted properly and in accordance with the provisions of the Constitution was borne out by the judgment of the Supreme Court in the *Dang's* case.[4]

Conclusions

The position, powers and functions of a State Governor, it is submitted, should be understood in the proper context of the place of the State as a constituent unit of the *quasi* federal Union of India and the prevailing conditions—political, social, and conventional peculiar to the Indian political system at the State and Union levels, and affecting and modifying the functioning of the parliamentary institutions. Not being elected by the inhabitants of the State, and selected from those not ordinarily residents of the State, he is appointed by the President in whose pleasure the holds his office. He is a link in the chain banding the States into the Union. Besides his higher loyalty to the President of the Union which is likely to be invoked only sparingly, he is the formal head of the State. In his latter capacity he should normally and ordinarily act only constitutionally. However, this presupposes certain conditions of political stability and working of the political parties and basic traits of those active in politics. The State must be robbed of the normalcy in the absence an emotional participation in proper functioning of the constitutional system, a feeling for national involvement in face of lack of consensus on the fundaments of political ideology, principles, programmes and policies and any deeper commitment to sovereignty and integrity of the Union. There should also exist certain basic and linguistic harmony and acceptance of socio-cultural values and political norms. The loyalty to "We, the people" must be deemed inalienable and indivisible. The habitual conformity to the norms of political behaviour and parliamentary standards provide the much needed congenial atmosphere so necessary in a democratic society. The parliamentary system is designed for a hormonious community in which no organised group owes any extra-territorial loyalty, and in which there are no sharp ideological, socio-economical, cultural or linguistic divisions. It works so long as an *intra* community conflict is absent, or else is peaceably resolved by discussion and debate, and political parties pursue national aims and objectives in preference to sectional, regional linguistic or other such sectarian and parochial divives aims.

The country must run into bad weather if the constitutional provisions are put to use against the best interests of the people. This must be the concern of the Union Government in a greater measure than the State Governments. Therefore, when a State Government professes aims and objectives opposed to the national interests, it must

4. *State of Punjab* v. *Satya Pal Dang*, A.I.R. (1969) S. C.

invite constant surviellance. When the State Government cannot be considered as functioning in accordance with the Constitution the President's rule must became inevitable. The fact that the President's rule became unavoilable in three States within one year of the general election must make the various parties do some thinking, and the leadership reflect the upon dangers of rendering functioning of the responsible government in the States impractical. This must tend to a weaking of the constitutional powers of the State as units of the Union. The frequent resort to the device of the President's rule must weaken the States' powers and slow down the experiment in federalism and parliamentary government at the States' level.

The Governor should ordinarily and normally do nothing himself, and should act only constitutionally on *aid* and *advice* of the State Chief Minister and the Council of Ministers which is collectively responsible to the popular House of the State Assembly. He should not intervene in the affairs of the administration, and should allow the implementation of the socio-economic policies and programme of the majority party for the time being. Neither he should show any preference, nor he should appear favourably inclined for one or the other of the rival parties or groups. He should act as an umpire of the diverse political forces playing the parliamentary game on the floor of the Assembly. He should act *a discretion* only sparingly. He should appoint a person the Chief Minister without looking into his face, or caring for his political affiliations. He should not also try to get rid to him, even, if occasionally, he causes certain inconvenience or annoyance. He should neither lend his ears to any wishpering compaign, nor take note of the street demonstrations against the party in power and the Government, He should not remove the Chief Minister and the Council of Ministers so long as they command the majority support in the Assembly; and should let their claim to remain in office be decided by open support exibited for them on the floor of the Assembly. However, the adherence to this convention must be rendered difficult in case the party complexion in the Assembly is vague due to uninterrupted process of to and fro defections, or if the Assembly is not called in session, or when called is not allowed to function because, unending disorderly conduct of the members on the floor of the Assembly. If such things happen the Constitution is voilated and the processes of parliamentary responsible government are put to abuse, or a threat to the security of the Union, because, a threat to the State makes a threat to the Union immediately imminent. Before the situation must become irrepairably bad he must act. His duty is clear. He must stand by his oath of loyalty to the Constitution and the unity and integrity of the Union and the Nation, and must extend his commitment to the parliamentary

responsible system of government. He can act as the situation demands, and if absolutely necessary, can remove the Chief Minister and the Council of Ministers. Either he can sworn in another Government, or recommend a take-over by the President. The question how should he act in particular situation must be answered looking into the whole background. Often he cannot act on the advice of the Council of Ministers, and must decide the course of action himself. The working of Governments in the Northern States by combinations, collectives, unions, fronts and *dals* has brought home the perils of chronic political instability caused by inherent weakness of such expedient. In the small period of less than one year thirteen coalition government fell. In most of these cases the governments fell under the weight of internal disunity, lack of agreement on common programme, and intra group rivalry of the coalitions. The Congress in opposition too did not feel comfortable, and contributed a lot to cause and foster political instability and induce defections from other parties to its ranks. Though the increasingly ugly incidents of to and fro floor crossings have been encouraged from both sides, yet the Congress (N) benefited and succeeded most in this unbecoming game and its operations toppeling. The game of toppling the Government was very strange phenomenon indulged in by the Congcess (N). Instead of waiting for the Assembly to meet, and let the U. F. or S. V. D. Government which would fall any way fall no time or opportunity was lost and no efforts were spared in engaging in hot and active manoeuorings. The Governor was approached with the demand for dismissal of the Government, because, the Chief Minister was alleged to have ceased to have the support of the majority in the Assembly, no matter, it was under prorogation of under adjournment *sine die*. He was presented with lists of MLAs who it was alleged did not support the Chief Minister any longer. The demand was backed up by the plea for an advanced meeting of the Assembly, and often the Governor was requested to witness the parade of the MLAs who momentarily had chosen to change sides, and, any time when freed might defect back to their original side. The Congress Party support for minority governments headed by defectors from the coalitions in the Bihar, Punjab and West Bengal was an unmixed evil and made the Chief Minister's office a cheap bait for the disgruntled and the fence sitter. It was no wonder that it recoiled on its own head in West Bengal when Parafulla Ghosh with fellow travellers defected and brought the fall of the PDF-Congress coalition Government in West Bengal. The Governor might honestly be wrong in his assessment, or might be that he is dishonest and uses his power for some ulterial motives on directions of the Union Government which do not see eye to eye with the

State Government, politically speaking. If he so acts the remedy still is not to assail the Constitution, make a resort to the Court, or worst still, to take the way to violence and arson.

Be that as it may, the unhealthy developments and much too frequent to and fro defections of the elected members of the State Assemblies have erroded the foundations of parliamentary system. Before any irrepairable damage is done to the structure of the parliamentary institutions and their practice and functioning rendered impossible some correctives must be applied before it is too late in the day. It was nice that the problems and reasons of practice of defections were examind by a committee at the higher level, and the matters were discussed at governmental and inter party levels. Certain measures were proposed, debated and planned as well. Nevertheles, nothing substantial has been accomplished, because, the legislators and politicians are not prepared to put themselves under any discipline and do not want to abide by any code of conduct farmed by them for themselves.

GROUNDS FOR COMPULSORY WINDING UP OF COMPANIES— A COMPARATIVE STUDY

*Hoti Prasad**

There are certain acts and circumstances which are to be taken as a test, or as evidence of a company being in a state in which the winding up order ought to be made. They, of course, are as matters of evidence upon which the court, if it thinks the evidence is sufficient, and is not in any way negatived, may act. Such acts or circumstances are different in different places.[1]

In England, a company may be wound up compulsorily on any of the grounds, namely, special resolution, reduction in membership below the legal minimum, failure to commence business within time, default in filing statutory report, or holding statutory meeting, inability to pay debts, and just and equitable ground.

The Australian law differs from the English law on the point that a compulsory liquidation in Australia can take place if the directors have acted in the affairs of the company in the intrests of the members as a whole, or in any other manner whatsoever which appears to be unfair, or unjust to other members[2], and where an inspector appointed under Ss. 169, 170, 173, has reported that he is of opinion that (i) the company cannot pay its debts and should be wound up; or (ii) it is in the interests of the public, or of the shareholders, or of the creditors, that the company should be wound up. It is not so under the English law.

In America, on the other hand, a business corporation may be dissolved by[3] :

(a) Legislative repeal of the general, or special Act under

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1. *In France*, such grounds are: bankruptcy, failure of business, reduction in membership below the legal minimum, and loss of three fourths of the capital. See Bagchi, *Law of Corporations*, (1928), p. 278.

In Germany, bankrutpcy, special resolution and expiry of the period for which the company was incorporated, are such grounds ; *ibid.* 280.

In Japan, expiration of the duration, amalgamation, bankruptcy and resolution are the grounds for compulsory liquidation. See *Commercial Code of Japan, Dissolution and Liquidation*, Articles 404, 416.

2. S. 222 (1) (f) of the Companies Act, 1961 (Australia).

3. S. Stevens on *Corporations*, 2nd Ed., (1949) p. 943

which the corporation was formed, provided the power of repeal has been reserved by the State;

(b) death or withdrawal of all members without succession; but this method of dissolution does not occur when shares, being transferable, may be sold, or may pass to the personal representatives of a deceased member;

(c) surrender of the Charter with the consent of the State; and of that proportion of shareholders or directors reqired by statute;

(d) expiration of the period for which the Corporation was formed; and

(e) forfeiture, because of misuse or neglect, of corporate powers and privileges.

In India, the position is the same as in England and Australia. S. 433 of the Companies Act, 1956, lays down the following grounds for compulsory winding-up of a company :

1. Special Resolution;
2. Default in Filing Statutory Report, or holding Statutory Meeting ;
3. Failure to Commence Business ;
4. Reduction in Membership ;
5. Inability to Pay Debts; and
6. Just and Equitable.

1. Special Resolution :

A company may be wound up by the court if the members have passed a special resolution to the effect that it be wound up by the court.[4]

Resolutions under this clause are very rare. The reason is that by the same machinery a company can be placed in voluntary winding-up. Mere special resolution is not sufficient for compulsory liquidation of a company, it should, however, be based on some sufficient ground justifying an action.

In the absence of a resolution passed by the members at a general meeting, a petition for winding up made in the name of the company by directors, must be held to be one without authority.[5] On the other hand, the Madras High Court holds the view that prior sanction by the members given at a general meeting is not a condition precedent to the directors having authority to file a petition in the name of the company for its winding-up. The petition in such case

4. S. 433 (a).

5. *In the matter of winding up the Patiala Vanaspati and Allied Products Co. Ltd , Doraha* (1953) A. I. R. Pepsu 195.

will not be dismissed but stood over so as to enable the directors to convene the meeting of the members and obtain their authority.[6] It is submitted that the former view is correct. The Court should not entertain an action from an unauthorised person.

I do not consider it right that persons advancing money in undertakings should be left at the mercy of a mere majority of their brother shareholders who wish to wind up the company. The Legislature has not authorised them to oppress the minority shareholders and get the company wound up against the interests of the company and public in general. The remedy for compulsory liquidation is a drastic one and should be availed of only when a clear case has been made out justifying an action.

The term "may", used in S. 433, implies that company may or may not be wound up. This shows that the court is not bound to order winding up simply because a special resolution has been passed to that effect. The power of the court is discretionary and should be exercised only where a bona fide case is made out. In Langham Skating Rink Co.[7], the court has aptly observed that :

> "It really is very important to these companies that the court should not, unless a very strong case is made out, take upon itself to interfere with the domestic forum which has been established for the management of the affairs of a company. The Legislature has not authorised a more majority to say that they will capriciously discontinue the undertaking which has been begun."

Sanderson J., has also rightly observed as under[8] ;

> "It is not right for the Court to make an order for compulsory winding up merely on the ground that there was majority of shareholders who voted at a meeting, directed to be held by the Court, in favour of winding up under supervision of, or by, the court, in the absence of any finding by the learned 'Judges of any other ground for compulsory windidg up and in the absence of any valid resolution for voluntary winding up."

To sum up, a petition under this clause ought not to be allowed by the court except for bona fide grounds which would justify an

6. *State of Madras* v. *Madras Electric Tramways Ltd.*, (1956) A. I. R. Mad. 131.

7. (1877) 5 Ch. D. 669.

8. *Oriental Navigation Co.* v. *Bhanaram Agarwala* (1922) A. I. R. Cal. 365 ; *Re Wear Engine Works Co.*, (1875) 10 Ch. App. 188.

order for winding up.[9]

2. Default in Filing Statutory Report or Holding Statutory Meeting :

Default in filing statutory report to the Registrar, or in holding statutory meeting, is another ground for compulsory winding-up.[10]

On this ground, the Indian Law differs from the English Law on the point that under the English Law, the petition for winding-up on this ground can be presented only by a shareholder[11], whereas under the Indian Law it can be presented either by the Registrar or by a contributory. Moreover, the petition should be filed before the expiration of fourteen days after the last day on which the statutory meeting ought to have been held.[12]

The power of the court here also is discretionary and instead of making a winding up order, it may direct that the statutory report shall be delivered, or that the meeting shall be held.[13]

In my opinion, it is of no use to order the report to be delivered unless its distribution among the shareholders, and the holding of a meeting to discuss it, are also at the same time ordered. Hence it is suggested that the term "or" used in S. 443 (3) should be replaced by the word "and". Secondly, the order as to the report, and probably as to the meeting also, should be against the directors personally who would in all likelihood be ordered to pay the costs, even if no winding up order was made.

3. Failure to Commence Business :

A company may be wound up compulsorily where it fails to commence its business within a year from its incorporation, or suspends its business for a whole year.[14]

The Act does not make the fact that the company has not commenced its business within a year of its incorporation anything in the nature of evidence of an act which gives to the shareholders a vested right to say that the company shall be wound up.[15] In dealing

9. See also : *In re Pioneer Bank Ltd.*, (1915), 39 Bom. 16 ; *Re Bengal Flying Club* (1966) 2 Comp. L. J. 213 ; *Re Akola Electric Supply Co. Ltd.* (1962) 32 Comp. Cas. 215.
10. S. 433 (b) ; *Kent Out Crop Coal Co.* (1912) W. N. 26.
11. S. 224 (1) (b) of the Act, 1948.
12. S. 439 (7) of the Act, 1956.
13. S. 443 (3) of the Act, 1956.
14. S. 433 (c).
15. *Re Metropolitan Railway Warehousing Co., Ltd.*, (1867) 17 L. T. R. 108.

with these cases the court must have regard to the wishes of the contributories, and they ought not to disregard those wishes unless there be something tyrannical in the conduct of the majority, or some mischief will result to the minority, or some hardship be imposed upon them in continuing the business.[16]

In order to ascertain whether the company has commenced its business, one has to look to the memorandum and articles of association because the statute does not purport to define what the business of the compony is. Where the business of the company can legitimately be carried on both abroad and in India, and it carried on business abroad only, there will be carrying on of business within the meaning of this Act. No order will be made on the sole ground that the company has not transacted a substantial business in this country. [17] Lord Cairns has rightly observed [18];

> "I do not stay to consider whether the second head literally and in terms meets the present case—that is the clause as to commencing business—that is to say, I do not stop to consider whether a company incorporated for trading in England and abroad—which does trade abroad, I will suppose, but does not trade in England—is a company which does not commence business within a year from its incorporation within the meaning of the second head."

It is submitted that it is not right for the court to order winding up merely because a company has failed to commence its business within a year from its incorporation or has suspended it for a whole year. There may be some good and sufficient causes for such failure which should be taken into consideration. The delay for sufficient causes should be condoned and the company should be allowed to continue its business. In this regard the learned Judge Mookerjee has observed as under :[19]

> "Where there has been a suspension of business of a company incorporated under the Indian Companies Act, the power of the court to wind up the company will be exercised only when there is a fair indication that there is no intention to carry on the business; if the suspension is satisfactorily accounted for and appears to be due to temporary causes, the order may be refused."

16. *Re Middlesborough Assembly Rooms Co.*, (1880) 14 Ch. D. 104.
17. *Re Capital Fire Insurance Association*, (1882). 21 Ch. D. 209.
18. *Reuss (Princess)* v. *Bos & others*, (1871) 5 H. L. 176.
19. *Murlidhar Roy* v. *The Bengal Steamship Co. Ltd.*, (1920) 47 Cal. 654. See also : *Re Capital Fire Insurance Association* (1883) 24 Ch. D. 408 ; *Caementium (patent) Co. Ltd.* (1908) W. N. 257 ; *Re Middlesborough Assembly Rooms Co.*, (1880) 14 Ch. D. 104.

Accordingly, if a holding company ceases to be active in its business, but its subsidiaries are doing the very business for which it was formed, it cannot be said that the former has suspended its business for a whole year.[20]

Similarly, in *Murlidhar* v. *Beagal Steamship Co.*[21] : a company employed a steamer and two flats to carry on its business. The flats were acquired by the Government during the First World War and the Company was not to replace them immediately in view of the rise in prices. This resulted in suspension of business for more than a year. In a petition to wind up the company, it was held that "the suspension of a business for a whole year is sufficiently accounted for, and does not furnish an indication that there is no intention to carry on the business."

Suspension of business for a whole year is usually deemed to be indication of absence of intention to carry on the business unless the delay has been satisfactorily explained and accounted for.[22]

The intention of a company is to be ascertained by objective test. Where there are reasonable prospects in the kind of business in the immediate future, the intention of a company will be obviously in favour of carrying on business. On the other hand, if it becomes obvious with reference to the memorandum that the company will never have sufficient resourses to commence business, the court will order winding up within the year.[23]

4. Reduction in Membership :

If the number of members is reduced, in the case of a public company, below seven, and in the case of a private company, below two, the company may be ordered to be wound up.[24]

The word "members" means actual members, and does not include past members i. e. Persons who, once having been members, are liable to be contributories. Personal representatives of deceased members, or trustees of bankrupt members, will not be regarded as members unless they become such. Any person who presents a petition under this clause must find out whether there are more than

20. *Re Eastern Telegraph Co.* (1947). 2 All E. R. 104.

21. (1920) A. I. R. Cal. 722 ; See also *Mohan Lal Saraf* v. *Cattack Electric Supply Co.* (1964) 1 Comp. L. J. 58 (Orisa) where suspension of business due to acquisition was held not sufficient to order winding up.

22. *In re Kaithal Cotton and General Mills Co. Ltd.* (1961) 31 Comp. Cas. 461.

23. *State* v. *Mayurbhanj Spinning & Weaving Mills*, (1963) A. I. R. Orissa, 1.

24. S. 433 (d).

seven persons who are actually members of the company, for if he is going to embark on an investigation of how many deceased members there are, and how many other members there are, it is a thing which he connot follow out.[25]

It is submitted that it is but rarely that an order is made under this clause. The court leaves the company to have a voluntary winding up. The court, however, will interfere when it finds something wrong in the affairs of the company. One reason for making on order is that by a continuance in such circumstances, the members may incur unlimited liability under S. 45 of the Act, 1956.

5. Inability to Pay Debts :

A company may be wound up by the court if it is unable to pay its debts.[26]

This is for practical purposes by far the most important of the statutory grounds for winding up. Inability means reasonable certainty that the existing and probable assets will be insufficient to pay existing liabilities. A company shall be deemed to be unable to pay its debts under the following three circumstances[27] :

(a) If a creditor to whom a company owes a sum exceeding five hundred rupees has served on the company a demand for payment and the company has for three weeks neglected to pay or otherwise satisfy the creditor.[28]

A creditor seeking to move the court under clause (1) (a) of S. 434 must have a claim exceeding Rs. 500 against the company and must serve upon the company a notice of demand for payment of such claim. Such notice can be served also by a Receiver appointed by the court in a suit for partition of joint family properties with all powers under O. 40, R. 1 of the Civil Procedure Code, 1908, demanding payment of the debt due to the joint family, and such notice can direct the payment of the debt to a third party as well. The receiver in such a case becomes a creditor 'by assignment or otherwise' within the meaning of this Clause (1) (a).[29]

Such demand must be given under the hand of the creditor. A demand shall be deemed to have been duly given under the hand of the creditor, if it is signed by any agent or legal adviser duly authorised on his behalf, or in the case of a firm, if it is signed by any

25. *Re Bowling & Welby*, (1881) 1 Ch. 663.

26. S. 433 (e).

27. S. 434.

28. S. 434 (1) (a).

29. *Harinagar Sugar Mills Co. Ltd.* v. *Pradhan*, (1966) A. I. R. S. C. 1707.

such agent, or legal adviser, or by any members of the firm.[30] Where a limited company is a creditor, a demand by its manager shall be deemed to be a demand under the hand of the company.[31]

The effect of such notice validly given under the provision is to raise a presumption under the statute as to inability of the company to pay the debt, and its insolvency rendering the company liable to the extreme penalty of losing its very existence and being compulsorily wound up by the court. On this aspect, all that the statute requires is that the notice must be in respect of an existing and presently payable debt which exceeds the sum of Rs. 500. If the amount stated in the notice is for some reason found not to be exactly the correct amount payable by the company, but is in respect of a debt existing and presently payable exceeding the sum of Rs. 500, this will be sufficient compliance with the provisions of the statute, and the notice will be a valid one.[32]

If the company neglects to pay the claim, or to secure, or compound for it within three weeks from the service of the notice, it will be conclusively estopped from denying that it is unable to pay its debts, and an order for winding up will be made on the petition by the creditor. A company is deemed to have neglected to pay its debts, or is unable to pay its debts in the following cases :—

(a) The company is commercially insolvent and it does not have assets presently available to meet its current liabillties.[33]
(b) Where a company disputes its liability to pay the debt, and the dispute is a cloak to hide its inability to pay its debts.[34]
(c) The alleged dispute as to the precise sum of liability of a company to a joint family is not bonafide but a result of collusion between the company and the manager (*karta*) of the joint family.[35]

On the other hand, a company will not be deemed to have neglected to pay its debts when there is a bonafide dispute as to the

30. S. 434 (2).
31. *Henley's Works Ltd.* v. *Gorakhpur Electric Supply Co. Ltd.* (1936) All. 840.
32. *Ofulynx Ltd.* v. *Simon Carves India Ltd.* (1971) 41 Comp. Cas. 174. *In the matter of Seksaria Cotton Mills Ltd.*, (1969) 39 Comp. Cas. 475; *Vanaspaspati Industies Ltd.* v. *Firm Prabhu Dayal* (1950) A. I. R. E. P. 142; Lakshmi *Sugar Mills* v. *National Industrial Corporation*, (1968) 1 Comp. L.J. 292 (Punjab); see also Rankin C.J. in *Japan Cotton Trading Co.* v. *Jajodia Cotton Mills* (1927) A. I. R. Cal. 625; In re *Jaulazar Manna Estate Ltd.*, (1931) A. I. R. Cal. 692.
33. *Re Tweeds Garages Ltd.* (1962) Ch. 406.
34. *Vanaspati Industries Ltd.* v. *Firm Prabhu Dayal*, (1950) A. I. R. E. P. 142.
35. *Harinagar Sugar Mills Co.* v. *Pradhan*, (1966) 2 Comp. L. J. 17.

debt; and as such the creditor is entitled to take refuge under clause (a) above for the purpose of winding up a company.[36] The court will refuse to order winding up a company where the dispute involves a substantial part of the debt[37], if not the whole debt. In addition, the court will not order winding up a company in the following cases :—

(a) A debtor company believes though wrongly that it is justified to refuse to pay.[38]
(b) The object of a petition to wind up a company is expenditious payment of debt when the company desires to dispute the debt in Civil Court.[39]

If the debt claimed by the creditor is disputed by the company, the Court should investigate the question and if it finds that the defence is a substantial one, it has a discretion to direct the creditor to establish his claim in an independent action, and no order for winding up will be made in such a case. Once it is proved that the debt is due to the petitioning creditor, it should proceed with the petition.[40]

Where a company admitted a debt in its balance sheet, and also acknowledge its existence on a demand notice by the debtor then in a winding up petition the company cannot avail the plea of "disputed debt", and escape winding up order.[41]

If there exists a bonafide dispute about the quantum of the debt, or on the question whether it is immediately recoverable or not, that must be settled by a properly instituted suit for the recovery of the debt and winding up proceedings cannot be utilised to achieve that purpose.[42]

Where a company after begging for time for payment of a debt springs on the petitioner at the last moment and assertain that the debt was a disputed one, such a defence is naturally open to great suspi-

36. *Re London and Paris Banking Corporation*, (1875) L. R. 19 Eq. 444.
37. *The Co.* v. *Rameshwer Singh*, (1920) A.I.R. Cal. 104.
38. British India Banking Corporation Sylhet Commercial Bank (1949) A.I.R. Assam, 45.
39. *P. Satya Raju* v. *Guntur Cotton, Jute & Paper Mills* (1925) A.I.R Mad. 199.
40. *State of Andhra Pradesh* v. *Hyderabad Vegetable Products Co. Ltd.* (1964) A. I. R. Andhra, 243; *The Co.* v. *Rameshwar Singh*, (1920) A. I. R Cal. 104.
41. *Vawang Tshang* v. *Goenka Commercial Bank Ltd.* (1961) 31 Comp. Cas. 45.
42. *Om Prakash Mehta* v. *Steel Equipment and Construction Co.* (P) *Ltd*,)1968) 38 Comp. Cos. 82.

cion and meets with no favour from the court.[43] Similarly, in respect of a loan alleged to be due to the petitioner in a petition for winding up of the respondent company, the defence was that the amount was due not to the petitioner but to her husband, and further the same had been discharged by delivery of blankets. The court held that as the respondent company had raised a dispute which was bonafide and the winding up court was not the proper forum for adjudication of the truth, or otherwise of the debt, the petition was liable to be dismissed,[44] Petition for winding up is not to be sought for as a short-cut and cheap device to coerce payment and stifle contest.[45] Moreover, it is not a legitimate means of seeking to enforce payment of the debt which is bonafide disputed by the company. A petition presented ostensibly for a winding up order, but really to exercise pressure, will be dismissed as a scandalous abuse of the process of the court.[46]

In the case of a banking company the effect of Sections 37 and 38 of Banking Regulation Act, 1949, together with the relevant provisions of the Companies Act, 1956, would be that the court, on satisfying itself that a banking company is unable to pay its debts, would order the company to be wound up. The court can take action even suo motu to wind up a banking company which is unable to pay its debts.[47]

From a perusal of the above decisions of the courts on this issue, it is concluded that the court will generally order winding up of a company when the debts due to thec ompany exceed the statutory limit, are ascertained, and payable presently which the company either refuses, or neglects to pay to the creditor on demand within the prescribed period of three weeks.

It is suggested that the demand in writing under this clause (a) of S. 434 need not be in any special form. It need not use the word "demand". A peremptory "request" or "call" for payment would, no doubt, suffice. But the debt must be for Rs. 500/- at least. A demand in excess of what is due can still be a valid statutory demand.

43. *Nawbazada Captain Syed Murtaz Ali Khan* v. *Stressed Concrete Construction* (p) *Ltd.* (1961) 31 Comp. Cas. 84.

44. *Mrs. C. R. Chandra* v. *Tirupati Cotton Mills Ltd.* (1971) 41 Comp. Cas. 26.

45. *Godauribai* v. *Amalgamated Commercial* (1965) 2 Camp. L. J. 272 ; *Chellorah & Co.* v. *Sundaram*, (1935) A.I.R. Mys. 122 ; *In re Bharat Vegetable Products Ltd.* (1951), 56 C.W.N. 29.

46. *Re British India General Insurance Co. Ltd.* (1970) 40 Comp. Cas., 554 ; *Lakshmi Sugar Mills Co. (P) Ltd.* v. *National Industries Corporation Ltd.* (1966) Comp. Cas. 31.

47. *Profulla Chandra Sinha* v. *Chhotanagpur Banking Association Ltd*, (1966) 36 Comp. Cas. 845.

(b) If execution or other process issued on a decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part. [48]

As regards this clause, a company is deemed to be unable to pay its debts if its acceptances are dishonoured,[49] or if the judgment creditor is informed that it has no assets in respect of which execution can be levied.[50] Even in the case of a decretal debt, question of bona-fide dispute may be raised and the court may, instead of passing winding up order, allow the petition to stand over on an undertaking by the company to file a suit for setting aside the decree.[51] Thus, for example, a company, having been sued on a debt, agreed to a consent decree but failed to satisfy it. In a winding up petition presented on that ground, the company claimed the debt comprised in the decree to be ultra-vires and had already filed a suit to set aside the decree. The Calcutta High Court held that the petition shall be adjourned till the disposal of the suit.[52]

In ascertaining the debts of a company, the sums under items such as "calls in advance", "share suspense", "forfeited shares account", and "deposit against premium" of which the company cannot be called upon to pay immediately will not be taken into account. The items such as "loans", "advances", and "outstanding liabilities" must be considered.[53]

It is submitted that if the return of the execution or other process issued on a decree or order of the court, is subjected to some reasonable grounds, the court being satisfied with such grounds, should excuse the company and allow it to continue its business. The company should be given one more chance as to comply with the decree or order of the court, provided there is no mala-fide intention on the part of the company.

(c) Lastly, if it is proved to the satisfaction of the court that the company is unable to pay its debts:[54]

This clause (c), as it will be observed, is quite distinct from Clause (a) discussed above. What the court has to find under this clause (c) is whether the company is "commercially insolvent" which

48. S. 434(1) (b).

49. *Re Globe etc. Steel Co.* (1875) L. R. 20 Eq. 337.

50. *Re Douglas Griggo Engineering Ltd.* (1963) Ch. 19.

51. *Bowes* v. *Hope, Life Insurance Guarantee Co.* (1865) 11 H. L. Cases 389.

52. *O. P. Mehta* v. *Steel Equipment & Construction Co.*, (1967) 1 Comp. L. J. 172.

53. *Sudhiya Nath Bhaduri* v. *Bihar National Insurance Co. Ltd.*, (1941) A.I.R. Pat. 603.

54. S. 434(1) (c)

has been defined by Sir James Williams, V. C., to mean [55] :

> "Not in any technical sense but plainly and commercially insolvent—that is to say, that its assets are such and existing liabilities are such as to make the court feel satisfied—that the existing and probable assets would be insufficient to meet the existing liabilities."

A company that is commercially insolvent can be wound up by the court. In determining whether it is commercially solvent, its ability to meet current debts must be determined. Though share capital is shown as a liability of the company for balance-sheet purposes, it is not really a liability.[56]

In determining whether a company is unable to pay its debts, the court shall take into account the contingent and prospective liabilities of the company.[57] What has to be ascertained is not whether if all assets were converted into cash, the company would be able to discharge its debts, but whether in a commercial sense the company is solvent. A perusal of the balance sheet must show that it assets are sufficient to meet its liabilities. If it is not so, the company may be regarded as commercially insolvent. A company may be ordered to be wound up if it is unable to pay its taxes in spite of demands, nor is able to furnish security.[58]

Moreover, where at the relevant time there is reasonable hope of tiding over the difficulty and emerging into a region in which the company might reasonably expect to carry on at a profit, it may not be ordered to be wound up on this ground.[59]

That the company is unable to pay its debts not necessarily entitles the petitioner to an order for the winding up of the company, as the discretion to pass such an order, even in the case of the inability of a company to pay its debts, is by S. 162 vested in the court.[60]

55. In *re Eurropean Life Assurance Socity*, (1949) L. R. 9 Eq. 122.

56. *Krishna Iyer Sons* v. *New Era Manufacturing Co. Ltd.* (1965), 35 Comp. Cas. 410.

57. S. 434 (1) (c).

58. *Coimbatore Transport Ltd.* v. *G. G. in Council*, (1949) A.I.R. Mad. 73 ; *Netraveli* v. *hitale Agriculture Products Ltd.* (1968) 1 Comp. L. J. 212.

59. *Sidhnath* v. *Bihar National Insurance Co.*, (1941) A. I. R. Pat., 603; See also *Avtar singh*, *Indian Company Law*, (1969) Second Ed. 391-92; *O. P. Mehta* v. *Steel Equipment & Construction Co.* (1967) Comp. L. J. 172, where the Calcutta High Court held that the mere fact that a disputed decree has remained unsatisfied, is not a proof of insolvency. The burden of proving insolvency is on the applicant.

60. *Aluminium Corporation of India Ltd.* v. *L. R. Cotton Mills Co. Ltd.*)1970) 40 Comp. Cas.259.

It is submitted that the mere fact that the liabilities of a company exceed its assets is not a sound ground for ordering the winding up of a company. The contingent liabilities are not always certain to arise. They may or may not arise. The court should look behind the veil and find out whether there are any changes as to carry on business at profit. If so, the court should not order the winding up of a company. Moreover, this clause (c) of S. 434 does not confer on any one an absolute right to seek a winding up order, but confers a discretionary power of the court to make an order that the company shall be wound up.

6. Just and Euitable :

A oompany may be compulsorily wound up if the court is of opinion that it is just and equitable that the company should be wound up.[61]

Clause (f) of Section 433 is the most general clause under which petitions for compulsory winding up are usually made. Though the court is not bound to construe this clause ejusdem generis as only covering grounds of a like nature with those specified in clauses (a) to (è), yet it will require grounds of a like magnitude before acting under the clause.[62]

The words 'just and equitable' are words of the widest significance and do not limit the jurisdiction of the courts in any way.[63] They leave it absolutely in the discretion of the court whether a winding up order should be made or not : The Legislature has in no way defined the circumstances by which the court is guided in the exercise of that discretion[64] except that the question as to its being just and equitable has reference to what is just and equitable from a judicial point of view, regard being had to all the circumstances of the case.[65]

In re Yenmidje Tobaco Co.,[66] it was argued that although the 'just and equitable' clause was not then limited by the application of the doctrine of ejusdem generis, yet the authorities showed that the clause would not apply axcept where the substratum of the company had gone, or where there was a complete deadlock, but Cozens-Hardy, M. R. observed that they were the two instances which were given in the authorities, but he should be very sorry to suppose that they were

61. S. 433 (f).

62. *Cowasjee* v. *Nath Singh Oil Co. Ltd.*,, (1921) 59 IC, 524.

63. *Re Bleriot Manufacturing Air Craft Co.*, (1916), 32 T. L. R., 253, 255.

64. *Re Bank of Gibralter and Malta*, (1865) L. R. 1 Ch. App., 69.

65. *Princess of Ruess* v. *Bos. & others* (1871) 5 HL 176.

66. (1916) 2 Ch., 426, 86, L. D., Ch. 1.

strictly the limits of the application of just and equitable clause as found in the Act.

For a long period ejusdem generis dominated interpretations of the just and equitable provision. But the rule has now been entirely abandoned, and the words are to be treated as conferring a discretionary power which is of the widest character and the courts are left to work out for themselves the principles on which such orders should be granted.[67] As such, there must be a strong grouudf or liquidating a company. Moreover, the court may refuse to make an order of winding up, if it is of opinion that some other remedy is available to the petitioner, and he is acting unreasonably in seeking to have the company wound up, instead of pursuing that other remedy.[68] Thus, when a winding up petition is made under this clause, it must be filed with absolute condour; it is the duty of the petitioners to disclose material facts as to the alternative remedies they have availed of, or which were available to them, and why they have not availed of the same.[69]

It is not possible to make an exhaustive list of all the circumstances in which it might be regarded just and equitable to wind up a company. But winding up on this ground has been ordered in the following situations :

(*a*) *Lack of Confidence in Directors :—*

The court may order a winding up of a company under this clause if it is satisfied that there is a lack of confidence in the directors of the company In Loch v. Blackwood (John) Ltd.[70], Lord Shaw has observed as under :

> "It is undoubtedly true that at the foundation of applications for winding up, on the just and equitable rule, there must be a justifiable lack of confidence in the conduct and management of the company's affairs. But this lack of codfidence must be grounded on conduct of the directors, not in regard to their private life or affairs, but in regard to the company's business. Furthermore, the lack of confidence must spring not from dissatisfaction at being out-voted on the business affairs, or on what is called the domestic policy of the company. On the other hand, wherever the lack of confidence is rested on a lack of probity in the conduct of the company's affairs, then the former is justified by the latter, and it is, under the statute, just and equitable that the company be wound up."

67. *B. H. McPherson* : "Winding Up on the Just and Equitable Ground", (1964) 27 M. L. R. 288. Followed in *J. M. Patel* v. *Extrusion Processes Ltd.*, (1966) 2 Comp. L. J. 74.

68. S. 443 (2) of the Act, 1956.

69. *N. M. Shah* v. *Atul Drug House* (1970) 2 Comp. L. J. 275.

70. (1924) A. C. 783.

It is submitted that where nothing more is established than that the directors have misappropriated the funds of the comyany, an ordered of winding up would not be just and eqitable, because if it is a sound concern, such an order must operate harshly on the rights of the shareholders. But if in addition to such misconduct, situations exist which render it desirable in the interests of the members that the company would be wound up, there is nothing in S. 434 which bars the jurisdiction of the court to make such an order.

(*b*) *Dead-Lock in Management* :

When there is a deadlock in the management of a company, it is just and equitable to order winding up.

The well known illustration is *Re Yenidje Tabacco Co. Ltd.*[71] :

> "W and R who traded separately as cigarette manufactures, agreed to amalgamate their business and formed a private limited company of which they were the shareholders and the only directors. The articles provided that any dispute was to be resolved by arbitration. A dispute arose which was submitted to arbitration, but one of them dissented from the award. Both these became so hostile that neithe of them would speak to the other except through the secretary. Thus there was a complete deadlock, and consequently the company was ordered to be wound up, although its business was flourishing."[72]

Similarly, in Re Davis & Collett Ltd.[73], rivalry between directors was held to be a good ground to wind up the company.

But the Madras High Court holds the view that the 'just and equitable clause' should not be invoked in cases where the only difficulty is the difference of view between the majority directorate and those representing the minority. The court further observed[74] :

> Where nine or ten directors belonging to different communities unanimously and soiidly take one view as against the minority of three holding other view and the company has been earning profits and has accumulated a goodwill, the mere incompatibility of good relations between the rival factions in the directorate is not sufficient for ordering winding up."

Similarly, the Calcutta High Court has held that winding up

71. (1916) 2 Ch., 420.

72. Expressly approved by the *Privy Council in Lock* v. *John Blackwood Ltd.*, (1924) All E. R., 1052; Applied : *Re Davis and Collet Ltd.*, E. R., 466; *Re Lundie Bros. Ltd.*, (1965) 2 All E. R., 692; *Re Expanded Plugs Ltd.*, (1966) 2 Comp. L. J. 74.

73. (1935) Ch. 693.

74. *Veeranchineni Seethiahar* v. *Venkatasubbiah*, (1949) A. I. R., Mad. 675

cannot be ordered on the grounds of friction and disputes between directors; the scramble for power is at the bottom of it all.[75]

It is submitted that the courts, however, do not insist on a paralysing dead-lock. The authorities show that there need not be a deadlock. A justifiable lack of confidence resting on a lack of probity in the conduct of a company's affairs is sufficient to obtain a winding up order.[76]

(c) *Bubble Company* :

If a company has no business, or assets, or where it is a defunct company, or the company is running at a loss continuosly, the company may be ordered to be wound up. In re Cuthber cooper & Sons Ltd.,[77] the Court refused to order windidg up the company on the ground of the directors' refusal to register the transmission of shares under the authority of the articles.

(d) *Losses* :

It is considered just and equitable to wind up a company when it cannot carry on business except at a loss. It will be needless, indeed, for a company to carry on business when there is no hope of achieving the object of trading at a profit.[78] But a mere apprehension on the part of some shareholders that the assets of the company will be frittered away, and that loss instead of gain will result, has been held to be no ground.[79]

Similarly, the Bombay High Court has observed that the court will not be justified in making a winding up order merely on the ground that the company has made losses, and is likely to make further losses.[80]

It is submitted that it is not for the courts to say whether the venture is one which would be successful, or would not be successful. This is a business matter for the shareholders to decide whether or

75. *Re Hind Overseas Ltd.*, (1968) 2 Comp. L. J. 95, where the learned Judge, A. N. Ray, makes an exhaustive review of all English and Indian authorities.

76. See *I. M. Patel* v. *Extrusion Processes Ltd.*, (1966) 2 Comp. L. J. 74; *Lock* v. *John Blackwood Ltd.*, (1924) A. C. 783. P. C.

77. (1937) Ch. 392; See also, *Charles Forte Investments Ltd.* v. *Amanda*, (1964) Ch. 240 (C. A.).

78. *Bachraj Factories* v. *Hirjee Mills*, (1955) A. I. R. Bom., 355; *Davis & Co.* v. *Burnswick*, (1936) 1 All E.R., 299.

79. See, *Re Mahamandal Shastra Prakashik Samiti Ltd.*, (1917) 15 All. L. J., 193.

80 *Re Shah Steamship Navigation Co.* (1908) 10 Bom, L. R., 107.

not they would engage in it. Where the company has, to all intents and purposes, come to an end without any hope or prospect of ever being successful, it should be ordered to be wound up.

(e) *Oppression and mismanagement* :

The effective remedy in the cases of oppression or mismanagement in a company, was, in the beginning, to get the company wound up by the court. Oppression, or mismanagement, was to be of such a nature as would make it just and eqitable for the court to wind up the company. Thus, where the court found that the majority shareholders had adopted an aggressive, oppresive, or squeezing policy towards the minority shareholders, it thought it just and equitable to wind up the company and issued an order to that effect. The mere fact that one of the members of the company has powerful hand in the management or affairs of the company by reason of his shares, does not make it just and equitable that the company should be wound up.[81] In this regard the Madras High Courts has aptly observed[82] :

> "Where the directors of a company were able to exercise a dominating influence on the management of the company and the managing director was able to out-vote the minority of the shareholders and retain the profit of the business between members of the family, and there were several complaints that the shareholders did not receive a copy of the balance sheet, nor was the auditor's report read at the general meeting; dividents were not regularly paid and the rate was diminishing, constituted sufficient ground for winding up."

An alternative remedy, therefore, has been introduced in Sections 397 and 398 of the Act, 1956, by which the court has the power to impose upon the parties whatever settlement the court considers just and equitable in the circumstances. Thus, instead of forcing a sound business concern to wind up, an effort is made to salvage it.

Accordingly, where on an application of a member or members, the court is of opinion that (a) the company's affairs are being conducted in a manner prejudicial to public interest, or in a manner oppressive to any member or members, and (b) to wind up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making of a winding up order on the ground that it was just and equitable that the company should be

81. *The Ripon and Sugar Mills Co. Ltd.* v. *Gopal Chetti*, (1932) A. I. R. P. C. I.; See also : *Kanika Mukherji* v. *Rameshwar Dayal*, (1966) 1 Comp. L. J. 77.

82. *Sabapathi Rao* v. *Sabapathi Press Ltd.*, (1925) A. I. R. Mad., 489.

wound up, or (c) by reason of any material change in the management or control of the company, it is likely that the affairs of the company will be conducted as aforesaid, the court may with a view to bring to an end the matters complained of, make such order as it thinks fit.[83]

Without prejudice to the generality of the powers of the court, any order under S. 397 or 398, may provide for—

(1) the regulation of the conduct of the compony's affairs in future;[84]
(2) the purchase of the shares or interest of any members of the company by other members or by the company;[85]
(3) in the case of a purchase of its shares by the company, the cousequent reduction of its share capital;
(4) the termination, setting aside, modification of an agreement between the company and the managing director, or any other director, the managing agent, the secretaries and treasurers, and the manager;
(5) the termination, setting aside, or modification of an agreement with any person, provided due notice hds been given to him and his consent obtained.
(6) Setting aside of any fraudulent preferences made within three months before the date of the application.
(7) any other matter for which, in the opinion of the court it is just and equitable that provision should be made.[86]

If the court orders any alteration of the memorandum, or articles of the company, the company shall not be at liberty to introduce any provision inconsistent with the order.[87] If the order sets aside or modifies any agreement with any managerial personnel, it will not give rise to any claim for damages ar compensation for loss of office.[88] Further any managerial personnel whose, appointment is so set aside shall not be capable of serving the company in any managerial capacity for a period of five years except with the leave of the court.[89]

83. See Ss. 397 (2) and 398 (2).

84. For example, *in Life Insurance Corporation of India* v. *Haridas Mundra*, (1959) A. I. R. Cal. 695, the court appointed a special officer with an advisory board to the total exclusion of the shareholders of a company to function subject to the terms and conditions laid down in the order.

85. Such an order was made in *Mohan Lal* v. *The Punjab Co. Ltd.*, (1961) A. I. R. Punj. 485.

86. *Mrs. Gajarbai* v. *Patni Transport (P) Ltd.* (1965) 2 Comp. L. J. 234.

87. S. 404 (1), See also Sub-Section (2), (3) and (4).

88. S. 407 (1) (a).

89. S. 407 (1) (b) and Sub-Section (3).

This remedy of winding up to eliminate oppression or mismanagement is, it is submitted, worse than the disease because it generally means that the business of the company would pass into the hands of the majority who would ordinarily be the only available purchaser and the break up value of the assets may be small.

(f) Loss of Substratum :

The subsratum of a company is deemed to have gone when :

(i) the subject matter of the company is gone[90], or
(ii) the object for which it was incorporated has substantially failed [91]. or
(iii) it is impossible to carry on the business of the company except at a loss[92], or
(iv) the existing and possible assets are insufficient to meet the existing liabilities of the company.[93]

However, a temporary difficulty which does not knock out the company's bottom should not be permitted to become a ground for liquidation. Take, for instance, in Re Shah Steam Navigation Co.[94] :

> A steamship company was incorporated with the principal object of acquiring a firm's business of plying steamers. This business was acquired, but very soon afterwards grave differences arose between the company and the firm. As a result the company had to return seven out of nine steamers acquired from that firm. Subsequently losses were also incurred, yet an application for winding up on the gronnd of failure of substratum was rejected, as the original objects had not become impossible of attainment. The company had

90. In re *Cine Industries & Recording Co. Ltd.* (1942), 44 Bom. L. R., 387; *Re Baku Consolidated Oilfields Ltd.*, (1944) 1 All E. R., 24; *Leanco Products Ltd.* v. *Rameshwer Lal*, (1954) A. I. R., Cal.. 144; *State of Andhra Pradesh* v. *Hyderabad Vegetable Products Co. Ltd.*, (1963) A. I. R. Andhra, 243; *Mohan Lal* v. *Grain Chambers*, (1968) A. I. R. S. C., 772.

91. *In re German Date Coffee Co.*, (1882) 20 Ch. D., 169; *Seth Mohan Lal* v. *Grain Chambers*, (1968) A. I. R. S. C., 772.

92. *Davco Products Ltd.* v. *Rameshwar Lal*, (1954) A. I. R. Cal., 195; *Mohan Lal* v. *Grain Chambers*, (1968) A. I. R. S. C., 772.

93. *Mohan Lal* v. *Grain Chambers*, (1968) A. I. R. S. C., 772; *Kaithal Cotton and General Mills Co., Ltd.*, (1961) 3 Comp. Cas., 461 (467); *Re Haven Gold Mining Co.*, (1882) 20 Ch. D., 151.

94. (1908) 10 Bom. L. R., 107.

bought other steamers and there was nothing to prevent further purchases.[95]

Similarly, a mere temporary suspension of business cannot lead to the conclusion that the substratum of the company is gone justifying a winding up order.[96]

Thus, it is a question of fact in each case whether the substratum of the company which is gone or not. In *Seth Mohan Lal* v. *Grain Chambers Ltd.*[97], Shah J has aptly observed :

> "The substratum of a company can be said to have disappeared only when the object for which it was incorporated has substaintally failed, or when it is impossible to carry on the business of the company except at a loss or the existing and possible assets or in sufficient to meet the existing liabilities.

Where owing to long drawn out litigation the business of a company had come to standstill and a part of its business was banned by legislation Shah J. held that "we cannot on that ground direct that the company be wound up. The company could always restart the business with the assets it possessed.[98] Similarly, in re Bengal Flying Club[99], before the Calcutta High Court, by reason of the acquisition, of its assets, a club could not carry on its normal activities.

However, the court refused a winding up order on the petition of a creditor as it appeared that other club activities were going on. Even where a company had lost its business through nationalisation, the court refused an order on the ground that negotiations of compensation could be better conducted by the directors than by the liquidator.[100]

To sum up, the 'just and equitable' rule, though wide enough, has its own significance. It is true that Clause (f) of S. 433, is

95. See also *Murlidhar* v. *Bengal Steamship Co.*, (1920) A. I. R. Cal. 722.; *Bukhtiarpur Bihar Light Ry. Co. Ltd.* v. *Union of India*, (1954) A. I. R. Cal. 499.

96. *C. P. Gnanasambandham* v. *Tamilnad Transports Ltd.*, (1971) 41 Comp. Cas. 26.

97. (1968) 1 Comp. L. J., 275.

98. *Seth Mohan Lal* v. *Garain Chambers. Ltd.*, (1968) 1 Comp. L. J., 286; See also in *Re Suburban Hotel Co.*, (1866-67) 2 Ch. App., 750.

99. (1966) 2 Comp. L. J. 213 (Cal).

100. *Re Eastern Telegraph Co.*, (1948) 18 Comp. Cas., 46; Re Bukhtiarpur Light Ry. Co., (1954) A. I. R. Cal., 499; *Lokenath Gupta* v. *Credits (P) Ltd.*, (1968) 1 Comp. L. J., 253; *George* v. *Athminattam Rubber*, (1968) A. I. R. S.C., 772.

not to be read ejusdem generis with the other clauses (a) to (e) of the said section. Clause (f), or 'the just and equitable' clause as it is commonly referred to, operates independently, and has a precise import and content of its own. Justice, equity and good conscience is a statutory rule in jurisprudence which prompts company courts to act in real and compelling circumstances particularly because it relates to the winding up of a company. Existence of frictions amongst shareholders, vague allegations against the quality of management by the person incharge of the company, and mere exclusion from management, cannot by themselves be a ground for winding up of a company. Proved malversation and conversion of funds, deliberate and want on oppression by the management in power, of the minority shareholders, with a view to make personal illegal gains, indulging in subversive activities so as to jeopardise the substratum of the company, a justifiable lack of confidence in the conduct and management of the company's affairs due to lack of probity on the part of those in management, where there open mismanagement, such are instances, though not exhaustive, when the courts exercise their jurisdiction under the 'just and equitable' rule to wind up companies.

(g) *Fraudulent Purpose* :

If a company is formedwith intent to carry out a fraud, or to cary on an illegal business, it is just and equitable to order winding up of the company. Of course, fraud in the issue of prospect[101], or fraud in carrying on business[102], is not ground for winding up a company. On the other hand, single or an isolated fraud other than series of fraud or a planed basis to enrich the company, is not to be considered a just and equitable ground to wind up a company. The test is whether it is an isolated fraud to enrich the fraud or it is a chain of fraud to enrich the company. In the latter case, the compauy is hit by the just and equitable rule for the purpose of winding up.

In re Thomas Edward Brinsmead & Sons[103], the company was found to deceive the public into believing that it was the J.B. & Sons. The company was ordered to be wound up. Similarly where a company is formed for conducting lottery, the mere facts that some other objects of the company are philanthropic will not protect it from being wound up on just and equitable ground when it appears that

101. *Re Haven Gold Co.*, (1882) 20 Ch. D. 151 (C. A.); See also *Oriental Navigation Co.* v. *Bhanaram Agarwala*, (1922) A. I. R. Cal. 363.

102. *Re Medical Battery Co.*, (1894) 1 Ch. 444.

103. (1897) 1 Ch. 45.

the company is formed for an illegal purpose.[104]

It is submitted that in exercising its discretion in the making of a winding up order, the court should not take into consideration the motive of the petitioner in presenting the application for winding up. If the petitioners have made out a case for winding up, e.g. by placing materials before the court so as to satisfy it that the company is insolvent, or that its substratum is gone, the court should consider whether it should make a winding up order or not. If it appears to the court that it is just to make such an order, the court should make it and not be guided only by the motive with which the petition was presented. But the court would not order a winding up when a petition has been brought for a purpose other than that of securing a winding up. The claim for winding up must not be a pretence, and there must not be any intention or motive behind the ostensible petition.[105]

104. *Universal Mutual Aid and Poor Houses Association* v. *A. D. Thapa Naidu*, (1933) A. I. R. Mad. 16.

105. See also : *Bachharaj Factories Ltd.* v. *Hirjee Mills Ltd.*, (1955) Bom. L. R. 378; *Re East Kajoria Collieries (P) Ltd.*, (1915) 35 Comp. Cas. 180.

LEGAL EDUCATION IN INDIA

*Veena Bakshi**

Legal Education is a subject which has attracted the attention of legal scholars throughout the world and rightly so because legal education produces lawyers i.e. men of law who in turn are responsible for reconstructing the fabric of the society. In the United States the writings of eminent scholars have been responsible for the prestigious position the lawyers and the law schools hold in the contemporary American Society. This is mainly due to the new role that has been given the lawyer of today in consonance with the changing world where socialism has occupied a place in men's hearts.

In a country like India where there is a wide disparity between the haves and the have-nots, lawyers can give a lead to the nation by discarding their traditional role of litigating lawyers and by taking on a new role of social reformers. In the struggle for Independence in India lawyers played a major role.[1] The lawyers of India are once again needed today to be instrumental in bringing about social change in the society and leading the country towards the realisation of the much cherished dreams of our Constitution makers.

We must prepare our lawyers for the new role that they have to play. This can best be done at the level of their legal education.[2] We must change our system of legal education to suit modern India.

> With increasing awareness and self-assurance western law and legal education have more and more proceeded on the premise that the legal order can and should make a significant contribution to the wise and effective harnessing of human energy and talent available to the society. In intellectual and social history, need and the perception of the need—especially when perception cannot be the insight of the individual philosopher but must be that of a large, participating profession—are not always

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1. A glance at any listing of leaders of the Indian national independence movement will reveal a predominance of lawyers and men who had had legal training. The bars of every section of the country supplied a number of great national leaders.

2. Arthur Taylor von Mehren : "In my Judgement the most promising—indeed perhaps the only solution is legal education".—"Law and Legal Education in India ; Some observations", 78 Harv. L. Rev. 1180 at 1185 (1965).

contemporaneous. It is an intellectual achievement of great social significance that both common law and civil law thinking today seek a legal order that explicitly relates legal rules, procedures and principles to social and economic purposes.[3]

History of Legal Education in India

India was under the control of the British Government until the year 1947. Before Independence a large number of students, intending to practice law, used to go to England to study law.[4] Law schools in India were started as a matter of necessity—to cater to the needs of the lower courts and for carrying on administration on this vast sub-continent.[5] They were downright bad and English influenced. Perhaps the most important factor responsible for destroying the incentive for the development of a healthy and meaningful attitude towards legal education in India, and conceivably in the entire commonwealth was the unfortunate absence of such incentive and attitude in England itself.[6]

Legal Education Today

There are about a hundred and thirty law schools in India today. But they are very conventional. Students who cannot get admission into other prestigious disciplines join law. Instruction is given by the lecture method which does not evoke any interest in the students. The subjects taught are conventional and almost invariably include Criminal Law, Company Law, Family Law, Contracts etc. It used to be a two year course but the Bar Council of India under its statutory authority (under the Advocates Act of 1961) ruled that the course be changed from a two year one to three years with effect from July 1968.[7] This in fact has been done and the LL.B course all over India is a three year programme now. There is an examination at

3. *Id.*, at 1181.

4. A study of the list of admissions into Lincoln's Inn (one of the four inns) reveals that from 1861 to 1893 one hundred Indian students studied there to become barristers.

5. The top positions on the Bench and, indirectly, even at the Bar in India were reserved for Englishmen or for Indians educated in England.

For a sketch of the development of the Legal Profession in India see 3 Law & Society Review no. 2 & 3. (Nov. '68—Feb. '69).

6. P.K. Tripathi, "In the Quest for Better Legal Education", 10 J. I. L. I. 469 at 470 (1968).

For quite some time attending a certain number of dinners for a certain number of terms at one of the four Inns was the only requirement for being called to the Bar.

7. Delhi, however, started its first three year course in July 1966.

the end of each year.[8] The examiners and papersetters are external, therefore there is a fixed syllabus which the teachers must cover and they do try and cover it even if it is at the cost of efficiency. The students read just two weeks before the examinations and pass, sometimes with good marks, thanks to the help books published by enterprising publishers of which there are many in this country. The students are not in the habit of buying text-books and many of them cannot even afford them and the library facilities are very poor. As India does not live in the cities, so Legal Education in India does not begin and end in cities like Delhi. There still are some schools of law which have no building, library or a regular staff. A few lawyers get together and teach in the evening—voluntarily. The teachers lay stress on the rules written in black and white. They do not care to go into the policy questions or the objectives behind the Act or its utility. This information is sufficient to get good marks in the examinations because the question paper only tests the rule knowledge. The papers are set in a very conventional, unimaginative way. The students are usually expected to write short essays on five topics which they can choose from a total of about nine or ten. It is very easy to predict the question paper. The questions of the previous year are usually not repeated so one can safely leave out those. There is ample choice so one can leave out the more difficult topics and do the easy ones. In short, the question papers are not designed to test the knowledge of the student. Stress is laid on rote memory. The Legal Profession is now becoming aware of the importance of legal education. Indian scholars of late have given much thought to this subject. The result has been encouraging. Many new changes have been brought about especially in the University of Delhi.

The Delhi Experience

A committee headed by Mr. Justice P. B. Gajendragadkar was appointed by the University of Delhi, on April 20, 1963, "to study the problem of the reorganisation of legal education in the University of Delhi". The committee made recommendations calculated to revolutionize the methods of teaching and examinations at the Law School. All the recommendations of the Gajendragadkar committee would have been meaningless if there had been no one to implement them. Dean Tripathi[9] carried out the recommendations adapting

8. Some schools, however, have divided the year into two terms and there is an examination at the end of each term.

9. Professor Tripathi is presently a member of the Law Commission of India.

them to the circumstances in respect of time and available resources.

The LL.B. course has been made a three year, six-term course beginning from July, 1966. The courses have been increased to thirty which must be cleared five in a term. A large number of new courses like the Indian Legal System, International Trade, Election Laws have been added. Seventeen courses are compulsory and the remaining thirteen must be chosen from a total of twenty-three optional subjects. External assessment has been abolished and the teachers assess their own students.

The major revolution has been in the mode of teaching. The lecture-method has been replaced by the Socratic method of teaching. The case-method is well set in. The students read their assignments beforehand and can get much more out of a class. They very eagerly look forward to having a class now where they can join the firing line—result : increased attendance.

> Passing through the busy corridors of the Law School between the end of one teaching hour and the beginning of another teachers are thrilled to hear students continue the threads of classroom discussions with the assiduousness of enlightened attachment or partisanship to one or the other line of approach to the problem just discussed in the class. This to the teacher is the concrete testimony of the change ; the student is now in it.[10]

Reforms

Before we talk of bringing about any reforms or changes in Legal Education we must ask ourselves some basic questions like what is the purpose of Legal Education ? What are we preparing Law students for ? What role, if any, they can play in bringing about a social change ? What kind of a society do we want to build ?

We the people of India have given to ourselves a Constitution which provides for a socialistic pattern of society which we must achieve through democratic means.

According to Professors McDougal and Lasswell,[11]

> the supreme value of democracy is the dignity and worth of the individual, hence a democratic society is a commonwealth of mutual deference—a commonwealth where there is full opportunity to mature talent into socially creative skill, free from discrimination on grounds of religion, culture or class. It is a society in which such specific values as power, respect and knowledge are widely shared and are not concentrated in the hands of a single group, class or institution—the state—among the many institutions of society.

10. P. K. Tripathi, "In the Quest for Better Legal Education" 10 J. I. L. I. 469 at 486 (1968).

11. M. S. McDougal & H. D. Lasswell, "Legal Education and Public Policy : Professional Training in the Public Interest", 52 Yale L. J. 203 at212.

In addition to these values any democratic society, according to them, can rightfully aspire to the achievement of other universally sought values like safety and health which are not equally distributed. Sickness is a poor man's burden, partly through exposure to hazardous occupations, partly through inadequate hygienic training, and partly through lack of capacity to command the best preventive and therapeutic help."[12]

We do realise that there can never be equality or justice as long as there are men who do not have a decent standard of living. We must eradicate poverty before we can talk of justice, equality etc. Engineers are doing their job in the modern India by improving technology which in turn raises the economic standard of the country and the people. The medical doctors are doing their job by relieving pain and suffering. We must see what role the men of law can play. It is for them to uphold democracy which India cherishes most. We must produce men who are capable of making democracy meaningful to the common man and it must be done soon for the time taken may prove vital to the survival of democracy and constitutional government in the land.

In the present age somebody might say that we cannot assume that every Indian wants democracy, that is, every person wants the same social goals. There might very well be some people who abhore democracy. We agree that for anyone to advocate democracy as a set goal is very dogmatic. The very idea of democracy that we uphold demands that we give everyone the choice of deciding what he wants the social goals to be. But we should provide them with the tools for deciding for themselves. A democracy can succeed only if each man decides for himself. If a man rejects democracy he should have reasons for doing so and should not do it in ignorance or be led by clever politicians who take advantage of people's ignorance. If everybody consciously rejects democracy then probably it is not worth having. By consciously is meant knowing the full implications and alternatives.

Professor Charles Black has, however, pointed out that the work of the legal profession has been traditionally defined as work *within* a social consensus, a kind of fine-grained implementation and generation of social values and he traces much of the current

12. *Id.*, at 219.

anxiety in the law schools to the sense that many current "legal issues" cannot be resolved within the standard limits of the legal system.

> The lawyer can see that the culture in which he lives and in which his law must grow or not grow is light years away from being ready to put forth the kind of effort and sacrifice it would take to give relief against the injustice of poverty. I have implied that decent living ought to be a civil right. With this concept, if the society workingly accepted it, lawyers could deal. But the society does not accept it—and the lawyer who would mold it into the shape of law feels no clay coming into his hands.[13]

Professor Black's argument is directed at protecting a tradition of analysis and evaluation—"the reason of the law" against movements to transform legal education into a vehicle for "involvement" and "the present relief of misery". His point is only that law schools serve particular intellectual functions which should not be weakened in favour of more "activist" forms of education.

We have to strike a balance between the old role of law schools (intellectualism) and the new role of turning out lawyers who would in turn build the society. For this we have to make our legal education "relevant" to the present society. Therefore the job for the law schools is to contribute their special and traditional skills of "keen thought and research···about the rational governance of our polity" to the necessarily larger and essentially non-legal efforts at social change.

Arguing that legal education is psychologically destructive as well as intellectually bankrupt, Savoy advocates radical revision of theory, practical techniques and the day to day details of the educational experience.[14]

> The positions of both Black and Savoy raise the problem of how law and politics are to be studied and understood in a time of social conflict and social change. For the pragmatists such understanding was to be achieved primarily by avoiding rigid doctrines and testing concepts against an easily-understood reality. Their approach assumed an underlying harmony of values in which there was a broad agreement about the 'meaning' of particular controversies and the nature of their just and equitable resolution. Such an agreement cannot easily be resumed today. The result is a difficult challenge : the need not for new facts alone, but for new ways of understanding facts and for working with that understanding.[15]

13. Charles Black, "Some Notes on Law Schools in the Present Day", 79 Yale L. J. 505 at 509 (1970).

14. Savoy, "Toward a new Politics of Legal Education", 79 Yale L. J. 444, 457-62, 481-96, (1970).

15. Rand E. Rosenblatt, "Legal Theory and Legal Education", 79 Yale L. J. 1153, 1178 (1970).

Frank's concern with the effective administration of individualised justice heavily influenced his ideas about the reform of legal education. The core of his proposed lawyer's school was an effort to sensitize law students to the "realities"—in Holmes language, to "material consequences"— of the legal system. Training by observation and supervised practice would serve the double purpose implied by Holmes theory : law students would become simultaneously better practitioners (through accurate knowledge of reality) and more vigorous reformers (through concrete experience with courthouse abuses).[16]

Many law school deans and professors have accordingly concluded that the road to reform lies in specifying at last, that research of an academic (rather than vocational) nature is one legitimate function of law schools as *institutions* and cannot be left only to idiosyncratic interests of individual teachers. Major reforms have been proposed to achieve this new institutional goal : the acquisition of funds to support academic scholars and students and the establishment of multi-disciplinary divisions or "law centres" devoted to research on pressing social problems and how law can contribute to their solution.

Money and institutional structure are not the only elements of the problems. The effort to redefine legal scholarship and legal training for a "public policy" branch of the profession necessarily involves conceptions of the legal system and of the entire society—of how they are operating now and what should be done (if anything) to change them.[17] The clue as to how these conceptions should be developed is taken not from jurisprudence and intellectual history, but from the pressing social problems with which the critics are rightly concerned : consumer protection, environmental regulation, criminal law reform and a host of other issues. Law work in these areas frequently involves the use of theories and methods from the social and natural sciences particularly behavioural sciences such as psychology and sociology and "hard" disciplines such as economics and statistics. It is in this framework that the intellectual explosions of law centres is expected to take place, while the major philosophical questions of previous years, concerning the nature and function of law, are increasingly regarded as settled, impenetrable or irrelevant.[18] There appears to be a consensus that efforts should be turned towards developing more precise more empirically—leased legal studies in particular areas of social pressure and change.

16. See Jerome Frank, *Courts on Trial*, 235, 240 (1950).

17. *Supra* note 11.

18. Stevens, I *Change in Higher Education*, 32, 37 (1970).

According to Professors McDougal and Lasswell,

> the first indispensable step toward the effective reform of legal education is to clarify ultimate aim. We submit this basic proposition : if legal education in the contemporary world is adequately to serve the needs of a free and productive commonwealth, it must be conscious, efficient and systematic training for policy making. None who deal with law, however defined, can escape policy when policy is defined as the making of important decisions which affect the distribution of values. What is needed now is to implement ancient insights by re-orienting every phase of law school curicula and skill training toward the achievement of clearly defined democratic values in all the areas of social life where lawyers have or can assert responsibility.
>
> The lawyer is today even when not himself a 'maker' of policy, the one indispensable adviser of every responsible policy-maker of our society—whether we speak of the head of a government department or agency, of the executive of a corporation or a labour union, of the secretary of a trade or other private association, or even of the humble independant epterpriser or professional man[19].
>
> The lawyer is a member of a learned profession—of a skill group which has the timerity to make a profession of tendering advice to others. For nurturing him in the necessary skills and information society offers him a peculiarly long period of training and incubation ; and if that period is filled with the proper experiences, he can—our whole educational system is based on the premise—be trained for responsible leadership. To no one else can clients and members of the public reasonably be expected to look for that enlargement and correction of perspective, that critical and inclusive view of reality, that is based on the disciplined exercise of the skills which the layman is not given the opportunity to acquire.[20]

According to the Yale thesis implementation of values requires first "trend-thinking". His goals clarified a policy maker must orient himself correctly in "contemporary trends" and "future probabilities". Implementation of values next requires scientific thinking. In a democratic society a policy-maker must determine which adjustments of human relationships are infact compatible with the realization of democratic ideals. Which procedures actually aid or hamper the realization of human dignity ? How can the institutions of legislation, adjudication, administration, production and distribution be adjusted to democratic survival ? What are the slogans and doctrines—in which contexts of experience—that create acceptance of democratic ideals and inspire effort to put them into practice ? In short, the policy-maker needs to guide his judgment by what is scientifically known and knowable about the causal variables that condition the democratic variables.[21]

19. *Supra* note 11 at 208-209.
20. *Id.* at 211.
21. *Id.* at 214.

The assumption of a community of interests, a harmony of ends was prominent in Llewellyn's proposal for educational reform. Like Frank, Llewellyn sought to achieve both increased technical competence and more professional commitment to the public good through immersing students in the concrete details of law work. He urged teachers of the case method to reject abstract analysis of rationalizations and to attack cases "from the front" as they appeared to the lawyer as he handled them.[22]

While Llewellyn was thus more explicit than Frank about the need to go beyond the case method of training he too did not clearly distinguish and then connect the problems of technical proficiency and social theory, particularised description and general values, educational reform and social change. Like Frank, he proposed to transcend the case system by immersing students even further in its details, a broad reality, in effect, was to be refracted through the marginal growth of legal doctrine.[23]

We do not propose to discard the traditional role of a lawyer. It is the lawyer's mastery over constitutions, statutes, appellate opinions and text-books and his skill in operating the mechanics of both governmental institutions and private associations that set him apart from, and give him a certain advantage over such skill groups in our society as diplomats, social psychologists and biologists. But much of what currently passes for instruction consists of the reiteration of a limited list of ambiguous terms cut as under from any institutional context that would set a limit to their ambiguities. Thus a student may learn that if a discussion begins with "contract", it must then proceed by rearrangement of certain meanings to be assigned to a small list of well-known words such as "offer and acceptance", "consideration", "mistake", "performance", "condition" and so on ; but he knows very little unless he has also learned to complete the meaning of these terms by reference to representative institutional contexts and important social values.

The training in the lawyer's repertory of skills should be given a new sense of purpose and new criteria of relevance. It is a fundamental truth of practical and scientific psychology that purpose increases ease of learning ; students can be expected to acquire more rather than less mastery of legal technicality when the comparatively small repertory of key legal terms is considered in relation to the goals and the vital problems and processes of democracy, rather than in a formalistic framework, unoriented towards policy.

22. See Llewellyn, "On What is wrong with the so-called Legal Education", 35 Colum. L. Rev. 651, 669-70 (1935).
23. *Supra* note 15.

There comes a time as Mr. Justice Holmes long ago remarked, when energy can be more profitably spent than in reading of cases. Given a new sense of purpose and trained in the skills and information which should be common to all policy-makers, the lawyer cannot escape becoming a better lawyer. Schools which prepare themselves to emphasize such purposes and to offer such training may succeed in becoming more truly vocational even as they grow more genuinely professional.[24]

Existing Curriculum Not Oriented Towards Achievement of Democratic Values.

Our existing law school curriculum is not adequately oriented towards achieving the distinctive values and conditioning variables of a free society. The organizing principle still appears to be legal technicality. Problems are defined and classified in terms of overlapping legal concepts of high level abstraction rather than in reference to social objectives. Little orientation is given in the historical and contemporary trends that are most helpful in determining what problems are most important and what objectives are most practicable.

The existing courses should be given a functional approach. They should be made relevant to the needs of the present society. Not only the legal syntax but also all legal structures and procedures must be related to the larger institutional contexts, the factual settings that give them operational significance.[25]

The new courses could be developed on the lines suggested by Professors McDougal and Lasswell. The contents of the courses would then include the following :

Contracts—History of consideration. Cases on consideration are taught without going into the question of how this concept originated and its historical development. The students should be taught what agreements are important in our society, how they affect the distribution of values, and to what extent they will be enforced, under what conditions and how.

Jurisprudence—Policy issues and value preferences should be better understood and even more systematically understood, which may suggest the need for more emphasis on Jurisprudence. Indian legal theory, if it could be formulated, might make a significant contribution to jurisprudential thought. This could be done at the LL.M. level. A group of LL.M. students could do joint research

24. See *supra* note 11, at 216.

25. For a systematic analysis of the larger context, see Malinowski, *Culture* in 4 Encyclopaedia of Soc. Sciences, 621 (1931).

work and the papers they produce could also form a basis for the new Jurisprudential course in India.

The Hindu concept of *Dharma* needs to be understood first and then taught.[26] A large number of topics can be taken from specific subjects like contracts, torts, criminal law, corporation law etc. for jurisprudential treatment. In this way, the student treads on familiar ground and the teaching of Jurisprudence becomes meaningful rather than abstract and unreal.[27] Various schools of jurisprudence should be discussed by resort to original works of ancient as well as modern philosophers and jurists. At present Salmond's *Jurisprudence* is prescribed as a text-book in most Indian Law Schools and the students are required to read a little bit of Maine and a little bit of Paton and the student's feast of reason is complete. There will be little excuse for allowing students to become law graduates without even an awareness of the trends in legal theory and philosophy.

> The main purpose of studying jurisprudence is to view the social problems facing the community and to provide suitable solutions for them. It is therefore natural that for a teaching of jurisprudence in this country, the Indian social background, the customs of the Indian people and the history of its laws must be constantly kept in mind.[28]

With the study of Indian and Western thoughts on a given problem the solution which comes out of the fusion of Eastern and Western theories must be most suitable for Indian society.[29]

Property Law[30]— The organizing focii of the 'property' courses must be such goals as the use of land for providing adequate, cheap

26. See S. Rangarajan, "Jurisprudence Curriculum and the Natural Law Concept", 3 Jaipur L. J. 143 at 152.

27. In the teaching of Jurisprudence in our country we have not yet focused our eyes on practical problems. That is why it is regarded by many, unfortunately, as a mere academic piece of study, one with which the student is concerned for the purpose of the examination only, having nothing to do with the practical requirements of a judge or a lawyer.

28. N. R. Sharma, "Teaching of Jurisprudence in India", 3 Jaipur L. J. 215. See the same journal for Indian material on motive, intention and theories of Punishment.

29. Paton, *A Text book of jurisprudence*, 1 (2nd ed. 1951).

30 See *supra* note 11 at 248 for a brief outline of the property course. It includes the techniques for expanding planning area, techniques for establishing and maintaining 'physical design' and permissible uses of area which further includes 'planning laws'. Can affirmative measures be worked out to supplement the negative measures of police power regulation ? Community purchase of land. How can this method of control, used so successfully in Scandinavia, be adapted by this country ? Institutional structure. How can long-term planning be best introduced into a short-term political structure ? Techniques to provide adequate housing.

housing to everyone and for growing more food. The concept of property in historical perspective and the present composition of property and its distribution among people must be studied and to see how the traditional concepts may be changed to achieve these goals.[31]

Elements of the Indian Legal System—At present great emphasis is put upon 'historical' studies which end up being a narration of facts without coming to grips with causes or conditions, leaving the potential policy-maker helplessly inadequate for modern conditions. Historical studies must be made useful by relating them to past and present conditions. In such an organization institutions like the Mayor's Court, the Supreme Court etc. would be studied with reference to the historical development of the concept of 'Rule of Law' in India or to trace the independence of the Judiciary from the executive.

The Panchayat system has been revived by the Government in villages where eighty percent of the Indian people live. The course should include research studies on the working of the village and caste panchayats as agencies for dispute settlement. A great many disputes are settled out of court. Research should be done to find out the traditional means available and employed by people, in the present system, to settle disputes.

The Law teachers should make it plain to the student not only that there are different ways of settling disputes but many ways of getting results other than by disputation.

Torts—What are the important injuries, intended or unintended recurring in our society? How could the prevention of injury and the lessening of loss to society as a whole be realized as a goal in addition to the goal of readjusting the distribution of loss among specific individuals? How can "libel and slander" be handled in a way that will promote respect for civil liberties and realistic reporting and comment in the channels of public communication?

Business Association—How can business managers be made more responsible to investors, labour, consumers and the public interest?

Insurance—Why link "fire" and "life" insurance? What is the function of each? If the most general function of insurance is to make certain by present relinquishments a future flow of stable and adequate income, should not the function be performed by government, since its taxing power can base the required relinquishments on ability to pay?

31. The concept of 'common' property, the basis of the Israeli "Kibbuzim", might be a possible solution.

Administrative law—Should be studied in the factual context to make the syntax with which it deals meaningful. Explicit and creative attention should be given to how "administration" can be adapted or even further extended for the better promotion of democratic values.

In the Delhi Law School new subjects like Election Laws, Public Control of Business etc. have been added. In the other Law Schools the duration of the course has been made three years but in most of them the curriculum remains the same. These subjects should be added in all the law schools and important modifications made in the content of each course. The law schools should be concerned with the city's problems and in any extension of the Law school's concerns priority should be accorded to subjects like urban redevelopment, mass transportation, environmental health and amenities, fair employment, civil rights, criminal law administration, consumer protection. A course in economic development is imperative for developing countries.[32]

At this stage the question may arise whether these problems are not more appropriately the concern of the political scientist, economist, sociologist and social psychologist, the social worker, public health physician and city planner?

Professor Cavers gives the answer to these questions thus :

> The lawyer's concern goes to the quality of the social process.... The typical problem confronting the lawyer is how to protect the individual against the bureaucracy... Sometimes though checks have been provided there is no one capable of imposing them. In other areas, the typical problem is how to provide a bureaucracy capable of protecting the individual or how to assert the public interest effectively in classes with privated. interests that often are more ably represented or more aggressively pressed. These tasks may entail the enforcement of existing law or the creation of new law. Troubles may spring from the obsolescence of legal instrumentalities or procedures which have persisted for want of studies searching enough to reveal their efficiencies. There may be need for social inventions. There will certainly be need for the identification of goals and the articulation of issues where goals conflict.[33]

"These problems", he says,

> all give rise to law-jobs, but jobs not likely to be done if we depend on the initiative and resources of individual lawyers or on improvised political

32. Mr. Justice Holmes observed in 1897 : "For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics." "The Path of the Law", 10 Harv. L. Rev. 457, 467 (1897).

33. David F. Cavers, *Law in a Changing America*, ed. Hazard at 139.

> action. In our complex communities a social order in which due process, democratic process and the equal protection of the laws are actually enjoyed will not come about simply as a result of some lawyer's battles for underdog clients or occassional exposures by crusading journalists. Devising new institutions and procedures to replace outworn or outdated ones, and ascertaining how their ends can be achieved without the sacrifice of values basic to the law, are tasks that can best be assumed by the law schools.

In the received traditions, law schools are viewed as teaching institutions, whose research activities are essentially incidental. Yet in problem areas he has mentioned our need is not to teach but to learn, and to learn a very great deal. That learning requires major organized investigation, with corresponding costs in manpower and money. Studying and administering to the cities' many troubles will require enlistment of persons representing a variety of disciplines. The lawyer's task is the synthesis of knowledge and skill of diverse other disciplines and professions in formulating policies and planning institutions and procedures, and the translation of academic learning into action. To discharge this role the law men will need to be literate in the languages and familiar with the methodologies of the social sciences, to be sensitive to their concerns and to appreciate their potentialities and limitations. Thus equipped, law men should be able to workd effectively with the experts and in the process to instil in the latter a clearer awareness both of values to which they as spokesmen for the law are committed and of the problems to which their legal training has rendered them alert.

It is as a base for institutions, in universities and in government, concerned with the application of social sciences that the law schools, which can command resources sufficient to perform that function, can play a new role.

In India there is the necessity of training law students in at least the rudiments of social sciences so that they will be sensitive to dilemmas created by the grafting of one society's institutions on to a different culture. All this has little relation to what law schools have traditionally done. For Institutions that have been fed a steady diet of judicial decisions, the notion of finding out what is actually happening to people under the laws must seem utopian or the reverse. But we must do this in order to make law 'relevant' to our needs even though it is a difficult task. Even Jerome Frank who argued persuasively in favour of "lawyer schools" recognized the importance of the related study of disciplines other than law.

But here we must sound a note of caution. As Professors McDougal and Lasswell put it "Heroic but random, efforts to integrate 'law' and 'the other social sciences' fail through lack of

what is being integrated, and *how* and *for what purposes*. All attempts to relate such fields or courses to each other are frustrated by lack of clear social goals and inadequate criteria of importance. The relevance of 'non-legal' materials to effective law teaching is recognized but efficient techniques for the investigation, collection and presentation of such materials are not devised." Therefore, before we embark on the new inter-disciplinary approach, extensive research should be done.

To develop skills of thought, observation and management, Professors McDougal and Lasswell recommend the preparation of materials on thought and language that can be kept readily available to the law student during all the years of his training. The incentive to master the tools of thought and language should be continually reinforced by a word-consciousness cultivated by the teachers in the classroom. As a guide and companion to many of the skills valuable to the law student it is advisable to prepare and keep up to date through constant revision a collection of materials that may be called "The Skill Book".

> When we take our values for granted we may not only make mistakes, but find ourselves at a disadvantage in the articulate defense of our values when we meet anyone who doubts or rejects them. Part of the lawyer's training should be familiarity with the thought and speech of those who are currently invoked as authorities in controversies over value. Hence a place will need to be found in the Skill Book in which are described prevalent modes of legitimizing democratic or anti-democratic values.[34]

One part of the Skill Book may include handy descriptions of the techniques used by qualified specialists in collecting social data together with the conceptual and technical processes by which they rearrange their observations, Sometimes a procedure calls for prolonged contact between the observer and the individual or the situation under survey.

Professors McDougal and Lasswell have also recommended the the preparation of a "Trend Book", to make available to the law student a guide to social trends as a corrective of the many distortions that result from specialisation. It would contain information about the population of the country, density, distribution and biological characteristics of the people of (India) and the world, trends in utilisation of resources, changing methods of getting social results etc.[35]

34. *Supra* note 11 at 270. See footnote 95 for a list of authorities in controversies over value.

35. See *supra* note 11.

The student also needs a guide to the best sources of information and analysis about the major fields of national policy from the ideological, diplomatic, economical and strategical standpoints. For this purpose it may be wise to arrange for a series of seminars, available to the students in their last year, on each of the four fronts of policy.

Legal-Clinics

The system of apprenticeship and the Bar Examination has been abolished by the Bar Council of India under its statutory authority. The sole qualification needed to enter the Bar is the Law Degree. Legal-clinics, therefore, should be established in the Law schools which would provide practical experience but in a manner more uniform, more comprehensive and more continuous.[36] The institution of legal clinics would serve the purpose of rounding off the curriculam of the law degree, of ensuring a wider and more uniform contact with the practical application of the law than it is believed is either usual or possible under a system of apprenticeship, of teaching the student how to handle clients, and of aiding poor people to obtain justice. The experience of every civilized country has been that where legal aid facilities are provided a steadily increasing use of them is made by poor people.

These legal-clinics could work in co-operation with the Legal Aid Society of India.[37] The attendance at the clinic should be compulsory for all students and work in the clinic should form an integral part of the curriculum. The clinic should be open every afternoon and perhaps two evenings a week for the convenience of those persons who could visit the clinic only in the evening. The actual direction, control and government of the clinic should be vested in the Deans of the various Law Faculties who can entrust

36. There are a number of objections to the system of apprenticeship. The most obvious objection is that the question of whether an apprentice will learn anything about the practical application of law depends almost entirely on the sense of duty of his employer. A knowledge of human nature and the best method of handling clients can only be gained by actual contact. In law offices, however, contact with clients is necessarily and properly the sole prerogative of the employer not the apprentice. The absence of such experience necessarily means that the apprentice enters upon his professional life with absolutely no guidance, whether theoretical or practical, in regard to these problems, whether of professional etiquettes or ethics, which will inevitably confront him from time to time.

37. The Society was inaugrated by the President of India on March 28, 1970 at Delhi. In his inaugral address the President stressed the importance of the role of students in making legal-aid effective.

the day to day responsibility to the other staff members. The details of the working of these legal clinics can by worked out by each law school to suit local conditions.

The students should be made aware that the poor people have problems all their own and working for them is completely different from working for a rich client. Poor people are not just like rich people without money. Poor people do not lead the settled lives of the rich into which law seldom intrudes. Poverty creates an abrasive interface with society; poor people are always bumping into sharp legal things,[38] The lawyer for poor must understand the relationship of poor people and the law.

The law schools never concern themselves or their students with what led a client to become involved with the law, or with what happened to him after he won or lost in a court.

> A striking example of this ommission is the total failure of the law students to ask what happens to a criminal once he is convicted. Lawyers have regarded conviction (and the final appeal) as marking the end of a defendant's involvement with the 'law'. For the criminal offender, however, conviction is more a beginning than an end. To the great detriment of society, lawyers (and therefore courts) have not seen the penal system as a part of the legal system. This blindness has cost prisoners fundamental rights, and has lead to a recidivist rate which virtually guarantees the society and the convict that once a man is convicted of a crime, he shall never again be a free or useful person.[39]

Producing materials which make the law accessible to poor people is a vital task. Having a summary and explanation of the laws which affect their lives means a great deal to poor people. Many poor people do not even know that they have legal rights; very few know the substance of even their most fundamental rights.

This practical training would benefit the student a great deal. Besides giving him an insight into the day to day working life of the lawyer, it would encourage him to use his judgment, to defend his conclusions when reached, and to realize the underlying principles of the law upon which the details of his case are based, and, the most important, it would instill into the student, at the most receptive period of his life, the duty incumbent upon the legal profession of ensuring justice for the weak, the defenceless and the indigent.

But we must not forget that if all the lawyers in the country worked full time, they will not be able to solve all the legal problems

38. Stephen Wexler, "Practicing Law for Poor People", 79 Yale L.J. 1049 at 1050 (1970).

39. *Ibid.*

of the poor and, infact, very few lawyers will concern themselves with poor people.[40] As I said earlier most of the problems of the poor stem from the fact of their poverty. Therefore the effort must be at organizing these poor people, rather than to solve their legal problems. Poverty, the main cause of their legal problems can be eradicated by poor people themselves and not by people who are not poor. Lawyers should find ways and means of organizing these people and suggest remedies. Litigation does not help them and if at all it does anything, it leaves them poorer, unhappier and worse off than before, Ways must be sought to awaken students to appreciation of the importance and the techniques of preventive law.

The Legal-aid clinics should not develop into tokenism which makes no real difference in the life conditions of the poor. The lawyers of a country like ours, working with underprivileged clients may be best able to create new forms of organization, social and legal, that could provide the most adequate representation for the underprivileged. If we do not succeed law is likely to be seen as another way in which rich men oppress the poor. Law must prove itself and not rest satisfied that the public will believe in the superiority of law because lawyers tell them so.

Conclusion for Curriculum

In organizing the curriculum care should be taken not to overburden the student with too many subjects. He should have enough time to read whatever he wants to, write papers and participate in extra-curricular activities. He should not lead a cloistered life like a scientist. To avoid overburdening we could replace some of the

40. Today one of the welcome and encouraging developments in America has been the widespread acceptance by the bar of an obligation to provide representation for the poor in both civil and criminal matters. To many young lawyers this acceptance of a duty to represent individuals is inadequate. Today law firms are challenged by young lawyers to take on causes rather than cases ; and while most civil rights cases are also causes, there is a difference. The cause, not the client, is the object of dedication. The undertaking is shaped and prosecuted not in defense or vindication of the client, but in maximum furtherance of the idea or program. It is, in essence, project-lawyering, rather than client representation. Urban renewal, environment improvement, justice for classes of poor like the American Indians or the Mexican Americans, and similar great causes are the focus of the legal work in these cases, rather than the defense or vindication of an individual.

In *Griffin* v. *Illinois*, 351 U.S. 12(1956) the American Supreme Court held that there are circumstances in which the state has an affirmative duty "to lift the handicaps flowing from different economic circumstances."

unimportant existing courses[41] with the new courses like sociology, economics, psychology etc. If a student can be made to develop lawyer's skills such as case and statute analysis, induction and deduction, policy analysis, criticism and prediction, within a narrow area within a specific field, he should be able to apply them with some success to other areas within the same field. In the first year those courses could be taught which would teach these skills and in later years some of the course being taught at present could be removed and the new courses added. The curriculum should be organized more imaginatively. We might shift a first year course to second year or incorporate it with another course without realising that the Professor who took that course is best suited to teach the first years because he best teaches how to read cases with understanding.

We must remember that a good legal education is not a "thing" that you "acquire". It is not something that you get by simply adding up a number of separate courses as you would acquire a cadillac on the installment plan. Like law itself, education is not a "thing" but a "process". You do not acquire a process, you participate in it. But it is, of course, important that the participating process deal with issues that are relevant to the needs of today and probable the needs of the future. The danger comes when our conception of "needs" is too narrowly focused on problems that are immediate and pressing as opposed to those that are basic or those that portend significant changes.

If we organize our curriculum on these lines we will be preparing good lawyers for the Bar and the public service and good research scholars and policy makers who are capable of and willing to participate actively in community decision-making processes, and whose contribution to these processes will tend to maximize the society's preferred values.

It is not enough to change the curriculum and to improve the content of each course. The formal structure of the curriculum and the internal arrangement of a specific course are not nearly as important as the process of communication and intellectual stimulation that takes place inside the classroom during the moments of confrontation between the teacher and students.[42] To accomplish this we must have a good student body and a good teaching staff.

41. Courses like Military Law, Court-fee Act, Suit Valuation Act could easily be replaced. The present Military Law course does not offer much and part of it overlaps with the English Constitutional Law syllabus.

42. According to Charles D. Kelso the minute we divide the topic of education into curricula, courses, methods of teaching etc. we create an obstruction in the path of reform.

Admission of Students

At present students who do not get admission in other prestigious cources join Law schools where you can get admitted even with very low marks. If we want to achieve the goals we have set out we must take students who are really interested in the study of law and who have an aptitude for it. (We are essentially creating a man who knows the law). As at present, admission should be open to all university graduates who have done their graduation whether in arts or sciences or any other subject. There are proposals that we introduce law subjects at the pre-law school level in the Arts course and then take only those students who do well in that. This process would result in excluding from the schools good science students who might decide to take law after graduation. Also it is well established that just any and every discipline is useful for the study of law. The science courses are as much useful as art courses like philosophy and economics. What is needed is a student who has had a good basic education and is aware of and concerned about the world around him. There are also proposals that, like Medicine and Engineering, Law should be made five or a six year course to be taught right after school. This proposal does not sound very feasible at at this stage. In India at present, students decide late in their lives whether they should join law. Besides if graduation is made a prerequisite then only those really interested in the profession of law would join it. Students with low marks may be taken also. But to ensure that we get 'good' students, that is, those who want to be lawyers because they see law as a satisfying, challenging combination of personal opportunity and service to society, we must introduce an Entrance Examination like the Law School Aptitude Test in America, the details of which will have to be worked out in consultation with the various law schools. Good students must be found and must be helped by scholarships when they cannot otherwise afford legal education. We must also discover ways for educating the public opinion of the nation to the need for good lawyers.[43] This could partly be done by introducing a course on "the role of law as a social institution and the processes through which law functions" at the college level. This will help bridge the gap between the lawyer and scholars trained in other disciplines. One result would be better communication between them which would also aid in developing law school curricula according to the inter-disciplinary approach.

43. This will help in procuring good students for the law schools.

Teachers

If the dream of providing the best form of legal education is to become a reality we must improve the quality of teachers. The LL.M. programme should be oriented towards producing better teachers, Some good law schools like Delhi could reorganize their LL.M. programme with the specific purpose of producing good law teachers who would be in great demand in the other Indian Law Schools. Instead of doing a large number of different subjects as at present, they should be given specialised training in their field of interest—the subject they will finally teach. They should all be given a large overdose of jurisprudence. A student who intends teaching criminal law will then be doing, besides the traditional Criminal Law and Procedure courses, courses like Criminology, Psychiatry, working of prisons and criminal courts in India, Police Administration etc. In short, he must have some basic understanding of basic social and psychological factors involved in all phases of the criminal processes from police operations to the prisoner's re-assimilation into his community. Likewise a student specialising in constitutional law would do courses in Political Science, Economics, Administrative Law, Public Control of Business etc. He need not do Torts or Contracts. The importance of comparative Constitutional Law should be stressed here, The study of the Legal systems of other countries provides very useful insights into your own systems and gives a broad perspective.

To keep the teachers informed about the latest developments in legal education we must have refresher courses for them where they should also be given inter-disciplinary courses.

The number of teachers should be increased considerably so that more tutorial work can be done. The teachers should not be overburdened. They should have enough time to do research work of their own and to plan what and how they must teach a particular subject. This is possible only if we have more teachers. The students must be given personal and detailed help in their studies, "By such measures they can slowly and painfully become a wave which will sweep into and through the legal profession, a wave of enthusiasm and devotion which will freshen the waters of Indian Law."[44]

We must have whole-time teachers in the Law Schools, At present some of the law schools have part-time teachers who are practicing lawyers. They are supposed to bring their practical experiences to the class-room but far from doing that they are too

44. Bertram F. Willcox, "Impressions of the Kasauli Seminar on Legal Education", 4 Jaipur L.J. 204, 206 (1964).

tired and over-worked to plan their classes and to teach effectively.[45]

Salaries adequate to support the teacher must be paid so that he is not forced to supplement his income by engaging in active practice. Better salaries would attract better qualified men and women to the teaching profession. At present many of our brilliant young law graduates join the Bar because of brighter prospects[46] and the less ambitious take to teaching. The teaching profession should be made as attractive as possible if we want to have good teachers. They should have enough independence and security. They must see important and appealing opportunities ahead of them. There is no reason why a member of the teaching profession should not be appointed to the bench of an appellate court in India. There is a tradition of drawing the bench from the practising Bar. This tradition, however, developed throughout a period of time when the law teacher was little known, and even when he was later grudgingly recognized he was treated as having less to offer than the "practical" lawyer. No one will gainsay the advantage of appointing practicing lawyers to the *trial* court. In an appellate court, which is at least as much concerned in setting the law for the future as deciding the immediate case, the reasons for his appointment are much less obvious, and those of man of legal research more obvious.

Method of Instruction

The case-law method of teaching has proved very successful in Delhi. The cases are taught by the socratic method, therefore there is a two-way traffic from which both the students and teachers benefit a great deal. The students besides learning more of the legal technicalities learn how to argue, in class.[47] The case method should be adopted by other law schools as well. But the case-method is very time consuming and does not tell the story, therefore the number of cases should be reduced and other extra-legal material added. Every class could begin with the case-method and end up with the problem method. The problems should provide a very good mental exercise for the students. Case-books need to be prepared. Some great teachers

45. But cf Jaipal Jhala, "Legal Education—Towards New Horizons." 1 S.C.C. (Journ. Sec.) 42 (1971).

46. They earn more and eminent members of the Bar can be and have been nominated to the Bench.

47. The emphasis in the case law system has shifted from its asserted "scientific goal" to its more practical purposes. See 64 Colum. L. Rev. 710, at 714.

might be capable of escaping the conceptual bounds of the case-book but most would stick pretty close to the materials between the covers. Therefore we must have good case books complete with comments and notes written by jurists. A few case books have already been published. The first, *Tort through Indian Cases* written by B. S. Sinha is strictly not a case-book for it contains only the summaries of cases and no extracts as the American case-books do. Another case book known is *Case Law on the Constitution Codes* by N. A. Subramanian of Madras Law College. It again is not a case book but gives the summary of cases. The third case-book available is *Law Relating to Government Control over Private Enterprise* written by N.R.M. Menon and N.G. Mysore of the Delhi Law School. The Delhi Law School has recently published a real case book on *Law and Poverty* and the hope of publishing future case books is entirely there. The teachers will of course have to be more imaginative and should make class-room discussions more realistic and comprehensive by references to comparable cases in the notes, to problems and to extra-legal materials.

In the class-room one's willingness to speak from partial knowledge, from uncertainty, from empathy unsubstantiated by conclusive documentation is systematically discouraged. The only facts which are considered are those which meet the convoluted and rarified standards of proof needed for one and only one forum-the courts. Intuitively formulated hypotheses are not even honoured as points of departure for more systematic attempt to marshal the facts needed to generate change. In life we never have all the facts we optimally could use to make a decision. To impose such a pre-requisite to speech in the law classroom is in fact to compel silence. And all too often, to withhold one's voice is an act of moral abdication.[48]

Legal discussion typically preoccupies itself with legal rules and legal doctrines. The more "avant garde" discussions utilize the findings of other disciplines and advance them as bases for rejecting one doctrine and accepting another. The debate rarely moves from rules and doctrines to issues of legal institutions or new modes of redress available outside the courts. But when an institution stands as an inseperable barrier to effective remedy, the practitioner must turn to new institutions, forums, doctrines and rules. This is the area of debate that will ultimately determine the shape of a new legel system capable of dealing with the vast explosion of rights and grievances and

48. Edgar S. & Jean Camper Cahn, "Power To The People or the Profession—The Public interest in Public Interest Law", 79 Yale L. J. 1005, 1026 (1970).

unchecked discretionary decisions for which the courts will provide, at best, a forum of last resort.[49]

Examinations.

A teacher should be given complete freedom to teach his subject in the best manner be can conceive of and having given him this freedom, he should be allowed to assess the progress made by his students whenever examinations are held.

A law teacher, according to Professor Willcox must be free to set his own examinations and to grade them.

> If a teacher is not trusted, he cannot teach effectively. He cannot teach anything new if he knows that students who believe him will be penalized as a result. He cannot keep in touch with the changing legal and social scene. He cannot experiment with new methods, probe new ideas... Not all teachers are trust-worthy of course. Some may favour individual students. Some may grade their own examinations high in order to make a seemingly brilliant record. But these evils and these dangers shrink into in significance when contrasted with the inestimable blight of imposing on law teachers the examination and grading of their own students by strangers—and often by strangers who know little and care less about the subjects or the courses.[50]

In Delhi the teachers correct their own student's papers but the roll numbers are there so the teacher does not know whose paper he is correcting. This is to ensure impartiality. In most other law schools the papers are both set and corrected by strangers. In my opinion it is very important that the teacher knows whose paper he is correcting. The purpose of an examination is to facilitate the teacher in assessing the knowledge of his students and it is not an end by itself. The teacher should be given the discretion to pass a student who has done badly in the examination if he is satisfied with his class-room performance. The advantages of incentive are well known. Good marks or just a pass when a student expects to fail motivates a student to an extent no amount of oral encouragement can parallel. On the other hand a failure is very discouraging especially when a student has worked hard throughout the term and for some reason did not do well in the examination. It is in the teacher's hand to make or unmake a person and his job is very delicate and he should handle it with care. To enable the teacher to discharge his responsibility we must have full faith in him. The fact that he gives high marks for a not too good paper shows that he has

49. *Id.* at 1026-27.

50. *Supra* note 44 at 207.

reasons for doing so—either the student's class-room performance is excellent[51] or may be the teacher is capable of reading below the paper.[52]

The research papers written in the tutorial work must be graded and marks added with the final examination marks. The research work could form twenty-five percent of the total marks for a course.

In the examination paper hypothetical problems should be set. Each problem could be based on a number of decided cases. The question paper should be designed to test the knowledge of a student and not his memory.

> Law schools militate against the use of law as an instrument of social reform by imposing standards of acceptable performance which are perniciously narrow. They reward ingenuity, even at the expense of human perceptiveness, they reward removal from the chaotic world of emotion, events, passions and people to the rarified stratosphere of metaphysical debate where the ability to proliferate distinctions is the ultimate offensive and defensive skill.[53]

The acquisition of legal analysis, no doubt an indispensable skill, should not be the only standard of academic performance. The ability to speak to a client, to understand another human being, to take an inchoate and ill-defined set of demands and give them structure and content—all these capacities go largely unrecognized and unrewarded in law schools. "Unfortunately, those among the faculty who are fit to judge—or to guide—are few and far between."[54]

Jobs

It is just not enough to find good students and to give them good legal education. The students must see important and appealing opportunities ahead of them. Thus they can feel a pride in what

51. A Yale Law School Professor is known to have gone to an ailing student's bed-side, asked him questions and to have given him an excellent grade.

52. Churchill in his book 'My Early Life' has described an examination he once took in school. He did very badly. In fact, he gave up a blank paper not exactly blank because it had a question number in the margin, enclosed by brackets and some ink blobs all over the page. The teacher was obviously capable of "reading below the paper" and passed him.

53. See supra note 48 at 1027.

54. Ibid. Whatever motivations call persons to teaching law, they unfortunately rarely draw those who would emulate Stephen Daedulus going "to encounter for the millionth time the reality of experience and to forge in the smithy of my soul the uncreated conscience of my race."

they are studying and in the reasons for their work. They must be made to feel they are important to India.

In America there is a competition among the law firms to get the best talent available and the law students get booked when still in school. In India there are practically no law firms and the prospects of starting on ones own are very bleak. Law graduates usually work with a senior lawyer without remuneration for four or five years before they can start on their own. The need is to create more law firms[55] and a sense of responsibility among the senior members of the profession to help the fresh graduates.[56]

India's simultaneous commitments to economic development, a welfare state and democracy imply vast new demands on the legal system—demands for systematic but flexible regulation and for broader distribution of legal resources. Major initiatives would seem to be with the government as dispenser of legal regulation, as a major consumer of legal services, and (potentially) as a distributor of legal resources. Only informed and imaginative collaboration between government, legal education and the profession can provide in full measure its potential contribution to a developed and democratic India.[57]

Conclusion.

The creation, through drastic reorganization, of a purposive, efficient and top-quality legal education is not merely a matter of desirability or even of necessity, it is a matter of utmost importance to the viability of democracy and of the Constitution itself. The quality of the law schools will affect the quality of the Bar, the Bench and indeed of the administration of law in all institutions and at all levels. In the words of Dean Tripathi:

> Good and great law schools will not only impart excellence to this quality but they will also play a big role through constant education, in carrying the Constitution from the books to the hearts of the people and securing it there so that its high principles and lofty ideals permeate and inform all their institutions and all their thought, expression and conduct.[58]

55. Law firms should be designed to free maximum time for *pro bono* work.

56. Alumni Associations can play a very important role by providing channels of communication between the alumni and graduating students.

57. Marc Galanter, 3 Law & Society Nos. 2 & 3 (Nov. '68—Feb. '69).

58. P. K. Tripathi, "In the Quest for Better Legal Education," 10 J.I.L.I. 469 (1968).

In the words of a Harvard scholar[59] :

> India today requires superlative legal education much more than does the West because in India a far less viable balance is struck between the society's requirements and reasonably effective exploitation of the law's potential for contribution to the meeting of those needs.

The law schools must keep in mind that they are not training lawyers for the first month out of school but for a progressive career that lasts a life-time. Law schools and legel education have to prepare students not only to practice law but also to inculcate in them the scientific spirit of inquiry, critical assessment and evaluation. The students must know not only the legal rules and exact formulation of legal ideas but also the social policies that shape the law. Legal education has to conserve and further the social values of the community and to advance the social good, for, if the law-man and lawyer of tomorrow is trained in merely a technical approach to law, he may become a reactionary obstructing desirable legal reform or a revolutionary unaware of the value of what he seeks to sweep away.[60]

President of Yale said as back as in 1874 :

> Let the Law School, then, be regarded no longer as simply the place of training men to plead causes, to give advice to clients, to defend criminals; but let it be regarded as the place of instruction in all sound learning relating to the foundations of justice, the doctrine of government, to all those branches of knowledge which the most finished statesman and legislator ought to know.

59. Arthur Taylor von Mehren, "Law and Legal Education in India: Some Observations," 78 Harv. L. Rev. 1188 (1965).

60. "Memorandum Submitted to the Robbins Committee on Higher Education," 7 Jour. Soc. Pub. Tea L. 116 (1963).

CONSTITUTIONAL VALIDITY OF STATE MONOPOLY OF ROAD TRANSPORT IN INDIA

*Mata Din**

Concept of Monopoly

Broadly speaking 'monopoly' means the sole power of dealing in an article or doing a specified thing. The most important test of monopoly is the 'exclusiveness'. In short, monopoly represents a set of conditions inconsistent with free and open competition among the public. Since we are primarily concerned with the State monopoly in this paper, it would be better if we also define State monopoly here. State monopoly means anything which is dealt with exclusively by the State and the public is not allowed by law to enter the field which has been occupied by the State. Malik, C. J., observed in *Moti Lal* v. *Uttar Pradesh*[1] that nationalisation (State monopoly) involves two implications :

(i) that the state will carry on the business ; and
(ii) that no one else will be allowed to carry on this business.

Constitutional Validity

In this paper we will discuss whether a State Government is empowered under the Indian Constitution to grant monopoly in respect of any business or trade in its own favour or in favour of any state controlled corporation, etc.

In this connection, we will have to study the relevant provisions of the Constitution which permit the State Government to create a monopoly in its own favour or in favour of any corporate body created by the state under a valid law. The Parliament of India has suitably amended the Constitution[2] to give power to the State Governments to monopolise any trade or business which includes the Road Transport Services also. The Parliament has also amended the Motor Vehicles Act, 1939 in 1956 and added Chapter IV-A to this Act which contains special provisions providing necessary powers to the

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1. A.I.R. 1951 All. 257, 267.

2. First Amendment to the Constitution, 1951 and Fourth Amendment to the Constitution, 1955.

State Governments to monopolise the road transport and to make rules for this purpose under the Act itself.

The State of Uttar Pradesh was the first state to take the lead towards nationalisation of Road Transport but it was prevented by the Allahabad High Court in *Moti Lal* v. *Uttar Pradesh*.[3] In this case the court held that nationalisation of road transport was not possible without an Act of the Legislature and to nationalise the road transport business under the executive order was unconstitutional. For that purpose the amendment of the Motor Vehicles Act was necessary. It may be pointed out that at that time Chapter IV-A of the Moter Vehicles Act-1939 which empowers the State Government to create monopoly of road transport in its own favour, was not there. The Uttar Pradesh Government took action under Chapter IV of this Act and also framed rules thereunder. But this Chapter did not give any power to the State Government to nationalise the road transport.

In this case the petitioner's contention was that the State cannot claim to have any better rights than the private operators and as such the State has no right to carry on any business without any legislative sanction and there was no such legislative sanction for running buses on hire. The whole activity of the State, therefore, was illegal. The petitioners also argued that they had an absolute right to ply buses on the route and that the State had no power to place any restrictions. In this case four independent judgments were delivered by their Lordships. The most important question in this case was whether road transport business can be nationalised by the State Government under the order of the Executive. In other words, whether legislative sanction is necessary for nationalisation of any industry, particularly the road transport business. The Allahabad High Court held that the State has got full power under Art. 289 of the Constitution to carry on trade or business. But for nationalisation of road transport business, the legislative sanction was very much necessary. Malik, C.J., observed in this connection :

> I may refer to the provisions of Art. 289 (2) of the Constitution which seems to recognize that the Union or a State can carry on trade or business and provides that the Parliament may by law impose taxation on any income occuring to the Government of a State in respect of a trade or business carried on by it and Art. 289 (3) seems to draw a distinction between a trade or business carried on as merely incidental to the ordinary functions of the Government and other trades or business carried on by it.[4]

3. A.I.R. 1951 All. 257.
4. A.I.R. 1951 All. 257, 267.

Further his Lordship held that the State Government need not have a specific Act to start transport business for hire. But if the business carried on by the State Government infringes the right of the individual, the State Government must have a legislative sanction, otherwise this would be an illegal act on the part of the State Government. His Lordship further observed :

> I have no doubt in my mind that it is not necessary to have a specific Act before a State Government can provide buses for transport of passenger for hire. I want, however, to make it clear that nationalisation of any industry does not appear to me to be possible without legislation as nationalisation has in it two implications : (1) that the State will carry on the business and (2) that no one else will be allowed to carry it on. The second must be deemed to be an infringement of the rights of the citizen and, therefore, it must be by legislation and the legislation would probably have to be justified under the provisions of Art. 19(6) of the Constitution.[5]

Another argument of the petitioners was that they had absolute right to use the highways and State had no power to restrict its use in any way. The court held that there is no absolute right of the operators to use the highways and the State has got the power to put reasonable restrictions on its use by the public. It was also held that such reasonable restriction or regulation might even amount to prohibition if it is necessary to be imposed in public interest. It means that the State can prohibit the public to use the highways if it is in public interest and this prohibition would be considered as a reasonable restriction which is permitted by the Constitution. Malik, C.J. observed in this connection :

> I may, however, point out that the right to use a highway is a right which a person possesses as a member of the public alongwith other members of the public, and whatever personal rights he has of using it are merely as such a member. That being so the right has always been held to be exercisable subject to such reasonable restrictions or regulations, which, at times, might even amount to prohibition, as might be necessary to be imposed in public interest. From the earliest times the right has been subject to regulation.[6]

The conclusion in the above case arrived at was that the executive Government has power to engage in transport and run its own buses in competition with the other operators in the State but to nationalise the road transport service, legislative sanction is necessary. Aggarwal, J. dissented from the majority view and held that the

5. A.I.R. 1951 All. 257, 267.
6. A.I.R. 1951 All. 257, 268.

State Government had no power to run buses for commercial purposes in the absence of an Act passed by the Legislature authorising the State to do so. But in *Ram Jawaya* v. *State of Punjab*,[7] Mukherjee, C. J., in delivering the judgment of the court, observed that the above opinion of Agarwal, J. was narrow and unsupportable. It was further held by the Supreme Court in this case that specific legislation would be necessary if the Government encroches upon the rights of the individual by doing the business or trade under executive orders. Mukherjee C. J., observed in this connection :

> Specific legislation may indeed be necessary if the Government require certain powers in addition to what they possess under ordinary law in order to carry on the particular trade or business. Thus when it is necessary to encroach upon private rights in order to enable the Government to carry on their business, a specific legislation sanctioning such course would have to be passed.8

In *Madhab Chandra* v. *Regional Transport Authority*[9] also the contention of the petitioner was that the nationalisation of road transport without any legislation infringed the fundamental rights of the people. The court held that under the executive orders the government cannot nationalise the road transport business without the appropriate legislation. Ram Labhaya, J. observed :

> The executive Government has no power to carry on any trade, business or industry to the exclusion, complete or partial, of the citizen. It can do so only under a law and in the exercise of its ordinary functions, it infringes the constitutional right of the citizen guaranteed to him by Art. 19(1) (g).10

In *Peoples Bus Service* v *State*[11], the PEPSU High Court held that the provisions of Arts. 19, 38, 39 and 289 of the Constitution clearly empower the State to start any business in which transport business apparently is included and no legislative sanction is necessary in starting this business. It was also held that no specific Act is necessary to validate the running of motor vehicles for hire by the State, particularly when the legislative sanction in the form of the necessary Appropriation Act to incur expenditure on the business has

7. A.I.R. 1955 SC 549
8. A.I.R. 1955 SC 549, 557
9. A.I.R. 1954 Assam 212.
10. A.I.R. 1954 Assam 212, 218
11. A.I.R. 1956 Pepsu 3.

been obtained. This is an implicit approval of the State Assembly and this should serve the purpose of making a specific law. It was also held that the running of parallel buses by the State Government, on the very routes for which the private operators hold permits, does not violate Art. 19(1)(g) and Art. 31 of the Constitution. But the above logic does not sound well and at the same time it does not seem to be a good law.

In *Saghir Ahmed* v *The State of Uttar Pradesh*[12], the constitutionality of the Uttar Pradesh Transport Act 1951 was challanged on the following grounds :

1. that the Act was discriminatory in its character and contravened the provisions of Art. 14 of the Constitution.
2. that it conflicted with the fundamental rights of the petitioners guaranteed under Art. 19(1) (g) of the Constitution.
3. that it was invalid as it purported to acquire the interest of the petitioners in a commercial undertaking without making any provision for compensation as required under Art. 31(2) of the Constitution, and
4. that it violated the guarantee of freedom of interstate and intra-state trade embodied in Art. 301 of the Constitution.

The main contention of the petitioners was that they had been prohibited from carrying on business of motor transport service on Bulandshahar—Delhi route under an order issued in accordance with the provisions of the *Uttar Pradesh Transport Act 1951*. The Act which prevented them from pursuing that trade or business was in conflict with the fundamental rights guaranteed under Art. 19(1)(g) of the Constitution. It was also argued on behalf of the appellants that their beneficial interest in the commercial undertaking was property within the meaning of Art. 31(2) of the Constitution. Since the Act does not conform to the requirements of the above Article, it must be held unconstitutional. Shri G. S. Pathak, Senior Advocate for appellants, put forward a somewhat novel argument that the right of the appellants to use a public highway for the purpose of trade was in the nature of an easement and that should be a property in law, and as such there had been a deprivation of property by the impugned legislation.

The last contention was held to be untenable by the court and the Advocate General Shri K. L. Mishra rightly ignored it.

In the present case the Act excluded all private bus-owners from the field of transport business and *prima facie* it was a violation

12. (1954) 2 M. L. J. 622.

of Art. 19(1)(g) of the Constitution. The question before the Supreme Court was whether the violation of the fundamental right by creating a monopoly in favour of state could be justified under the provision of cl. (6) of Art. 19 on the ground that it amounted to reasonable restrictions on the fundamental right of the individual in the interest of the general public. Clause 6 (ii) of Article 19 which was added to the Constitution in 1951 clearly empowers the state to carry on any trade or business either by itself or through any Corporation, to the exclusion, partial or complete, of the citizens. But clause 6(ii) of Art. 19 was not in existence at th e time when the impugned Act[13] was passed by the State. The High Court however had held that, quite apart from the new provision, the creation of a State monopoly in regard to transport service could be justified as reasonable restriction imposed in the interest of the general public. The question before the Supreme Court was whether the view taken by the High Court was correct ? In this connection, Mukherjee, C. J. observed :

> To answer this question three things will have to be considered. The first is, whether expression 'restriction' as used in Art. 19(6) and for the matter of that in other sub-clauses of the Article, means and includes total deprivation as well ? If the answer is in affirmative, then only the other two questions would arise, namely, whether restrictions are reasonable and have been imposed in the interests of general public ?[14]

Mukherjee, C. J. further quoted Justice Patanjli Sastri's observation in *A.K. Gopalan* v. *The State* in this connection :

> The use of the word "restrictions" in the various sub-clauses seems to imply, in the context, that the rights guaranteed by the Article are still capable of being exercised and excludes the idea of incarceration though the words, "restrictions" and deprivation are sometimes used as interchangeable terms, as restrictions may reach a point where it may well amount to deprivation. Read as a whole and viewed in its setting among the group of provisions (Arts. 19-22) relating to 'Right to Freedom', Article 19 seems to my mind to pre-suppose that the citizen to whom the possession of these fundamental rights is secured retains the substratum of personal freedom on which alone the enjoyment of these rights necessarily rests.[15]

In that case, the issue before the court was undoubtedly different from the one that has been raised in this case and the question whether the restrictions given under Art. 19 could go to the length of total deprivation of these liberties was neither raised nor decided in

13. Uttar Pradesh Transport Act, 1951.
14. (1954) 2 M.L.J. 622, 628.
15. (1954) 2 M.L.J. 622, 629.

that case. But a distinction was drawn by the majority of learned judges between negation or deprivation of a right and a restriction upon it and although it was said that restriction may reach a point where it might amount to deprivation, yet restrictions would normally pre-suppose the continued existence—no matter even in a very thin and attenuated form—of the thing upon which the restrictions were imposed.

Further, the court expressed its opinion but not finally that the normal use of the word "restriction" would imply limitation and not extinction. If the word "restriction" includes total prohibition then the law under review cannot, in my opinion,be justified under Art. 19(6). In that case the law would be void unless it satisfies the provisions of Art. 31 of the Constitution. If, however, the word restriction under Art. 19(6) be taken in certain circumstances to include the prohibition as well, then the court will have to see whether the prohibition of the rights of all private citizens to carry on the business of motor transport on public roads within the State of Uttar Pradesh as laid down by the Act, can be justified as reasonable restrictions imposed in the interests of the general public. Of course, the Supreme Court had held the Act under dispute unconstitutional as it violated the rights of the citizens under Art. 19(1)(g) but it seems that the court was more influenced by Art. 39(a) on social grounds. Mukherjee, C. J., observed in this connection :

> One thing, however, in our opinion, has a decided bearing on the question of reasonableness and that is the immediate effect which the legislation is likely to produce. Hundreds of citizens are earning their livelihood by carrying on this business on various routes within the state of U. P. Although they carry on the business only with the aid of permits which are granted to them by the authorities under the Motor Vehicles Act, no compensation has been allowed to them under the statute. It goes without saying that as a result of the Act they will all be deprived of the means of supporting themselves and their families and they will be left with their buses which will be of no further use to them and which they may not be able to dispose of easily or at a reasonable price. It may be pointed out in this connection that in part IV of the Constitution which enunciates the directive principles of state policy, Art. 39(a) expressly lays down that the state shall direct its policy towards securing that the citizens, men and women equally have the right to an adequate means of livelihood.[16]

Perhaps, the Supreme Court did not look at clauses (b) and (c) of Art. 39 and Art. 38 of the Constitution in their entirety. The provisions of these Articles direct the State that the wealth of the

16. (1954) 2 M.L.J. 622, 631.

nation should not be allowed to be concentrated in the hands of few persons. Rather the wealth should be distributed to serve the ends of common good. The only way to avoid the concentration of wealth in a few hands is the nationalisation or State control over the private sector. The State Policy of Nationalisation of Road Transport is undoubtedly in the general interests of the public. It may also be pointed out that the nationalisation of any industry does not mean that those who are employed in the industry would be thrown out of the job. They may not lose their means of livelihood. They would be retained in service provided they are found fit for it as has been done in the case of other industries[17] which have been nationalised.

His Lordship observed in respect of amendment in Art. 19(6) of the Constitution :

> The new clause in 19(6) has no doubt been introduced with a view to provide that a state can create a monopoly in its own favour in respect of any trade or business ; but the amendment does not make the establishment of such monopoly a reasonable restriction within the meaning of first clause of 19(6). The result of the amendment is that the state would not have to justify such action as reasonable at all in a court of law and no objection could be taken to it on the ground that it is an infringement of the right guaranteed under Art. 19(1)(g) of the Constitution. The question of reasonability would not have arisen at all and the appellant's case on this point, at any rate, would have been unarguable. These are however considerations which cannot affect our decision in the present case. The amendment of the Constitution, which came later, cannot be invoked to validate an earlier Legislation which must be regarded as unconstitutional when it was passed.[18]

In this regard Professor Cooley has also been quoted in this judgment who observed, "a statute void for unconstitutionality is dead and cannot be vitalised by a subsequent amendment of the Constitution removing the constitutional objection but must be re-enacted."[18a] The court decided that the impugned law is unconstitutional and should be held void, in the following words :

> We think that this is a sound law and our conclusion is that the legislation in question which violates the fundamental right of the appellants under Art. 19(1)(g) of the Constitution and is not shown to be protected

17. Like insurance and banking.
18. (1954) 2 M.L.J. 622, 631-632.
18a. Cooley, 1 *Constitutional Limitations*, 384.

by clause (6) of the Article, as it stood at the time of the enactment, must be held to be void under Art. 13(2) of the Constitution.[19]

The next point which was disputed was whether the deprivation of the petitioner's right to run buses or their interest in a commercial undertaking should attract the provisions of Art. 31(2) of the Constitution as the deprivation has been made by the authority of law within the meaning of cl. (1) of that Article. The court held that deprivation of business and trade means the deprivation of property and hence it should attract Art.31 (2) of the Constitution. In deciding the above question the court observed :

> In view of that majority decision it must be taken to be settled now that the clauses (1) and (2) of Art. 31 are not mutually exclusive in scope but should be read together as dealing with the same subject, namely, the protection of the right to property by means of limitations on the states power, the deprivation contemplated in Cl. (1) being no other than acquisition or taking possession of the property referred to in Clause (2). The learned Advocate General conceded this to be the true legal position after the pronouncements of this referred to above. The fact that the buses belonging to the appellants have not been acquired by the Government is also not material. The property of a business may be both tangible and intengible. Under the statue the Government may not deprive the appellants of their buses or any other tangible property but they are depriving them of the business of running buses on hire on public roads. We think, therefore, that in these circumstances the legislation does conflict with the provision of Art. 31(2) of the Constitution and as the the requirements of that clause have not been complied with, it should he held to be invalid on that ground.[20]

As far as Article 14 of the Constitution was concerned the court held that the law in question does not violate the right of the petitioners at all under this Article.

When the State of Uttar Pradesh lost the above case, and the impugned law could not be saved under Art. 19(6)(ii) of the Constitution, the Fourth Amendment to the Constitution was introduced and passed to wash away the effects of this case.

But it should be kept in mind that the First Amendment to the Constitution which added sub-clause (ii) to Art. 19(6) was meant to clarify the intention of the makers of the Constitution that state monopolies or nationalisation schemes which may be introduced by legislation are illustrations of reasonable

19. (1954) 2 M.L.J. 622, 632.
20. (1954) 2 M.L.J. 622, 632-33.

restrictions imposed in the interests of the general public and must be reated as such.[21]

Gajendragadker J. observed in the case of *Akadasi* v. *State of Orissa* :

> The Constitution makers had apparently assumed that the state monopolies or schemes of Nationalisation would fall under, and be protected by Art. 19(6) as it originally stood but when judicial decisions rendered the said assumption invalid, it was thought necessary to clarify the intention of the constitution by making the amendment. It is because the amendment was thus made for purposes of clarification that it begins with the words "in particular". These words indicate that restrictions imposed on the fundamental rights guaranteed by Art. 19(1)(g) which are reasonable and which are in the interests of the general public are saved by Art. 19(6) as it originally stood, the subject-matter covered by the said provision being justiciable and the amendment adds that the state monopolies or nationalisation schemes which may be introduced by legislation, are an illustration of reasonable restrictions imposed in the interests of the general public and must be treated as such. That is why the question about the validity of the laws covered by the amendment is no longer left to be tried in courts. This brings out the doctrinaire approach adopted by the amendment in respect of state monopoly as such.22

His Lordship further added in this connection in the above case :

> In our opinion, the amendment clearly indicates that State Monopoly in respect of any trade or business must be presumed to be reasonable and in the interests of the general public, so far as Art. 19(1) (g) is concerned.[23]

The Orissa High Court in the case of *Lokanath Misra* v *State and another* held that where the business involved is of public utility, e.g. motor transportation, the grant of monopoly is only a reasonable restriction upon occupational freedom of the persons.[24]

Malik C. J. in the case of *Moti Lal* v. *Uttar Pradesh*[25] also observed that in certain circumstances the reasonable restrictions under Art. 19(6) may include total prohibition or total stoppage or monopoly. In this connection his Lordship said :

> The first is the argument that '*reasonable restriction*' cannot mean a total stoppage. I do not think this argument is sound. The words in Art. 19 are not 'regulation' but are reasonable restriction, and I do not see why, if by reason of the nature of the trade carried on, which might be against

21. A.I.R. 1963 SC 1047.
22. A.I.R. 1963 SC 1047, 1054.
23. *Ibid.*
24. A.I.R. 1952 Orissa 42.
25. A.I.R. 1951 All. 257.

public morality or if, for any other reason, it is deemed necessary in the general interest, to stop totally any trade or business it cannot be included in the word restriction.26

Further Malik C.J. expressed his views very forcefully in this connection :

The Constitution does not give any list of such trades or business and no one can claim that he has an absolute right to carry on any trade or business that is now being carried on or that he may invent in future. The state must be deemed to have the right under Art. 19 (6) to regulate or prohibit such business in public interest. Cases of prohibition on the grounds of public morelity etc. are quite common.27

In *Bhikaji Narain* v *State of Madhya Pradesh*[28], the court held that the impugned Act became inconsistent with Art. 31 as soon as the Constitution came into force on 26.1.1950 and continued to be so inconsistent upto 27.4.1955. But all the defects in amending statute have been removed by the Constitution (First & 4th Amendment) Acts 1951 and 1955. The facts in this case were as follows :

Each of the petitioners had been carrying on business as stage carriage operator for a considerable number of years under permits granted in accordance with the provision of Sec. 58 of Motor Vehicles Act, 1939 (as amended by C.P. and Berar Motor Vehicles Amendment) Act, 1947. Very far reaching amendments were introduced by C.P. & Berar Motor Vehicles (Amendment) Act, 1947 into the Motor Vehicles Act, 1939.

The result of the amendments was that the power was given to the Government (i) to fix fares or freight throughout the province or for any area or for any route ; to cancel any permit after the expiry of these months from the date of notification declaring its intention to do so and on payment of such compensation as might be provided by Rules, (iii) to declare its intention to engage in the business of road transport generally or in any area specified in the notification; (iv) to limit the period of the licence to a period less than the minimum specified in the Act ; and (v) to direct the specified Transport Authority to grant a permit (*inter alia*) to the Government was financially interested.

A perusal of the new provisions of the amending Act would show that very extensive powers were conferred on the Provincial Government. The government was authorised, in exercise of these powers, not only to regulate or control the fares or freights but also to take up the

26. A.I.R. 1951 All. 257, 269.
27. A.I.R. 1951 All. 257, 271.
28 A.I.R. 1955 SC 781.

entire motor transport business in the province and run it in competition with and even to the exclusion of all motor transport operators. It was in exercise of the powers under the newly added sub-clause (3) of Sec. 58 that the period of the permit was limited to four months at a time. In exercise of the powers conferred on it by the new Sec. 43(1)(iv), the notification declaring the intention of the Government to take up certain routes under the scheme was issued by the Government.

It was clear that these powers were given to the State Government to carry out and implement the policy of nationalisation of road transport business. At the date of the passing of the amending Act, there was no such thing as fundamental rights and it was well within the legislative competency of the State Legislature to enact the law, and on the date of its passing it was perfectly a valid law. But when the Constitution of India came into force on 26.1.1950, which guarantees fundamental rights to the citizens of the country, the amending Act became void to the extent of any inconsistency with the fundamental rights of the people under Art. 19(1)(g) read with cl. (6) of that Article.

However on 18.6.1951, the Constitution (First Amending) Act was passed by the Parliament. By Sec. 3(1) of that Act for clause (2) of Art. 19, a new sub-clause was substituted which was expressly made retrospective. Clause 6 of Art. 19 was also amended which now reads as follows :—

(6) Nothing in sub-clause (g) of the said clause shall affect the opperation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in parlicular, nothing in the said clause shall effect the operation of any existing law in so far as it relates to, or prevents the State from making any law relating to :—

1) the professional or technical qualifications necessary for practising any profression or carring on any occupation, trade or business or,
ii) the carrying on by the State, or by a Corporation owned or controlled by the State, of any trade, business, industry or service whether to the exclusion, complete or partial of citizens or otherwise.

It may be seen that Cl (6) of Art. 19 as amended was not made retrospective as the amended Cl. (2) had been made. The petitioner in the above case, contented that law having become void for unconstitutionality was dead and could not be vatalised by a subsequent amendment of the Constitution. The petitioner's contention was that in order to regain vitality the impugned Act should have been re-enacted. Saghir Ahmad's case was quoted as authority. But in

that case it was not pointed out by the learned Advocate General, K. L. Mishra that the Uttar Pradesh Government published the notification on 25.3.1953 and proposed scheme thereunder on 7.4.1953. It means that scheme was published long after the Constitution (First Amendment) Act, 1951 had been passed and the scheme would have been protected by this Amendment. But this point was not raised in Saghir Ahmed's case. Had this been done, perhaps the case would have been decided otherwise. Because at the time of the petition the impugned law was well protected by the amendment.

The question before the court in *Bhikaji Narain's case* was that what effect the amended cl. (6) had on the impugned Act. The court held that the impugned Act was not dead but it was very much alive and was in effect as far as the non-citizens were concerned. Of course, the impugned Act was in-operative and stood ineffective, nugatory and devoid of any legal force or binding effect only with respect to the exercise of the fundamental rights on and after the date of the commencement of the Constitution. Therefore between 26.1.1950 and 18.6.1951 the impugned Act could not affect the fundamental rights of a citizen under Art. 19 of the Constitution.

The true position was that the impugned Act became ineffective, as it was eclipsed for the time being by the fundamental rights The effect of the Constitution (First Amendment) Act removed the shadow and made the impugned Act free from all blemish or infirmity. Dass, in this connection, observed :

> If that were not so, then it is not intelli gible what "existing law" could have been soughi to be saved from the operation of Art. 19 (1) (g) by the amended Cl. (6) in so far as it sanctioned the creation of State Monopoly, for, 'ex hypothesi' all existing laws creating such monopoly had already become void at the date of the commencement of the Constitution in view of cl. as it then stood.29

After the amendment of cl. (6) of Art. 19, the Act in question immediately became fully operative even as against the citizens. The notifications declaring the intention of the State of taking over the bus routes to the exclusion of all other motor transport operators was published on 4.2.1955 and at that time it was perfectly constitutional for the State to do so, and the court held that the contentions put forward by the State of Madhya Pradesh were well-founded and the objections raised by the petitioners were untenable and must be negatived.

29 A.I.R. 1955 SC 781, 785.

The petitioners also contended that their rights under Art. 19 (1)(g) read with cl. (6) of that article have been violated because they have been deprived of their property, namely, the right to ply motor vehicles for gain without compensation under Art. 31(2) of the Constitution. But the court refused to accept this contention and held that after the Fourth Amendment to the Constitution which added Art. 31 (2-A)[30] to the Constitution, no body can claim compensation under Art. 31(2) unless the ownership or right to possession of any property is transferred to the State.

Hence the compensation under Art. 31(2) was not warranted. Moreover, Art. 31 which was amended on 27th April, 1955 removed the inconsistency and this petition was filed on 27th May, 1955.

In *Krishnayya* v. *State of Andhra Pradesh*,[31] Chapter IV-A of the Act was challenged. The State of Andhra Pradesh published a scheme for the purpose of providing an efficient, adequate, economical and properly co-ordinated transport service in the public interest with effect from 10.1.1958 under Sec. 68-C of the Motor Vehicles Act. The petitioners filed objections to its approval by the Government. They were heard by the Secretary, Home and Transport Department. In the meantime, the Andhra Pradesh Government established a Road Transport Corporation and issued an order dated 11.1.1958 empowering the State Regional Transport Corporation to take over the management of the existing Road Tranport Department of the Government of Andhra Pradesh to enforce the above scheme.

The petitioners filed petition under Art. 226 of the Constitution on two grounds :

1. that Chapter IV-A of the Motor Vehicles Act is *ultra vires*,
2. that the scheme is vitiated by reason of non compliance with the procedure laid down in the Act itself.

Chapter IV-A could be impugned also on third ground, namely, that : It is a colourable legislation ; that it constitutes a fetter on the power of the Parliament to enact future legislation.

30. Art. 31(2-A) : "Where a law does not provide for the transfer of the ownership or right to possession of any property to the State or to a Corporation owned or controlled by the State, it shall not be deemed to provide for the compulsory acquisition or requisitioning of property, notwithstanding that it deprives any person of his property."

31. A.I.R. 1959 A.P. 292.

Sections 68-B and 68-G of Chapter IV-A were attacked as a fraud on the power of the Parliament. It was contended that this Chapter, judged by its effects and operation, empowers a State or State controlled Corporation to acquire private transport undertaking as a whole covertly and directly by making provision for compensation for only a part thereof, namely, for the Cancellation of the permits and as such, it is a fraud on the Constitution particularly on Art. 19 (6) (ii) and Art. 31.

The petitioners contended that they had been deprived of their property by introducing the scheme, their transport vehicles and other materials had become useless, and as such they should be given compensation under Art. 31(2) of the Constitution.

The court held that the petitioners were not entitled for compensation under Art. 31 (2) unless the provisions of Art. 31 (2-A) are satisfied. Art. 31(2-A) lays down that unless the possession or the owenrship in the property is transferred to the State, the property cannot be said to have been acquired by the State, and unless the property is acquired by the State in the terms of Art. 31(2-A), the provisions of Art. 31 (2) can not be attracted. Chapter IV-A of the Motor Vehicles Act, therefore, is not fraud on the Constitution. P. Chandra Reddy, J., observed in this connection :

> So long as the State does not acquire title to the property, the Fundamental Right of a citizen under Art. 31 does not come into play. Viewed in the light of the amended Article, it cannot be postulated that the attributes of a compulsory acquisition either in relation to tangible assets or intangible ones are present in the statute that it is assailed as unconstitutional. Obviously, the Parliament made provision for compensation for cancellation of permits to avoid controversy. Consequently the doctrine of colourable legislation cannot be extended to the provisions of Chapter IV-A of the Motor Vehicles Act.[32]

The High Court observed that colourable legislation implies two things. One is legislative in competency and another is constitutional prohibition. But in this case there seems to be no question of legislative incompetency because the State has got power to enact this law under the amended Art 19 and at the same time, there is no constitutional prohibition on the legislature to enact the law.

His Lordship further observed in favour of constitutionality of of the Act :

> We, therefore, reject this contention and uphold the constitutionality of sec. 68-G. There is always a presumption in favour of the constitutionality

32. A.I.R. 1959 A.P. 292, 298.

> of a legislation and it is only for those who impeach its validity to show how the legislature has transgressed the limits imposed upon it by the constitution and this the petitioners have not succeeded in establishing.[33]

As regards the validity of Sec. 68-B is concerned, P. Chandra Reddy, J, observed :

> The competency of Parliament to alter, repeal or amend any law is not affected by Sec. 68-B. If a law which may hereinafter be passed by parliament is repugnant to the provisions of the statute now challenged the question would then arise which of the two laws will have to prevail. If the law that is made, either expressly or by necessary implication, repeals any part of Chapter IV-A it is the latter enactment that overrides it.[34]

His Lordship further added :

> If there is a conflict between the impugned statute and the other legislation either in existence or to be made the only question is which of them prevails. It cannot have the effect of abridging or cutting down any right of the Government to make further legislation. Therefore the argument, in this regard is unsustainable and has to be negatived.35

In *Dosa Satyanarayanamurthy* v. *Andhra Pradesh State Regional Transport Corporation*[36] also the constitutionality of Chapter IV-A of the Act was challenged before the Supreme Court. In this case petitioners filed petition under Art. 32 for the enforcement of their fundamental right to carry on the business of motor transport in West Godavari District in Andhra Pradesh.

In exercise of the powers conferred by Sec. 68-C of the Motor Vehicles Act as amended in 1956, Andhra Pradesh State Regional Transport Corporation published seven proposals dated 7.12.1959 in the official gazette propounding seven schemes for the nationalisation of the Road Transport in respect of different parts of West Godavari District. The objections and representations were invited within 30 days of the publication of the scheme. Objections were heard by the Minister but the objectors were not satisfied and they filed the petition in the Supreme Court.

Shri A. V. Viswanatha Sastri, for the petitioners, raised the following points before the Supreme Court :

1. Chapter IV-A of the Motor Vehicles Act is *ultra vires* the powers of the Parliament. It comes within the exclusive legislative field of the State.

33. *Id.* at 299.
34. *Ibid.*
35. *Ibid.*
36. (1961) 1 S.C.R. 642.

2. It infringes the petitioner's right under 19(1)(g)
3. It violates Art. 14.
4. The scheme is vitiated by the doctrine of bias.
5. The scheme should be prepared and introduced for the whole of the State.
6. The Chief Executive Officer was not to act on behalf of the Regional Transport Corporation.
7. New routes have been added in the scheme.
8. The scheme did not give the number of vehicles.

Supreme Court held in the first instance that Chapter IV-A is not *ultra vires* the powers of the Parliament which could enact Chapter IV-A under entry 21 read with entry 35 of the concurrent List.[37] Another attack was whether Chapter IV-A of the Act is saved by Art. 19(6) of the Constitution. If Chapter IV-A, which provides for the nationalisation of Road Transport Services in the manner prescribed thereunder is not a permissible legislation covered by Aricle 19(6), it would certainly offend against the fundamental right of the petitioners to do business in motor transport. The main question raised before the Supreme Court in this case was that how far and to what extent Art. 19(6) (ii) secured the validity of Chapter IV-A of the Motor Vehicles Act from the attack that it violated Art. 19(1)(g).[38] The counsel for the petitioners contended that Art. 19(6)(ii) provides only for a partial class of persons as a whole and not for partial exclusion of some among the same class. As sec. 68-C enables the State Transport Undertaking to frame a scheme for excluding among the same class, the said provision is not saved by Art. 19(6) of the Constitution. The counsel also contended that section 68-C enables the State Government to take over particular class of a service (bus transport service) and excludes all or some of the persons in that service. Consequently this section confers a wide power on the State Government beyond the permissible limits of Art. 19(6)(ii) of the Constitution. In other words, Art. 19(6)(ii) does not enable a partial exclusion of some among the same class of service,

37. See also *H. C. Narayanappa* v. *The State of Mysore* (1960) 3 S.C.R. 760.

38. The constitutional validity of Chapter IV-A of the Act was also questioned in *G. Nageshwara Rao* v. *Andhra Pradesh Regional Transport Corporation* (A.I.R. 1959 S.C. 308) but not on the above ground. There it was argued on behalf of the petitioner that chapter IV-A of the Act was a piece of colourable legislation of which real object was to take over the business of the petitioner under the cover of cancellation of permits in contravention of Art. 31 of the Constitution and that plea was rejected by the Supreme Court. But no attack was made on the validity of Chapter IV-A of the Act on the ground that it infringed the provisions of Art. 19(1)(g) of the Constitution.

whereas section 68-C permits the said exclusion. J., Subbarao, in delivering the judgment of the court and upholding the validity of Chapter IV-A of the Motor Vehicles Act observed :

> Under sub-cl. (ii) of Art. 19(6), the State can make a law relating to the carrying on by the State or by a Corporation, owned or controlled by the State, of any particular business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise. Art. 19(6) is only a provision and the law made empowering the State to carry on a business is secured from attack on the ground of infringment of the fundamental rights of a citizen to the extent it does not exceed the limits or scope of the said provision. Sub-clause (ii) is couched in very wide terms. Under it the State can make law for carrying on a business or service to the exclusion complete or partial of citizens or otherwise. The law, therefore, can provide for carrying on a service to the exclusion of all the citizens; it may exclude some of the citizens only ; it may do business in the entire State or a portion of the State, in a specified route or a part thereof. The word "service" is wide enough to take not only the general motor service but all the species of motor services.
>
> There are, therefore no limitations on the States' power to make laws conferring monopoly on it in respect of an area, and person or persons to be excluded. *In this view, it must be held that Sec. 68-C does not exceed the limits prescribed by Art. 19(6)(ii) of the Constitution.*[39]

The next attack on chapter IV-A was that this violated Art. 14 of the Constitution, the Supreme Court held that this falls under reasonable classification and it does not offend against Art. 14. Subba Rao, J., observed :

> The legislature placed the State Transport Undertaking in a class different from other undertakings. The question is whether the classification made in Chapter IV-A of the Act is best and has reasonable relation to the object of the legislation. The object of Chapter IV-A, as provided by the provisions of Section 68-C is to provide, in the interest of the public, an efficient, adequate, economical and properly co-ordinated road transport service. To achieve that object Sec. 68-C confers a power on State Transport Undertaking to prepare a scheme to run the service, whether to the exclusion, complete or partial, of other persons or otherwise. The classification has certainly reasonable nexus to the object sought to be achieved. Ordinarily a State Transport Undertaking, compared with personal or private undertakings, should be in a better position than others to carry on the said services for the benefit of the public. Administratively, financially and technically it can be expected to be in a far better position than others. It can provide more well equipped buses, give better amenities to the travelling public, keep regular timings, repair or replace the buses in emergencies. It may also employ efficient supervisory staff to keep things going at an appreciably high standard . We are not suggesting that there

39. (1961) 1 S.C.R. 642, 649.

> are no individuals or private companies who can efficiently run the service. But the State, compared with individuals, should certainly be in a better position to achieve the object, namely, to improve the road transport service in all its diverse aspects. In such a situation, when Legislature, which must be presumed to understand and correctly appreciate the needs of its own people, makes a classification between a State Transport Undertaking and others carrying on the business of transport services, *we can not say that there is no reasonable basis for such a classification.*40

Another attack on chapter IV-A was that it gives arbitrary powers to the State Transport Undertaking to initiate the scheme.

The Court in not accepting the argument held :

> It is said that the State Transport Undertaking is either the State Government or a Corporation owned or controlled by the State, and as such the entire quasi-judicial procedure prescribed is only a cloak to screen the exercise of an absolute and arbitrary power on the part of the Government. We cannot say that Chapter IV-A is such a device. The legislature made a sincere attempt to protect as far as possible individual rights from the arbitrary acts of the executive. Once it is conceded that Chapter IV-A of the Act is constitutionally good and that the legislature can validly make law for nationalisation of the Road Transport Service, the procedure laid down for implementing the said policy cannot, in our view he said to be unreasonable.[41]

The Supreme Court further added in this connection :

> If in any particular case the mala fides of authorities concerned and collusion between the State Transport Undertaking and State Government to deprive particular persons of their right to do road transport business or to drive out persons from trade on extraneous considerations, are established, that may be a ground for striking down that particular scheme. But the provision of Chapter IV-A cannot be struck down on the ground that they confer an arbitrary power on the State Transport Undertaking, between individuals and private Undertakings and between individuals and individuals.42

The same question was also raised in *Saghir Ahmed v. State of Uttar Pradesh* [43] where Sec. 42 (3) of Uttar Pradesh Road Transport Act, 1951 was challenged. Under that section the Government was exempted from taking permits for its own vehicles and it could run any number of buses as it liked without obtaining the permits for them. In furtherance of the State policy establishing a complete State monopoly in respect of Road Transport business, the Road Transport

40. *Id.*, at 650-651.
41. *Id.*, at 652.
42. *Id.*, at 652-653.
43. A.I.R. 1954 SC. 728.

authorities began not only to cancel the permits which had already been issued to private operators but also refused to issue new permits to the private operators, who would otherwise be entitled for the permits. The Court held that the State Government can be placed in a special class as against the citizens. Mukherjel J., observed :

> There is no doubt that classification is inherent in the concept of a mono poly, and if the object of legislation is to create monopoly in favour of the State with regard to a particular business, obviously the state cannot but be differentiated from ordinary citizens and placed in a separate category so far as the running of business is concerned and this classification would be perfectly rational in relation to the object of the Statute.44

The Supreme Court, therefore, held that the provisions of Chapter IV-A of the Act do not contravene the provisions of Art. 14 of the Constitution.

Next objection was that Government is actuated by bias against the private operators. Under the scheme, it was alleged, the Government had complete control over the Road Transport Corporation. Everything of the scheme was finalised by the State Government. On this hypothesis it was contended that the Government itself was made judge in its own cause and its decision was vitiated by legal bias. Furthermore, the Minister being incharge of Road Transport, predetermined the issue of nationalisation of Road Transport and this disqualified him to decide the dispute between the State Transport Undertaking and the petitioners. Similar questions were raised in *Gullapalli Nageswara Rao* v. *The State af Andhra Pradesh.*[45] It was contended in that case that the Chief Minister who was incharge of transport, could not be a judge in his own cause as he was biased against the private operators. The Supreme Court pointed out the distinction between official bias of an authority which is inherent in a statutory duty imposed on it and personal bias of the said authority in favour of, or against one of the parties.

In the above case the objection regarding the Minister's bias was turned down by the Supreme Court. The same question was also discussed in H. C. *Narayanppa* v. *The State of Mysore*[46] and it was held that the decision of the Minister or any officer of the Government cannot be challenged on the ground of bias unless a clear-cut proof has

44. (1955) 1 S.C.R. 707, 731
45. A.I.R. 1959 SC 1376
46. A.I.R. 1960 SC 1073

been established against them that they were biased. Shah J., observed :

> It is also true that the Government on whom the duty to decide the dispute rests, is substantially a party to the dispute but if the Government or the authority to whom the power is delegated acts judicially in approval or modifying the scheme the approval or modification is not open to challenge on a presumption of bias. The Minister or the officer of the Government who is invested with the power to hear objections to the scheme is acting in his official capacity and unless there is a reliable evidence to show that he is biased, his decision will not be liable to be called in question, merely because he is limb of the Government.47

In this case it was not proved that the Minister concerned had any personal bias against the private bus operators. Hence he was not disqualified for hearing objections to the scheme and decide.

In the case of *G. Nageshwar Rao* v *Andhra Pradesh State Regional Transport Corporation*,[48] Mr. M. K. Nambiar, who appeared for the petitioners questioned the validity of the scheme and his first argument before the Supreme Court was that Chapter IV-A of the Motor Vehicles Act in substance and in effect, authorised the State to acquire the undertakings of the citizens without providing for any compensation for the entire undertaking and therefore it was a fraud on the Constitution, particularly on Art 31. His argument was that under Art. 31 of the Constitution no law shall be made by the State for the transfer of ownership or right to possession of ony property to the State or to a Corporation without fixing the amount of compensation or specifying the principles on which compensation is to be determined. Chapter IV-A of the Motor Vehicles Act, 1939 authorises the State to acquire the ownership of the property of the displaced operators under the guise of cancellation of permits without providing for compensation under Art. 31 of the Constitution and as such this Chapter of the Motor Vehicles Act was a colourable legislation and a fraud on the Constitution.

In appreciating the above argument, it would be better to mention the relevant provisions of Articles 19 and 31 of the Constitution.

19 (1) All citizens shall have the right,

(g) to practise any profession, or to carry on any occupation trade or business.

47. A.I.R. 1960 SC 1073, 1079.
48. A.I.R, 1959 SC 308.

19 (6) Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particutar, nothing in the said sub-clause, shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,—

(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

(ii) the carrying on by the State, or by a Corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.

Article 31 (1), (2) and (2-A).

Art. 31 (1) No person shall be deprived of his property save by authority of law.

(2) No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for compensation for the property so acquired or requisitioned and either fixes the amount of the compensation or specifies the principles on which, the compensation is to be determined and given ; and no such law shall be called in question in any court on the ground that the compensation provided by that law is not adequate.

(2-A) Where a law does not provide for the transfer of the ownership or right to possession of any property to the State or to a Corporation owned or controlled by the State, it shall not be deemed to provide for the compulsory acquisition or requisitioning of property, notwithstanding that it deprives any person of his property.

Art. 19(6)(ii) was added alongwith other amendments by the First Amendment of the Constitution which came into force on 18th June, 1951. Clause 2 of Art. 31 was amended and Cl. 2-A was inserted by the Fourth Amendment of the Constitution with the clear intention and purpose to supersede the decisions of the Supreme Court in the cases of *State of West Bengal* v. *Subodh Gopal Bose*,[49]

49. A.I.R. 1954 SC 92

Dwarkadas Shri Niwas v. *Sholapur Spinning & Weaving Co.*[50] and *Saghir Ahmed* v. *State of Uttar Pradesh.*[51] In *Subodh Gopal's* case, the Supreme Court held that clauses (1) and (2) of Art. 31 are not mutually exclusive in scope and content and should be read together and understood as dealing with the same subject, namely, the protection of the right to property by means of limitations on the State power referred to above, the deprivation contemplated in cl. (1) being no other than acquisition or taking possession of property referred to in cl. (2) of Art. 31.

The Supreme Court confirming the above principle in the case of *Dwarkadas Sriniwas* v. *Sholapur Spinning & Weaving Co. Ltd.*[52], held that the word acquisition is quite a wide concept, meaning the procuring of property or the taking of it permanently or temporarily and need not be confined to the acquisition of legal title by the State in the property taken possession of. In *Saghir Ahmed's case*[53], the Court applying the same principle held :

> The fact that the buses belonging to the appellants have not been acquired by the Government is also not material. The property of a business may be both tangible and intangible. Under the statute the Government may not deprive the appellants of their buses or any other tangible property but they are depriving them of the business of running buses on hire on public roads. We think therefore that in these circumstances. the legislation does conflict with the provision of Art. 31 (2) of the constiution and as the requirements of that clause have not been complied with, it should be held to be invalid on that ground.

In the aforesaid cases, the Supreme Court broadly laid down the two following principles and both of them do not hold good now :

(a) that both clauses (1) & (2) of Art. 31 dealt with the doctrine of eminent domain ; they dealt with the topic of compulsory acquisition of property and

(b) that the word "acquisition" does not necessarily imply acquisition of legal title by the State in the property taken possession of but may comprehend cases where the citizen has been substantially dispossessed of the right to enjoy the property, with the result that the right to enjoy property has been materially reduced by the impugned State legislation.

50. A.I.R. 1954 SC 674
51. A.I.R. 1954 SC 728.
52. A.I.R. 1954 SC 674
53. A.I.R. 1954 SC 728, 740.

The Fourth Amendment of the Constitution (1955) which inserted cl. (2-A) in Art. 31 is very significant. The result of cl. (2-A) of Art. 31 is that unless the law depriving any person of his property provides for the transfer of ownership or right to the possession of any property to the State, the law does not relate to acquisition or requisition of property and, therefore, the limitations placed upon the legislature under Cl, (2) of Art. 31 of the Constitution will not apply to such law. Taking in view the legal position of the Fourth Amendment, Mr. M.K. Nambiar contended inthe case of *G. Negeswara Rao.* v. *Andhra Pradesh State Regional Transport Corparation,*[54] that the right to do business is property as held in the case of *Saghir Ahmed*[55] and Chapter IV-A of the Moter Vehicles Act in effect transfers ownership of that business to the Corporation or the State indirectly. The law creates State monopoly of the bus transport and prevents other citizens from doing this business without any compensation under Art. 31 (2) of the Constitution. But the Supreme Court disagreed with the above contention and held that chapter IV-A does not take away the property of the private road operators. Hence Art. 31 (2) cannot be attracted. The issue of compensation to the displaced operators under Art. 31 (2) has been settled almost finally by the Supreme Court in this case. However Professor P.K. Tripathi is of the opinion that this decision is founded on an "Oversimplification" and Supreme Court might overrule it at some later date. In this connection the learned Professer referred to an Irish case of *Uister Transport Authority* v.*James Brown and Sons Ltd.* where in similar circumstances, the payment of compensation was held obligatory.[56]

In *Ram Chandra* v. *State of Orissa*[57] the Supreme Court justifying the State monopoly of Road Transport held that the Orissa Motor Vehicles (Regulation of Stage Carriage Service) Act, Act No. 36 of 1946 and Orissa Motor Vehicles Amendment Act. (Act No. 1 of 1949) could not be said to be invalid on the ground that they were designed with a view to ousting the private stage carriage services from business altogether and were intended to create a virtual monopoly in favour of a Joint Stock Company or the State. Art. 19 (6) of the Constitution as amended by the First Amendment Act (1951) rendered

54. A.I.R. 1959 SC 308
55 A.I.R. 1954. SC 728
56. See Professor P. K. Tripathi's review of *Constitutional Protection* by L.A. Sheridan, at p. 91 of the Law Review of Punjab University Law College, Chandigarh (April-Oct 1964)
57. A. I. R. 1956 SC 298.

inapplicable all such arguments regarding alleged ousting of the private sector and the monopoly in favour of the State or the Joint Stock Company. Thus the resultant culimination of private owned stage carriage services would not amount to infraction of fundamental rights guaranteed under Art. 19 (1)(g) of the private operator and the State had complete right to create monopoly of Road Taansport in its own favour.

In the end, it may be made quite clear that the amended Art. 19(6)(ii) of the Constitution clearly authorises the State Government to make a law to enable a State to create a monopoly in its own favour of any trade, business, industry or service and it can be exercised by itself directly or through its nominee. Once a law is made in this regard, the fundamental right of a citizen under Art. 19(1)(g) would be extinguished and the right of a citizen would not come into conflict with that of the State. Consequently, it would not involve any judicial determination of any disputes between two parties. Nor would it be correct to speak of a *lis* between the operators and the State Transport Undertaking.

It may also be pointed out that it is very much competent for the Parliament to enact Chapter IV-A of the Act under entry 21 read with entry 35 of List III of the Constitution. The expression, "commercial and industrial monopolies" in entry 21 of List III of the Seventh Schedule to Constitution of India is wide enough to include grant or creation of commercial or industrial monoyolies to the State and citizens as well as the control of monopolies.[58] It was observed by the Supreme Court in *Kondala* v, *A. P. State Transport Corporation*[59] that there are no limitations on the State's power to make laws conferring monopoly on it in respect of (i) an area, or (ii) persons to be excluded. This section, which enables the State to take over a particular class of service, and excludes all or some of the persons doing business in that class of service does not exceed the limits prescribed by Article 19(6)(ii) of the Constitution. The most important decision delivered by Justice Gajendragadkar in *Akadasi* v. *State of Orissa*.[60] which has decided the issue almost finally is that the creation of state monopoly in respect of any trade or business must be presumed to be reasonable restriction and in the interest of the general public as far as Article 19(1)(g) is concerned. Art. 19(6)(ii) shows that it is permissible to the State to make laws for creating State monopolies, either partial or complete, in respect of any trade, business, industry or service which includes Road Transport also. The State may enter any trade as a monopolist either for administrative reasons, or with the object of mitigating the evils flowing from competition, or with a view to regulating prices or improving the quality of goods or even for the purpose of making profits in order to enrich the State exchequer.

58. *H. C. Narayanappa* v. *The State of Mysore*. (1960) 3 *S. C.* R. 742

59. A. I. R. 1961 SC 82.

60. A. I. R. 1963 SC 1047.

It was also held that in interpreting Art. 19(6), it is essential for the court to bear in mind the political or the economic philosophy underlying the provisions in question and that would necessarily involve the adoption of a liberal and not a literal and mechanical approach to the problem. Mr. Justice Gajendragadkar in delivering the judgment of the court observed :

> Art. 19 (6) (ii) clearly shows that there is no limit placed on the power of the State in respect of the creation of State monopoly. The width of the power conferred on the State can be easily assessed if we look at the words used in the clause which cover trade, business, industry or service. It is true that the State may according to the exigencies of the case and consistently with the requirements of any trade, business, industry or service, exclude the citizens either wholly or partially.[61]

From the above it is clear that the State Governments are fully empowered by the Constitution[62] to nationalise the road transport in the public interest. But it cannot be said that the monopoly is free from defects. The defects of any monopoly can be very serious and damaging in the absense of any competition and State Monopoly is no exception to it. But it does not mean that these defects cannot be removed. Therefore, it may be pointed out that if anything goes wrong with the nationalisation of road transport then we will have to blame the man and not the scheme.

61. A. I. R. 1963 SC 1047, 1053.

62. Art. 19(6) (ii) read with Art. 305

A STUDY OF RETAIL INSTALMENT CONTRACTS OF THE BAY AREA : A STUDY OF LAW IN BOOKS AND LAW IN ACTION*

*Umesh Kumar***

One of the most significant developments in the law of contracts has been the appearance of what Saleilles has called the 'contrats d'adhesion'.[1] The traditional image of contracts as being the exclusive product of a freely negotiated agreement no longer accords with realities. Modern techniques of mass-production and mass-distribution make the use of a uniform set of printed conditions, which can be used recurrently and for a large number of persons, necessary. Standardising contracts is, in this, a counterpart of standardising goods and productive processes.[2] Typically, the standardised contracts[3] are used by enterprises with strong bargaining power, and frequently the weaker party the "adherent" consumer—is not in a position to shop around for better terms. For one, all competitors may be using the same or similar standardised contracts. The result is that often the consumer has no alternative but to accept. He does not negotiate. He merely adheres.[4]

The use of adhesion contracts in American business is phenomenal. And since each kind of trade or business raises its own problems, the process of contracts-standardisation is keyed to meet the exigencies of particular trade or business. The present study chooses the instalment sales transactions. Again, only a narrow area of these transactions has been identified for the purpose of research. I have concenrated on the retail instalment contracts used by the TV-dealers of the Bay Area. The research methodology has been (a) to collect prevailing retail instalment contracts forms[5] for making an analytical study vis-a-vis the provisions of the Unruh Act, (b) discussions with the cooperating TV-dealers and officials of the financing agencies, whose role in the retail instalment transactions is substantial and significant, and (c) discussion with a helpful attorney in order to learn the mechanics of drafting of the standardised retail instalment contract forms.

To combat the present ills, some tentative suggestions have been made in the end.

Retail Instalment Contracts :

In the United State, retail instalment purchasing has assumed truly gigantic proportions.[6] In fact, it has been claimed that without financing the purchase of consumers' goods, it would be impossible to create an adequate market to sustain mass production, low unit costs and prices within the average family budget.[7] A responsible official of a large Bank has shown me with facts and figures that one of the principal keys to the buoyancy of the American economy is the retail instalment sales.[8]

Granted then, that retail installment contracts' role in the American economy is significant, the next few pages would attempt their structural and functional analyses.

*The present author is very grateful to Professor Justin Sweet, University of California, School of Law, Berkeley, who supervised the research, besides giving many valuable suggestions.

The field work was done between October 1968 and January 1969 in Oakland, Berkeley and San Francisco. It is understood that the ensuing discussion and conclusions are important and havenot lost their validity as yet.

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1. De la Declaration de Volonte, 1910, p. 229, art. 89. The full quotation occurs in Prasunitz, *The Standardisation of Commercial Contracts*, (1937) p. 36.

2. Llewellyn, "Book Review of Prausnitz", 52 Harv. L. Rev. 700,701 (1939).

3. The expression standardised contracts, standard form contracts, adhesion contracts and mass contracts have been used synonymously, though, sematically, subtle shades of difference may be discerned.

4. Kessler, "Contracts of Adhesion : Some Thoughts About Freedom of Contracts", 43 Colum. L.R. 629 (1943); Anson, *Principles of the English Law of Contract*, 146 (1959). Anson refers to the "adherent" as enjoying the "status" of a consumer. This reminds one Henry Maine's famous generalisation that in all progressive societies the development of law has been from status to contract. Would not development of the concept of adhesion contract contradict Maine ?

5. It may be mentioned that to break the unconcealed hostility of the dealers and finance companies, the present author had to pose himself as a Government nominee interested in introducing similar institutions in his own country !

6. At the end of September 1968, credit sales of consumer goods amounted to nearly 21.8 billion dollars. 54 Fed. Res. Bulletin. No. 11 (Nov. 1968).

7. Ehrenzweig : *Contracts in the Conflict of Laws*.59 Colum L. Rev. 973, 976 (1959). The other advantages of the installment purchasing include : (i) permitting consumers to use goods, while paying for them (ii) committing consumers to disciplined savings (iii) enabling retailers to increase sales and (iv) providing sellers and financiers with a lucdrative from investment.

8. Interview with one of the Managers of the Bank of America, Telegraph Ave. Branch, Berekeley., dated Nov. 1, 1968.

Every retail instalment contract[9] seems to possess two characterstics :

(a) an *advantage* to the buyer, in the sense that though he gets the goods for use, the payment of the purchase price is spread over a period of time in the shape of periodical instalments[10]; and

(b) the assumption of some *disadvantage*, which could take several forms, by the buyer. Generally, a time-price differential is computed upon and added to the unpaid balance at the time of sale. Where no time-price differential is added, the disadvantage consists in the fact that the goods are available at a lesser price, if paid for in cash or the fact that buyer by handing out cash would have received some additional goods or services or otherwise a superior product.[11]

A retail instalment contract, used by TV-dealers in the Bay Area is generally a printed standard form contract of four separate sheets having more or less identical terms and conditions, on each page. The Act[12] prescribes the size of lettering, and uses three expressions : 8-point type,[13] 8-point bold type, and 10-point bold type. In general the printed portion of retail instalment contract must be, at least, in 8-point type.[14] "Notice" clause[15] has to be in 8-point bold type. "Acknowledgement" by the buyer of a completed copy of contract,[16] as well as, the description of the nature of the contract,[17] have to be in 10-point bold type. The intention of the legislature is that the terms

9. Though a retail instalment contract has been defined in S. 1802.6, Ca C. C, as including a security agreement, it is not necessary that every such contract must have a title-retention provision. To do otherwise, would exclude time-sale transactions of perishable goods, where it is impractical to retain security interest.

10. In case of TV, they are either weekly or monthly, usually the latter. The Unruh Act, S. 1805.2 permits also semi-monthly instalments.

11. See Section 1802.6, Cal. C.C. In 1960, California Legislature passed the Unruh Act. (Retail Instalment Sales Act.) to regulate all goods sales except the automobile. The Unruh Act, covers SS 1801 to 1812.10 of Cal. C.C.

12. Whenever the expression "Act" is used, it refers to the Unruh Act, 1960.

13. One point type is about one seventy-second of an inch Merriam Webster New International Dictionary 1904 ,2750 (1948 ed). This paper has been typed in eleven point type.

14. Cal. C. C. S. 1802.1.

15. Cal. C. C. S. 1803.2 (c). See infra page 107

16. Cal. C.C. S. 1803.7. See infra page 108

17. i. e. whether Retail Instalment Contract or Security Agreement See S. 1803.2 (b)

and conditions—for the most part exculpatory in an instalment contract should not be hidden behind microscopic print. Here, as indeed everywhere else in the instalment contract form, when the provisions of the Act do not further the interest of the seller, the attempt is to satisfy only the *minimum* required by law. All the instalment contract forms, the present author came across, satisfied the minimum requirement of the Unruh Act as regards the size of lettering.

The printed contract forms are usually supplied by a financing agency to the retail dealers. These finance companies exert powerful influence over instalment sellers.[18] In fact, the relationship between the retail seller and finance companies has very strong adhesive tones. The financing agency usually approaches an attorney to get the instalment contract forms drafted. A representative of the agency approaches an attorney and very often, leaves behind the instalment contract forms, his competitors have been using. The attorney[19] told the present author that a discussion does take place between him and the agency representative, but it is vague. The agency invariably wants legal protection upto the hilt, just in case the instalment-purchaser happens to turn out a "clever guy".[20] At the same time, the agency wants a contract, which will hold in a court of law and is almost always lukewarm towards any suggestion for including clauses favourable to buyers. Their reaction is that the Unruh Act provides enough safeguards for the buyer and enongh obligations on them. The attorney therefore, generally counsels restraint, when the agency wishes to have a term embodied which is inconsistent with the current law. No wonder, the finished product shows painful attempts to conform to the Unruh Act requirements. It is also felt by attorneys that after they have turned in the drafted contract, the financing agencies tinker with the words doing minor surgery or even graftings here and there.[21]

18. In fact, after World War I, the initiative in determining the terms and conditions of retail instalment financing transactions largely passed from the installment seller to the finance company. See Note, "Protection of Borrowers in Distributive Finance", 60 Yale L.J. 1218, 1222 (1951) and Note, "Protection of Automobile Instalment Buyers : The FTC Steps In", 61 Yale L. J. 718, 719, n.8 (1952).

19. Mr. Willard E. Stone, Walnut Creek, California.

20. Even if the buyer does turn out to be a "clever guy", financing agency has other alternatives. It has a recourse to the dealer and can compel him to repurchase the note and security instruments for the balance of its debts. Above all, based on its prior experience with that dealer, it has a reserve against losses of perhaps 15-20% of the balance of dealer's assigned accounts.

21. See infra Page 112.

What has surprised the present author must, however, is the fact that apparently these instalment contracts are not periodically examined by anybody versed in law because at least one recent legislative amendment of the Act is not reflected in the prevailing instalment contracts.[22]

A typical instalment contract is thus heavily one-sided document. Moreover, the financing agencies[23] were unanimous that they did not allow any retail seller to renegotiate or delete any of the printed terms in the contract provided by them. A purchaser is supposed to submit docilely and sign meekly on the dotted line. When this was pointed out to the financing agencies, they assured the present author that the hard provisions of the installment contracts are used with great reluctance and only after exploring all avenues for an amicable settlement.[24] If the retail dealer is unreasonable with the buyer or refuses to live up to the promises he made, the financing agency, if approached to, can always armtwist the dealer, as not only the contract between the dealer and the financing agency is highly favourable to the agency, the letter also has 15-20% of the balance of dealer's assigned accounts, which can be used as a lever. The financing agency can also cancel a retailer's contract on the ground of "misconduct" and even black-list them. Chances are that no other financing agency would come forward to do business with him, and this may well be disastrous for his business.

In drafting an instalment contract form, the usual practice is to go through the provisions of the Unruh Act and the relevant decisions and then almost always the effort is to weave the language of the statute in to the contract. This tends to assure efficacy as experience shows that this considerably softens judicial hostility, just in case the clauses of the contract have to be construed in a court of law. The Act determines *affirmatively* what must be a part of every instalment contract. It also determines *negatively* what the contract must not have. Both such affirmative and negative determinations are designed to instil the minimum respect for consumer's position by shortening the reach of the instalment seller and the financing ageney.

22. See infra Page 111.

23. Pacific Finance, Household Finance, Crocker-Citizens National Bank and Budget Finance.

24. The attorney, the present author talked to, confided that in practice, while reputable and big financial agencies are slow to fall back on the clauses of the contract, the smaller ones lose their patience soon presumbaly on account of their small cushinning power to absorb resulting losses accruing due to withholding of the installments. The Finance Companies deny this.

25. See Hogan, "A Survey of State Retail Instalment Sales Legislation", 44 Cornell L. Q. 38 (1958).

The affirmative determinations generally rest on the philosophy of disclosure. It is presumed, at least in theory, that if a cautionary notice is given and the onerous terms of the contract disclosed, and still the consumer, in exercise of his judgment, agrees to be bound by them, it is his own fault.[26]

The provisions of the Act concerning disclosure, and what extent they are adhered to in practice, are discussed below :

(1) The simple requirement[27] that the instalment contract must be in writing and legible, is of course, always met.

(2) The nature of the contract is required to be disclosed. "Either at the top of the contract or directly above the space reserved for the signature of the buyer", the words, "Security agreement" or "Retail Instalment Contract", depending upon the nature of the contract must appear in at least 10-point bold type.[28]
In practice, the words "Security Agreement" or "Retail Installment Contnact" always constitute a caption of the instrument. They never appear "above the space reserved for buyer's signature." Often both the expressions are joined together in a single heading reading : "Retail Installment Contract or Security Agreement". These are invariably in, at least, 10 point bold-type, as required by law.

(3) An additional device of disclosure takes the form of "notice" and informs the buyer of his legal status under the Act. S.1803.2 (c) of the Act makes the inclusion of this notice in the corpus of the contract compulsory and even provides the language and size of lettering of the notice :

Notice to the Buyer

"1. Do not sign this agreement before you read it or if it contains any blank space". (S. 1803.4 of the Act lays down an injunction against the seller that he should not obtain the signature of the buyer to a contract when it contains blank spaces to be filled-in affter it has been signed. What if he does ?[29])

26. See infra Page 110.

27. Cal. C. C. S. 1803.1 reads : "A retail installment contract shall be..... in writing; the printed portion thereof shall be in at least eight-point type".

28. Cal. C. C. S. 1803.2 (b). Originally, instead of "security agreement", the words were "conditional sale contract", but in 1963, the Act was amended and the words "security agreement" were substituted.

29. See infra page 108-109.

2. You are entitled to a completely filled-in copy of this agreement.
3. Under the law, you have the right to pay off in advance the full amount due[30] and under certain conditions to obtain a partial refund of the service charge.

The present author found that the notice was invariably a constituent of the instalment contract but sometimes it was not in bold type as insisted by law.

(4) The buyer has a right to be furnished a legible and completed copy of the instrument[31]. It is necessary because it is a source of reference for the buyer for determining his rights during the life of the instalment contract. Considering its significance, the Act seeks to achieve the result by
   (a) Penalising the retail seller if he fails to do so by providing that in that event the buyer may only be obligated to pay cash sale price;
   (b) and by the concept of disclosure. Any acknowledgement by the buyer of delivery of a copy of the contract is required to be (1) in at least 10-point bold type, and further (2) it should appear directly above the space reserved for buyer's signature.

   Typical acknowledgement clauses in the instalment contracts are :
   (1) "Buyer acknowledges that this agreement was completely filled in prior to its execution and that he received a true copy thereof";
   (2) "Buyer acknowledges that he has read and received a completed legible copy of this contract";
   (3) This is a retail-installment contract the receipt by the buyer of an executed copy of which is hereby acknowledged".

30. Cal C.C. S. 1802.10 indicates that the expression "service charge" is synonymous with "time price defferential". The prevailing instalment contracts, frequently, employ the expression time-price differential, may be because it is relatively less comprehensible to a layman.

31. Since the following discussion is on the Cal. C. C. S. 1803.7, it is being reproduced here in full : "The seller shall deliver to the buyer, or mail to him, at his address shown on the contract, a legible copy thereof completed in accordance with the provisions of this (Unruh Act). Until the seller does so, the buyer shall be obligated to pay only the cash sale price Any acknowledgement by the buyer of delivery of a copy of the contract shall be printed or written in a size equal to at least 10 point bold type and, if contained in the contract shall also appear directly above the space reserved for the buyer's signature. The buyer's written acknowledgement conforming to the requirements of this section of delivery of a copy of a contract shall be a rebuttable presumption of such delivery and of compliance with this section and Section 1803.4, in any action or proceeding by or against an assignee of the contract without knowledge to the contrary when he purchases the contract. If the holder furnishes the buyer a copy of the contract, or a notice containing the items required by S. 1803.3 and stating that the buyer should notify the holder in writing within 30 days if he was not furnished a copy of the contract, and no such notification is given, it shall be conclusively presumed in favoure of the third party that a copy was furnished."

There is little doubt that these acknowledgement clauses are printed prominently is the required point-type to catch the buyer's eye. In practice, the buyer is invariably furnished a copy of the contract.[32] Originally, if the buyer "acknowledged" by signing the contract, the seller was *conclusively presumed* to have complied with all disclosure requirements as to buyer's copy. However, since it is doubtful whether a buyer understands the implication of the words of acknowledgement clause or even pauses to read them, the Act underwent an amendment in 1961 and now such acknowledgement is only a "sebuttable presumption". It will, of course, be very hard to rebut the presumtion of completeness of the contract once the buyer has signed on it *and* acknowledged it to be so. 1961 Amendment also added a sentence reading that : "If the holder furnishes the buyer a copy of the contract...stating that the buyer should notify the holder in writing within 30 days, if he was not furnished a copy of the contract and no such notification is given, it shall be *conclusively presumed* in favour of the third party that a copy was furnised..." (Emphasis added).

None of the retail dealers told the present author that they ever used this provision of the Act.

(5) Cal. C.C.S. 1803. 2 (a) requires that every instalment contract must be contained in a single document containing the "entire agreement of the parties with respect to the cost and terms of payment for the goods and services, including any promissory notes or any other evidence of indebtedness between the parties relating to the transaction..."

However, it is usual to find in the instalment contracts sweeping words like "this agreement contains the entire agreement of the parties", without any qualification,

32. The retail dealers, the present author, interviewed, insist that the buyer gets a completely filled-in copy of the contract. However, since the present author did not interview consumers, he is not in a position either to affirm or deny the delaers' assertion.

It was once thought that a seller by providing in the contract that it contains "the entire agreement" of the parties was thereby effectively disclaiming any warranties which might otherwise attach to the sale. This notion has long been dispelled and the language of S. 1803.2 of the Act makes it further clear by providing that the entire agreement-of-the parties requirement has a limited application as to the "cost and terms of payment". It is surprising, however, that the instalment contract users still believe that it displaces any warranty not expressly stated in the contract.[33]

(6) Control of excessive finance charge. Rate fixing[34] and disclosure together have been employed under the Act in combating the major problem in instalment sales financing, namely, the unreasonable or exorbitant finance charge. Disclosure protects the buyer against deception. The instalment contract, for example, must list[35] :

(a) The cash sale price of the goods, services and accessories;
(b) The amount of the buyer's down payment in money and goods with a brief description of the goods;
(c) The difference between these two;
(d) The amount, if any, included for insurance, specifying the coverages and the cost of each type of coverage;
(e) The amount of official fee;
(f) The unpaid balance, which is the sum of items (c), (d) and (e) ;
(g) The amount of the service charge ;
(h) The time balance, the sum of items (f) and (g), expressed in number and amount of instalments and the due date or period thereof ;
(i) The time sale price.

The prevailing instalment contracts, the present author found, closely follow this format.

USEFULLNESS OF DISCLOSURE PROVISIONS

The apparent objective of disclosure provisions is to provide the buyer with notice of the nature of the transactions which he has entered into. The value of such notice, however, is questionable for two reasons. One is the poor bargaining position of almost all the

33. That is how the relail dealers justify the clause.
34. Cal. C.C. S. 1805.1
35. Cal. C.C. S. 1803.3

credit purchasers and second is their predilection to sign contract without reading them. There is a mystic psychological appeal in the printed contract akin to that of the desire to conform. Since everyone who purchases goods on instalment signs these forms, they become part of the immediate cultural pattern. The consumer adherent derives a psychological comfort from being one of a large number of similarly behaved persons[36]. However, for those, who do read and may therefore question, or be able to find more attractive terms, the disclosure provisions may prove of some benefit.

A second advantage the buyer may gain from the disclosure requirements is that they may serve as a nice foundation for court litigation. The buyer's position is greatly improved if he has a contract with illegal terms or conditions on its face.

Thirdly, when the seller is obliged to set down the components of the instalment transaction and is limited in the rates he may charge, it may have a salutary effect on those who bait a consumer by advertising low cash prices with intent to dupe him into paying high finance charges.

INSURANCE

One of the risks attendant upon this kind of financing is the damage or destruction of the goods. The appropriate safeguard is insurance to protect the secured party against such perils. Several problems directly concering the buyer arise here. One relates to coverage. As the ownership of the property is divided, so are the risks to the goods. Both parties are concerned with coverage against fire, theft, accident and the like. This may lead to excessive insurance. (For example, requiring a 600 dollar policy on a 60 dollar deal). Other problems that come up are, pyramiding coverage (failing to cancel old insurance and requiring new insurance when the debt is refinanced), overcharging, and coercion.[37]

The Unruh Act regulates the rate of insurance charge only to the extent that the insurer must not charge more then his fixed rates[38].

36. Schuchman, "Consumer Credit by Adhesion Contracts" 35 Temple L.Q. 125,133. (1962); Project "Legislative Regulation of Instalment Financing", 7 U.C.L.A. Law Rev. 618, 674 (1960).
37. Hogan, "A Survey of State Retail Instalment Sales Legislation" 44 Cornell L. Q. 38,53 (1958), Pyramiding coverage and overcharging are not primary to this study and so are not discussed here, though some cursory remarks as regards the latter would appear.
38. C.C.S. 1803.5 (b) : "The amount included for such insurance, shall not exceed the premiums chargeable in accordance with rate fixed for such insurance by the insurer".

If the buyer was procuring the insurance himself in an open market in free competition, this provision would probably be adequate. But such is not the case. The Act requires that the contract must state whether the insurance is procured by the buyer or the seller[39] but typically the seller obtains the insurance for the buyer and does so from an insurance company operated by the financing agency with whom he has a working relationship. Common in the prevailing installment contracts are clauses like:

> "Buyer will insure goods...in form and amounts with companies, and against risks and liability, satisfactory to seller, and hereby assigns such policies to seller. Seller is authorised to make any claim thereuuder, to cancle same upon default, and to receive payment of, and endorse any instrument in payment of, loss or return premium."

Such clauses would appear to make a buyer vulnerable to all kinds of abuses. However, in practice, it's effect is very much cut down. Under Insurance code,[40] the amount of the insurance coverage can not exceed the amount of the indebtedness of the buyer and further the rate must be in accordance with schedules filed with the Insurance Commissioner. However, the seller can always and does urge a particular insurer whose rate schedules are immediately available with him rather one of buyer's choice. This is justified by the retail dealer under the "satisfactory" insurance cover rubric. S.1803.3(e) of the Act obliges the seller to show in the contract the amount for insurance and also "the coverage and the cost of each type of coverage".

Hower, there appears to be no reason to grant the seller the additional income he obtains by including the insurance premium within the amount on which the service charge is computed. The seller already has the profit on the sale, the profit by way of so-called service charge and the profit of the insurance commission he usually receives from the insurance company. It would seem that to permit this additional source of revenue can only give the seller additional reason to make the cost of premium as high as posible.[41] Besides, it also does not seem to be in accordance with the spirit of the Unruh Act.

BUYER'S DEFENSES

Another important term frequently found in instalment contracts concerns with disclaimer of warranty. Given below are some

39. Cal. C. C. S. 1803.5 (a).

40. Cal. C. C. S. 1803.5 (d) reads: "The provisions of Insurance Code S. 1668 shall apply to any violation of this section".

41. Project. cit. supra. n. 36. p. 678.

typical clauses availabie in the prevailing instalment contracts:

> (1) "Buyer...accepts goods, as is..."
>
> (2) "Seller makes no express warranties unless they appear in writing signed by seller and makes no implied warranty of merchantability or fitness for a particular purpose".

It would appear that within the meaning of S.2-316 of the Uniform Commercial Code, these words will exclude implied warranties. However, Cal. C.C. SS 1804.1(a) and 1804.1(g) go against the Uniform Commercial Code. S.1804.1(a) reads as follows :

> "No contract or obligation shall contain any provision by which—
>
> (a) the buyer agrees not to assert against a seller a claim or defense arising out of the sale.
>
> (g) the buyer releases the seller from liability for any legal remedy which the buyer may have against the seller under the contract or any separate instrument executed in connection herewith."

These two sections seem to be overlapping in scope and prohibit a provision in the contract, which would deny the buyer relief against the seller's default and misconduct. One interpretation of these sections may be that they qualify UCC and take an instalment sale out of the purview of the UCC. In that case, serious impediments to transactions in used goods would be certain to result, since implied warranty attached to such transactions.[42] Thus, the "as is where is" clause UCC, S.2-316 (3)(a) has recognised as effectively disclaiming warranties would not protect the seller, even on the sale of used goods, from liability.

As far as action against the financing agency is concerned, it is usual to find one of the following clauses in the instalment contracts, which have a bearing on the answer :

> (1) Buyer understands that seller will offer this instrument and seller's interest herein to Redisco Incorporated (a financing agency) for discount. To induce Redisco Inc., to accept such offer, Buyer agrees and represents to Redisco Inc., that assignment here of shall be free of any and all defenses which Buyer may or might have against seller unless Buyer notifies Redisco Inc., of any such defenses within 15 days after notice of assignment.
>
> (2) This agreement...binds jointly and severally all signing as Buyer and their heirs and representatives, and inures to the benefit of seller's

42. Drumar Mining Co. v. Morris Ravine Mining Co, 33 Cal. App. 2d 492, 92 P. 2d. 424 (1939).

assigns free of all rights of action and defenses if seller's assignee gives due notice of assignment and within 15 days of mailing such notice receives no written notice of facts giving rise to Buyer's claim or defense.

(3) Buyer agrees that his rights of action and defenses against seller shall not be effective against seller's assignee if the assignee gives notice as prescribed in Civil Code S. 1804.2 and Buyer fails within 15 days thereafter to give written notice to the assignee of the facts constituting his claim or defense.

Let us now turn to the provisions of the Unruch Act :

S. 1804. 1(a) provides :

"No contract...shall contain any provision by which:

(a) the buyer agrees to assert against an assignee a claim or defense arising out of the sale other then as provided in S. 1804.2"

S. 1804. 2 provides :

"Except as provided in S. 1812.7[43] an assignee of the seller's rights is subject to all claims and defenses of the buyer against the seller arising out of the sale notwithstanding an agreement to the contrary, but the assignee's liability may not exceeed the amount of the debt owing to the assignee at the time that the defense is asserted against the assignee."

"The right of the Buyer under this section can only be asserted as a matter of defense to a claim by the assignee".

S. 1804.2 was added in 1967[44] and it will be seen that the prevailing instalment contracts do not take note of 1967 amendment.

43. Cal. C.C. S. 1812.7 reads : "In case of failure by any person to comply with the provisions of this chapter (Unruth Act) such person or any person, who acquires a contract or instalment account with knowledge of such non-compliance is barred from recovering any time-price differential or service charge or of any delinquency, collection, extension, deferral or refinance charge imposed in connection with such contract or instalment account and the buyer shall have the right to recover from such person an amount equal to any of such charges paid by the buyer.

44. Originally, Cal. C.C. S. 1804.2 provided that : "No right of action or defence...which would be cut off by assignment, shall be cut off by assignment to any third party whether or not he acquires the contract in good faith or for value unless the assignee gives notice of the assignment and within 15 days... receives no written notice of the facts giving rise to the claim or defense..."

Thereafter the section imposed certain minimal disclosure requirements which the notice by the assignee must contain, including the notification to the buyer that he must respond in 15 days.

The instalment contracts still reflect the old law which has now been discarded. However, the existence of these clauses in the printed contracts would continue to make buyers feel[45] that their defenses against the financing agency are going to be cut off in 15 days. Either the prevailing instalment contracts were drafted before the 1967 amendment and financing agencies are ignorant of the fact[46] or they are deliberately continuing to use them for psychological reasons and because they are to their manifest advantage—at least apparently. All the officials of the financing agencies the present author had a talk with, showed ignorance of the change in law, but this could well be feigned. Businessmen are not simpletons who would not take count of what is going on in the legislature affecting their trade.

S. 1804.4 provides that "any provision in a contract, which is prohibited by the (Unruh Act) shall be void but shall not otherwise affect the validity of the contract".[47] The doctrine of severability saves the instalment contract from falling to pieces. But is it not unusual that a contract which violates the Act enacted to protect the consuming public, is nonetheless binding upon the buyer, who was intended to be protected against such failures to comply ? This is not much of a consolation that the offending provision in the insalment contract can not be enforced. Enforcement requires the processes of law and court. Why not make such contracts unenforceable as a whole ? That will instil more respect for the law.

ON DEFAULT :

Every instalment contract is full of what will befall the buyer, if he does not pay the instalment on time. Since threats are always less expensive to the creditor than litigation, harsh provision in a contract can get the results. The enforceability of such clauses then is immaterial. At the same time, it is true that the attorneys do not encourage the insertion of such clauses in the instalment contract forms. The attorney, the present author talked to, was of the opinion that often tinkering with the words of the attorney-drafted

45. Ignorantia juris non facit Ignorance of law is no excuse and the doctrine of notice provides that everybody is supposed to know of the law and by law is understood current law, both statutory and decisional. However, the fact of life is that most people do not know of the law and it is intuitively felt that if a survey is taken of the consumers, many would not appear to know even of the Unruh Act !

46. Some even said that they will call their head office and be in touch with the attorney.

47. Fresno Loan & Thrift v. Roberts, 25 Cal. Rep. 624 (1962).

contract form is done by the financing agency particularly to make it look more fearsome.

For example, the Act provides[48] that a contract may provide for the payment by the buyer of a delinquency charge on each instalment in default in an amount not in excess of 5% of such instalment or $5, *whichever is less*, but a minimum charge of $1 may be made. The instalment contract forms, with little regard for the words of the Act, provide flatly that the delinquency charges will be "at least $1 and *not over* $5".

Similarly, the Act permits[49] only "actual *and* reasonable costs of collection[50]" But what the instalment contracts frequently provide is :

(1) "Buyer agrees to pay...collection charges for a default in the payment of any instalment... ;" or.
(2) "Buyer will be liable for...reasonable collection charges..."

The attorney was certain that here the omission is wilful and the handiwork of the financing agency.

Another instance relates to the provision concerning attorney's fees and courts. S.1811.1 of the Act provides for the award of *reasonable* attorney's fee and costs to the *prevailing party* in any action on a contract, *regardless* of whether such action is instituted by the seller, holder or buyer. If the seller[51] proceeds to sue and buyer tenders the price in court, S.1811.1 of the Act applies and the former shall not get attorney's fee.[52]

However, the clause in the instalment contract provided that :

"Buyer also agrees to pay reasonable attorney's fees plus actual costs, in the event this agreement is referred to an attorney for collection."

Let us take one last instance. S.1812.2 of the Act provides that :

(i) if there is any default by the buyer in the performance of his obligations under a contract;

48. Cal. C.C. S. 1803. 6.
49. Cal. C.C. S. 1803.6.
50. "Occasioned by removal of goods from the State without written permission of the holder, or by the failure of the buyer to notify the holder of any change of residence, or by the failure of the buyer to communicate with the holder for a period of 45 days after any default in making payments due under the contract". Cal. C.C. S. 1803. 6.
51. The seller will include his assignee.
52. See 1961 amendment.

(ii) the holder, pursuant to any rights granted in the contract;
(iii) may proceed to recover judgement for balance due without retaking the goods ; or he may retake the goods and then proceed. In that case, he shall, within 10 days, from retaking, give notice[53] to buyer of his intention to sell the goods at public sale or retain goods in satisfaction of the balance due.

If he retakes goods and sells it, then S.1812.5[54] forbids him to sue buyer for the unsatisfied portion of his balance.

Let us now have a look at the prevailing instalment contracts. Some of these contracts have a clause like these :

(1) The Buyer will pay...all reasonable attorney's fees and legal expense incurred by seller *and* any deficiency remaining after repossession and resale of goods.
(2) If Buyer defaults in any of his obligation under this contract and/or if any levy or attachment is made or any preceedings in bankruptcy are instituted by or against Buyer or his property and/or if any application for a receiver shall be made for buyer and/or if seller or its assignees deem the goods in danger of misuse or confiscation or with reason deems itself insecure then in any of the said events, the entire amount shall immediately at the option of seller or its assigns and with or without notice, become due and payable and seller or its assigns, may either collect the amount due, or with or without notice, may take peaceful possession of said goods in any manner permitted by law, wherever found ; all payments made by Buyer to be deemed to have been made for the use of said goods.

The gap between what law is in the statute book and the extent of its compliance will appear to be too obvious.

Conclusions :

1. Retail instalment contracts are usually drafted by attorneys for financing institutions. Consumer's interests are not considered by the attorney because the client does not want so. The clauses in the instalment contracts which do help buyer are only the outcome of the imperatives of the Unruh Act. The disclosure provisions of the Unruh Act are complied with and are generally on the front page of the instalment contract. However, grave doubts exist if these disclosure provisions have improved buyer's position or furthered his interests. All they have definitely done is to impart a *sense* of fairness to the instalment contracts and this goes to strengthen seller's position

53. 1961 amendment.
54. 1963 amendment.

rather than buyer's, because buyer feels the instalment contract is fair and reasonable and this in turn leads to complacency and meek obedience.

2. The consumer, when he goes out to purchase goods on instalments, has this dilemma. Either he should not buy what he needs or sign meekly on one of the printed instalment contracts, which everybody is using and which he can neither negotiate nor modify. It is the financing institutions which forbid any modification and not the retail seller.

3. There appears an unfortunate dichotomy between what the Unruh Act prescribes and what the instalment contracts provide. The Act says one thing, instalment contract forms another. The very fact that this could be done on large scale, for quite sometime and with impunity shows all too clearly the problem of enforcement of the Unruh Act as well as the regard in which the Act is held by sellers and financial institutions. The explanation that they do not know the changes in law is too facile an explanation to be believed. It appears to be deliberate at least, in some cases.

Suggestions

One suggestion has already been hinted to, namely, the possibility of making the drafting attorney responsible in some way[55]. It would seem that a deliberate disregard of the provisions of the Unruh Act, whether due to pressure of the client (usually financing agency) or otherwise, may be professionally unethical. A case could be made against such an attorney by the hurt consumer and the Bar Association may be the right forum for a test case. It will be interesting to watch the reaction of the Bar Association, which could prevent such lapses, if it wants to. Another way could be to insist through law that the drafting attorney's signatures must appear at the end of every instalment contract form he has drafted. This would not only prevent subsequent tinkering, as alluded to earlier, but may also strengthen the position of the attorney *vis-a-vis* the financing agency.

However, it is doubtful if either alternative will be well received by the attorneys. And, in any case, it can only be *a* solution and not *the* solution.

A second solution may be to prepare instalment contract forms from the buyer's point of view. Initiative may be taken to form some kind of a consumer's association, whose task should be to disseminate these instalment contract forms among a sizable section of community

55. See page 104/5.

of a particular area. The potential buyers should be told of the advantages of using this instalment contract form rather than seller's and should be encouraged to insist with retail dealers to purchase goods only on the basis of the instalment form, the buyer has with him. Retail dealers and financial agencies are bound to resist vigorously, but it is not unresonable to assume that this resistance will be followed by some kind of a "round-table-talk", the result of which could well be, from buyer's point of view, either a "fair" form or at least a less one-sided instalment contract form than what are being used now. The principal demerit of such a scheme is that this would be expensive and would require time, planning and conscious effort, commodities not easily available when we are dealing with an unidentified mass of consuming public.

Another solution may be to avail of the existing provisions as to licensing. The Unruh Act, unfortunately, does not require licensing[56], but Brokers Law, does. A great many financing[57] are already licensed under Brokers Law.[58] as personal property brokers. Others which engage in retail financing and retail instalment selling may be required to do so. This would include both financing agencies and the sellers doing their own financing. As licensee under the Brokers Law, such financing agencies are subject to the supervision of the Commissioner of Corporations.[59] Certain other requirements of the Brokers Law may be modified, it found inappropriate, to sales financing transactions. However, the essential similarity of the loan and credit sale transactions suggests that modification will not be difficult. Application of the Brokers Law would faciltiate control of dealer-financing-agency collaboration to conirol the discounting of commercial paper and the sale of credit life and disability insurance. Further, the opportunity to avoid the rate limitations of the Unruh Act by means of the Brokers Law could be eliminated.

S. 22615 (c) of the Financial Code, relating to the grounds for suspension or revocation of the license of a personal broker requires the Corporations Commissioner to take such action if he finds, inter alia, "that any act or condition exists which, if it had existed at the time of the original application... reasonably would have warran-

56. It might in that case jeopardised its chances of ever seeing the light of the day.

57. All the present author talked to.

58. In 1951 the Brokers Law and the Small Loan Law were revised and consolidated with other laws relating to financial institutions in the Financial Code, which designated Brokers Law as "Personal Property Brokers Law" and Small Loan Law as "California Small Loan Law".

59. Cal. Fin. Code. S. 22400.

ted the Commissioner in refusing originally to issue the licence"[60]. In Section 22206, covering the findings which the Commissioner must make in determining whether to issue a license, there is sufficiently broad language permitting the denial or revocation of licenses for violations of another State statute. Then, findings are to be made as to the financial responsibility, character and general fitness of the applicant[61], and one of which would suffer impairment by reason of a violation of the Unruh Act. All the financing agencies the present author talked to, conceded that the Corporations Commissioner has enough power under the Financial Code to deter them from using unfair methods in retail instalment financing, but they also felt that possibly the Commissioner may not revoke a license for the violation of the Unruh Act, whatever the language of the Financial code might suggest.

The abov mentioned suggestions can be given effect to without amending the Unruh Act. It is well-known that the Unruh Act was passed without much opposition, may be because it did not have much teeth. It is time that licensing provision is included within the sanctioned sections of the Unruh Act. It should require that those who deal in consumer paper, and those sellers who carry their own paper, be licensed. At least, that will make it more difficult to violate the Act without detection for those who seek any permanency of operation in this State.

Another suggestion is to amend the Unruh Act with a view to include a provision, completely general in its scope, making void *all unjust or unreasonable* conditions in contracts.[62] To decide the question, it would be necessary, in each case, to consider the whole structure of particular trade and the differing bargaining powers of the parties to the contract.

One objection that comes to the mind of the present auther, as regards this suggestion, will be that in matters of contract the parties wish to know so far, as is possible, how they stand from the outset. It is better for the question of reasonableness of a particular condition to be judged before it is inserted in a contract than after there has been some dispute on the contract : otherwise the parties may never know until it is too late whether or not the condition forms part of the contract.

60. Fin. Code S. 22615(d).

61. Fin. Code S. 22206.

62. It has been tried in Israeli Standard Contracts Law, S. 14 (Quoted in Note, "Administrative Regulation of Adhesion Contracts in Israel", 66 Colum. L. Rev. 1340, 1345 (1966). UCC S. 2 302 also mandates conscious judicial review of unconscionability.

If we were to start with the proposition that the question of reasonableness of the various clauses in an instalment contract should be decided before they are put into use, then the solution will be different. A major defect at present lies in the tendency for every finance company and/or instalment seller to produce their own retail instalment contract, and what is done now by way of remedy is to pass special legislation-like they did in retail instalment trade but only when it becomes obvious that nothing short of legislation will prevent harsh bargains being made. What the prevent author would suggest is that an Act should be passed setting up a Commission, let us call it Contracts Commission, consisting of three permanent members, who should be experienced lawyers and four other ad hoc members—two from a consumers' panel and two from a contractors'[63] panel—for each specified trade using standardised retail instalment contract forms. The precise details may be worked out and it may not be very difficult. This Commission should have the power and duty to prepare standard form of contracts to be used in the trades or businesses specified in the Act. The draft standard form of contract might, in appropriate cases, contain alternative and optional clauses. The Commission should hold a public inquiry into the draft form, at which objections to it can be made, followed by the settlement by the Commission of the standard form of contract. Such forms would be embodied in statutory instruments like the Unruh Act—and their use should be made compulsory except to the exetnt the commission itself allows alternatives. The standard form should be incorporated in all contracts of the stipulated type, whether or not the contract contained express reference to it, and any attempt to avoid or vary the standard form should be made nugatory and subject to penalties. Lastly, the approved standard form should be widely publicised so that potential consumers would know of its existence.

Such a standard form or model form is essential if consumers are to be protected. The operation of the Unruh Act has shown that to prescribe the use of certain clauses is not enough. Besides, such forms, it is hoped, would use good, clear language, rather than the welter of words and jargon which characterise the prevailing instalment contract forms.

The suggested solution has three special advantages :

(i) It would ensure, in general, that conditions in contracts were fair. By so doing, it would help remove the element of suspicion from all transactions between big companies and ordinary people.

63. i. e. those, who are using such instalment contracts forms in their business.

(ii) When two identical taansactions take placc, it is convenient that the form of contract should be identical. Persons connucting many identical transactions with various customers have realised the benefits to be obtained from imposing on the customers a standard form of contract. What is now proposed is that the benefits should be reciprocated so that a customer trading with more then one firm would know that the same form of contract was being used in each transaction. As a result, he might acquire some knowledge of the contracts in cases where now he is hopelessly confused. The trader or businessman will also benefit from this uniformity in as much as he will be saved the effort of preparing his own standard form or the lawyer's fee for preparing them for him.

(iii) Such contract forms can be altered, whenever the exigencies of situation require so, by approaching the Commission, which will grant approval whenever it is fair and reasonable.

BASIS OF GOVERNMENTAL TORT LIABILITY IN THE UNITED STATES OF AMERICA.

*S. P. Singh**

Not until 1946 did the United States broadly consent to be sued for its servants' torts under the English principle "The King can do no wrong." The Federal Tort Claims Act of that year expanded liability that had been previously recognised only in narrowly defined fields.[1] Under the Federal Tort Claims Act, the liability of the United States Government in tort has been equated with that of a private person. It is so provided by 28 U.S.C., Section 2674, which states that "the United States shall be liable—in the same manner and to the same extent as a private individual under like circumstances." Furthermore, 28 U. S. C. Section 1346 (b) gives the United States District Courts exclusive jurisdiction to hear cases based

> on any claim against the United States...on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office...under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred.

Shortly after the enactment of the Act, the question arose as to the extent to which tort law rules have in fact been made applicable under the Federal Tort Claims Act. More specifically would the Government be liable if the act or function was one which could not be performed by a private person ?

This problem came before the Supreme Court of the United States in 1950 in the case of *Feres* v. *United States*.[2] The facts of that case were that a member of the military, while on active duty in the service of the United States, perished by fire in the barracks as a result of the negligence of other military personnel. The Supreme Court held that there was no liability, expressing the view that the working of Section 2674 of the Act :

> is not the creation of new causes of action but acceptance of liability under circumstances that would bring private liability into existence...One obvio-

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1. For example, Maritime torts, patent infringement and injuries to oyster beds. See Gellhorn & Byse, (4th Ed. 1960) at p. 388.

2. 340 U.S. 135 (1950).

> us shortcoming in this claim is that plaintiff can point to no liability of a 'private individual' even remotely analogous to that which they are asserting against the United States...Nor is there any liability 'under like circumstances ; for no private individual has power to conscript or mobilize a private army with such authorities over persons as the Government vests in echelons of command.[3]

In other words, since no private person has the authority to conscript or mobilise an army, the United States was not made liable by the Act. The Court observed :

> we find no parallel liability before, and we think no new one has been created by this Act. Its effect is to waive immunity from recognised causes of action and was not to visit the Government with novel and unprecedented liabilities.[4]

This interpretation was followed and applied in the subsequent case of *Dalehite* v. *United States*.[5] In that case the court had to consider claims preferred under the Act in connection with a disastrous explosion of ammonium nitrate fertiliser in Texas city which resulted in damage unparalleled in history. The fertilizer was being produced according to Government specifications and under the control of the Government for shipment to areas under military occupation after World War II. The action was rested on the ground that there was negligence on the part of the Government in its participation in the manufacture and loading of the fertilizer, as well as in fighting the fire.

Mr. Justice Reed delivered the majority opinion, which held that under the Act the liability of the United States was restricted to ordinary common law torts and did not extend to liability arising from acts of a Governmental nature or function. In support of this view the court said that :

> one only need read section 2680 (listing thirteen exceptions to liability) in its entirety to conclude that Congress exercised care to protect the Govern-

3. *Id.* at 141.

4. *Id.*, at 142. There were two additional grounds for rejecting the claim : (a) The relationship between the Government and members of the armed forces is "distinctively federal in character" and so the question of the law of the place does not arise. Since no federal law recognises such recovery, the claim must fail. (b) The primary purpose of the Act was to extend a remedy to those who had been without remedy and not to those already well provided for, such as military personnel. But if a service man sustains injury while on furlough or leave the result is different. (See *Brooks* v. *United States*, 337 U.S. 49 (1949).

5. 346. U.S. 15 (1953).

> ment from claims, however negligently caused, that affected the governmental functions.[6]

The opinion stressed the language of the Act which made the United States liable "in the same manner and to the same extent as a private individual under like circumstances....." The phrase "*like circumstances*" definitely nagatived a complete relinquishment of sovereign immunity.

The majority opinion held that the Federal Tort Claims Act

> did not change the normal rule that an alleged failure or carelessness of public fireman does not create private actionable rights. Our analysis of the question was determined by what was said in the Feres case...The Act, as was there stated, limited United States liability to 'the same manner and to the same extent as a private individual under like circumstances' ...Here, as there, there is no analogous liability ; in fact, if anything is doctrinally sanctified in the law of torts it is the immunity of communities and other public bodies for injuries due to fighting fire.[7]

The interpretation of the statute by the Supreme Court in these two cases was not only unfortunate, it was not consistent with the spirit or letter of the Act. Mr. Justice Jackson, delivering the opinion of the minority, took this approach.[8] He graphically described the situation existing under modern conditions in justification of his view that the Government should be held liable. Otherwise, he said, "the ancient and discredited doctrine that 'The King can do no wrong' has not been uprooted ; it has merely been amended to read, 'The King can do only little wrongs' "[9]. Nevertheless, the conclusion to be drawn from these two cases is, which is analogous to the existing law of *India* on sovereign and non-sovereign functions[10], that the Govrnment is not liable for the tortious acts of its servants in cases involving acts or functions which are not similar to those which could be performed or undertaken by a private person.

6. *Id.* at 32.

7. *Id.* at 43-44.

8. He was joined by Mr. Justice Frankfurter and Mr. Justice Black.

9. *Ibid.* at 64.

10. In India the liability of the Government has been equated with the former liability of the East India Company by Article 300 of the Constitution of India. However, the dichotomy between sovereign & non-sovereign functions prevailed many decades. Still the state is not liable for the tortious acts of its servants if the function involved is soverign. See, *Kasturi Lal Ralia Ram Jain* v. *State of U.P.*, A.I.R. 1965 S.C. 1039. For a detailed study of the Law of India, see also, S.P. Singh, "The Development of Public Tort liability in France & India : A Comparative view," J.I.L.I., Vol. 13 No. 1 at p. 92.

But in 1955, in its decision in *Indian Towing Company* v. *United States*,[11] the Supreme Court of the United States veered away from this aspect of the *Dalehite* doctrine and rejected the criterion of Governmental versus non-Government or Sovereign versus non-Sovereign functions. This later approach of the Supreme Court is in accord not only with the spirit and letter of the Federal Tort Claims Act, but also with current jurisprudential thinking, as indeed was suggested by Mr. Justice Jackson in his dissent in the *Dalehite* case.

In the *Indian Towing Company* case, the cause of the harm for which the Government was sued was the failure of the lights in a Government lighthouse, resulting in the grounding of a tug and in water damage to cargo. The light was out because members of the United States Coast Guard had negligently failed in their duty of inspection and maintenance.

Mr. Justice Frankfurter, writing the majority opinion, rejected the criterion of governmental and non-governmental functions followed in the previous decisions, saying that "it is horn book tort law that one who undertakes to warn the public of danger and thereby induces reliance must perform his 'good Samaritan' task in a careful manner."[12] The argument of the Government that "there can be no recovery based on the negligent performance of the particular governmental activity" was rejected by the court. This would mean that some negligence would be actionable, and some not, without "a rational ground, one that would carry conviction to minds not in the grip of technical obscurities."[13] The court pointed out that the government's basis of differentiation would be gone if private lighthouses were established and stated further that the

> Government is not partly public or partly private, depending upon the governmental pedigree of the type of a particular activity or the manner in which the Government conducts it... On the other hand, it is hard to think of any governmental activity on the 'operational level', our present concern which is 'uniquely governmental', in the sense that its kind has not at one time or another been, or could not conceivably be, privately performed.[14]

The court then concluded that there is nothing in the Federal Tort Claims Act which indicates

> that Congress intended to draw distinctions so finespun and capricious as to be almost incapable of being held in the mind for adequate formulation ... The broad and just purpose which the statute was designed to effect was to compensate the victims of negligence in the conduct of Governmental activities....[15]

11. 350 U.S. 61. (1955).
12. *Id.* at 64.
13. *Id.* at 66.
14. *Id* at 67-68.

In other words, the Supreme Court held that the Federal Tort Claims Act does not incorporate the distinction between governmental and non-governmental functions and that Section 2674 is not to be read as excluding liability for negligent conduct in the performance of activities which private persons do not perform.

The approach of the Supreme Court in the *Indian Towing case* was followed by the Court in the case of *Rayonier*, Inc. v. *United States*.[16] The facts of that case breifly were that the United States had permitted a railroad to run trains over a right of way passing through land owned by the United States in the State of Washington. On August 6, 1951, sparks from a railroad engine ignited six fires on the right of way and adjoining land. As a result of negligence of United States Forest Service personnel in fighting the fire, it spread and destroyed timber, buildings, and other property of the plaintiff.

Rejecting the reliance of the Government on the *Dalehite* case, Mr. Justice Black said that the distinction between governmental and proprietary functions relied on in that case has been expressly overruled by the *Indian Towing* case. He stated that "these provisions (i. e.) Ss. 2674 and 1346 (b), given their plain natural meaning, make the United States liable ...if...Washington law would impose liability on private persons or corporations under similar circumstances."[17]

Mr. Justice Black observed further :

> Congress was aware when losses caused by such negligence are charged against the public treasury they are in effect spread among all those who contribute financially to the support of the Government and the resulting burden on each tax-payer is relatively slight... But when the entire burden falls on the injured party it may leave him destitute or grievously harmed. Congress could, and apparently did, decide that this would be unfair when the public as a whole benefits from the services performed by Government employees... The very purpose of the Tort Claims Act was to waive the Government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented Governmental liabitity.[18]

15. *Ibid.*
16. 352 U.S. 315 (1957)
17. *Id.* at 318.
18. *Id.* at 319-320.

The *Indian Towing* and the Rayonier cases, followed by other decisions, have made it clear that under the provisions of the Federal Tort Claims Act, 1946 the liability of the Government for the tortious acts of its servants shall be the same as that of a private person (without distinguishing whether such activity could be performed by a private person or not), subject to the condition that claims against the United State s depend on the law of the place where the cause of action arises.

LEGALITY OF GHERAO : A POINT OF VIEW

There are a number of methods adopted by labour to find redress of their grievances. In recent years we have witnessed a new phase in the history of industrial relations in India, wherein labour has adopted a new method called 'Gherao' to find a quick and easy redress of grievances. To start with Gherao was used as a movement prominently in west Bengal in the year 1967. Now we find that Gherao is used by labour to settle their score all over India. The management is very scared of the term Gherao and they oppose it vehemently wherever it occurs. The purpose of this article is to examine the legal significance of 'Gherao' and how it differs from other methods adopted by labour to improve work conditions and its impact on industrial life generally.

WHAT IS GHERAO

For the first time an attempt was made by the special bench of Calcutta High Court to define Gherao.[1] As per Chief Justice Sinha Gherao means "a physical blockade of a target, either by encirclement or forcible occupation. The target may be a place or a person or persons, usually the managerial or supervisory staff of an industrial establishment. The blockade may be complete or partial and is invariably accompanied by wrongful restraint, and/or wrongful confinement and occasionally accompanied by assault, criminal trespass, mischief to person and property, unlawful assembly and various other criminal offences.....In short to achieve the object not by peaceful means but by violence."[2] As per Justice B. N. Benerjee "Gherao means encirclement. Encirclement may be due to various reasons say for example, there may be encirclement of a popular leader himself enjoying this form of demonstration. Encirclement may also be made by a hostile crowd, say of workmen, who elect wrongfully to confine them to concede to their demands. 'Gherao' as such, that is to say simple encirclement is no offence under criminal law of this country. But Gherao accompanied by violence and diverse forms of crimes resulting in wrongful confinement or wrongful restraint of the encircled person or persons is a

1. *Jay Engineering Works* v. *State of West Bengal*, A.I.R. 1968 Cal. 407.
2. *Id.*, at 417.

criminal activity, not because it is encirclement but it is encirclement "with more"[3]. The definition given by Justice Banerjee appears to be more convincing as he feels that mere encirclement is not criminal but encirclement with something more makes it criminal. Thus Gherao may be defined as a simple physical blockade of a target either by encirclement or by occupation, the target may be the managerial or supervisory staff of an industrial establishment. While Gherao is not an offence as such, if it is accompanied by violence or as a coercive method which results in an offence either in the Indian Penal Code or any other law then it is unconstitutional and violative of the laws of the land. Intention of the persons encircling the target will be the gist to dicide whether particular Gherao is an offence or not. Therefore, it is clear that Gherao is not a criminal offence unless it is accompanied by the intent and acts committed by the persons encircling the target (which may be a person or a place) amounting to an offence as defined either in the Indian Penal Code or any other law of the land.

The special bench of Calcutta High Court has gone to the extent of clarifying that Sections 17 and 18 of the Indian Trade Unions Act 1926 do grant some exemptions to members of a trade union. However, Gherao is an aspect of industrial dispute and trade unions have no special privileges and exemptions to this except where criminal conspiracy is involved under Section 17 of the Indian Trade Unions Act.[4] There is of course no doubt that labour has the right to collective bargaining with management and that in pursuit of this they can put legal pressure on the management to enter into any trade agreement which is obtained by legal means. There is a common thread between the trade union laws of India and the laws in England. Both draw a line at violence, intimidation, or the law relating to crimes. Any act of violence which amounts to the commission of an offence should never be excused. If any such situtation arises the High Court is not merely entitled, but bound, to grant relief where violation of fundamental rights occurs, irrespective of the existence of other alternative remedies. Their Lordships also held that once the laws are made neither the court nor the cabinet, nor the ministers nor any subordinate authority has the power to add or detract, interfere or effect any discretionary power.[5] Labour has certain rights under the Indian Trade Unions Act 1926 and some other laws relating to

3. *Id.*, at 456.
4. *Id.*, at 408.
5. *Id.*, at 409.

labour. It is, however, a mistake to think that the rights acquired by labour are unrestricted.

The way labour relations have developed in India, especially in West Bengal, it is evident that labour and management have become averse to legal processes for the settlement of industrial disputes. As it has been remarked in an article in the "Economic and Political Weekly", "Legalism in industrial relations has bred a sense of irresponsibility, a burning desire to defeat the system by a short cut method of quick justice."[6] It is also to be noted that the Gherao movement has proved that legal machinery set up for the settlement of industrial disputes is not very effective for the workers. They probably feel that the legal machinery provided under the laws involves a lengthy process and so they have been inclined to adopt Gherao instead. The Gherao movement undoubtedly represents the anger, resentment and retaliation of workers towards the policies of the Government, and the whole problem of Gherao reveals a lack of human touch by management in handling the legal matters.

Gherao is not the only method used by workers to obtain a favourable settlement of industrial dispute. Other tactics such as Demonstrations, Strikes, Sit-Down Strikes, Go Slow and Picketing are also used by workers to put pressure on management. Many of these are well recognised by the law. Generally there seems to be confusion in the minds of workers and management about the different methods of pressure tactics. So it is both interesting and useful to differentiate the various types of pressure tactics.

GHERAO V. DEMONSTRATIONS

The word 'demostration' has been explained in Webster's dictionary as the "Act or example of making known by visible means or of giving tangible evidence of something specific."[7] In industry a demostration by the workers expresses their resentment of management policies. The demonstration may express sympathy with other workers, opposition to the policies of the management, or a demand for higher wages or better conditions of employment. It may take a violent form; the workers may destroy property in the factory, or they may assault the proprietors of the industry or the managerial or supervisory staff. If the demonstration becomes violent it comes within the ambit of the law and would be described as illegal.

6. De Nitesh, R. Srivastava Suresh, Economic and Political Weekly, Gheraos in West Bengal, 1967.
7. Webster's New International Dictionary of the English Language.

If we compare Gherao with demonstrations we find that all the elements present in demonstrations are also present in Gherao. In Gherao, apart from the expression of feelings by visible acts, there is a blockade by encirclement of person or property. For Gherao to be illegal there must be criminal intimidation, criminal trespass, wrongful confinement or mischief to person or property, unlawful assembly or other criminal offences under law. It would not be wrong to say that Gherao is another form of Demonstration severe in its intensity, and that both can be illegal only if some other criminal offence is committed by the workers apart from Demonstrating or making a Gherao.

GHERAO V. STRIKE

Strike "means a cessation of work by a body of persons employed in any industry acting in combination, or a concerted refusal under common understanding, of any number of persons who are or have been so employed to continue to work or to accept employment,"[8] An analysis of the above definition would show that every strike in industry must have the following ingredients :—

1. There should be :
   (a) an Industry,
   (b) an employer (or employers),
   (c) "Workmen" (a body of them),
2. There should be :
   (a) Cessation of work,
   (b) refusal to work;
3. This cessation should be by a body of workmen;
4. They should be acting in concert or in combination in order to enforce a demand against the employer during an industrial dispute.[9]

If we compare these elements required under Strike with Gherao, we find that in Gherao all the ingredients of the strike are present. In order to make a 'Strike' a 'Gherao' there must also be a blockade of persons or property. In industry it would mean the blockade by the workers of the Managerial or Supervisory staff, or of the factory or

8. The Industrial Disputes Act 1947, Section 2 (q)
9. Rustamji, *The Law of Industrial Disputes in India*, 330.

industrial establishment. If the Gherao is staged by the workers up to this extent it is perfectly legal. A concerted stoppage of work or refusal to work by a body of workmen amounts to a 'Strike' within the meaning of Section 2 (q), of the Industrial Dispute Act 1947, even though such stoppage or refusal is only of a few hours duration or only for a part of a day, it is legal.[10] And it would also be perfectly legal for the workers to stage a strike which does not contravene the provisions of Sections 22 and 23 of the Industrial Disputes Act of 1947. When a strike for a specific reason is expressly prohibited by statute and is declared illegal, the wider question of the workmen's right to resort to the strike as a measure of collective bargaining arises.[11] Similarly it has been held by the special bench of the Calcutta High Court that while Gherao is not an offence as such, if it is accompanied by restraint or confinement, assault, criminal trespass, mischief to person or property, unlawful assembly or other criminal offences, used as coercive measures, it is unconstitutional and a violation of the laws.[12] Hence Gherao itself may not be illegal but it becomes illegal when corollaries stemming from it are involved.

As stated earlier simple strike is not the only weapon used by the workers on the management as a pressure tactics : some other forms of strike such as stay-in, work-to-rule, pen-down or tools down, and go-slow are also adopted quite often is industry. Therefore it would be interesting to observe the distinguishing features of these forms of strike.

(i) Gherao V. Stay-in-Strike.

In this form of strike there is the element of trespass in addition to refusal to work. As such it is closer to Gherao since some criminal intimidation is involved. But the law has definitely approved of this type of strike. In the Punjab National Bank case[13] the Supreme Court held that "The pen down strike in which the employees participated in the present cannot be said to be outside the section 2(q) of the Act".[13] Hence it would also not be wrong to regard Gherao as such to be legal.

10. *Buckingham & Carnatic Co. Ltd.* v. *Workers of Buckingham & Carnatic Co Ltd.*, A.I.R. 1953 S. C. 47.
11. *Raja Bahadur Motilal Poona Mill* v. *Piraji Musah*, AIR. 1957 S. C. 73
12. *Jay Engineering Works* v. *State of West Bengal and others*, A.I.R. 1968 Cal. 407.
13. A.I.R. 1960 S. C. 160.

(ii) Gherao V. Go-Slow.

Another kind of strike called 'Go-slow' is also resorted to by the workers. In this the workers do not stay away from work but deliberately slow down production. Such action has been condemned as a reprehensible act on the part of the workers but no clear cut law has been laid down as to whether 'Go-Slow' is another form of a strike. 'Go-Slow' tactics have been described by the judiciary as a misconduct on the part of the workers and they can be dismissed by the management for resorting to them. Gherao can also include this type of tactic, but it would require some original offence apart from the simple act of Gherao to make Gherao a criminal offence in law.

So we see that Gherao can encompass all types of strikes. The main differentiating factor is the blockade of person or property. For strike to be illegal they must contravene the provisions of sections 22 and 23 of the Industrial Disputes Act 1947 ; to bring Gherao within the definition of crime, violence or other criminal intimidation for coercing management must occur.

Gherao V. Picketing

When a strike is called by the leaders or active workers and they feel that there are some differences among themselves because of groupism, they employ picketing to get more support or to intensify the strength of the strike. The Encyclopaedia of Social Sciences has described three purposes of picketing : to inform those unaware of the fact that a strike is in progress ; to persuade the workers to join the strike ; by moral persuasion or if necessary, by physical obstruction to prevent them from going to work. The extent to which these purposes, especially the last, may be accomplished varies according to the method of picketing employed and the presence or absence of legal difficulties.[14] Picketing is used to prevent workers entering the place of work and is done at or near the entrance. Therefore, picketing is nothing but intensification of the strike activities of the leaders or active workers. If we compare Picketing with Gheraos we find that Gherao is in a way picketing, and generally would take that form. If violence and criminal intimidation or other criminal offences were committed by the workers during Gherao or Picketing it would be illegal and the workers would be punished according to the procedure established by law. But picketing has difinitely been universally recognised as a method of pressing their demands on management by

14. Encyclopaedia of Social Sciences, Volume XIV, p. 422, *McMILLAN*.

the workers. Hence it would also not be wrong to allow Gherao as such as a method of collective bargaining and pressing demands on management, provided it does not lead to any criminal offence.

GHERAO V. DHARNA AND SATYAGRAHA

Sometimes when the leaders or active workrs feel that some demand should be pressed on the management, but that it cannot be pressed adequately through demonstrations or strikes, they try to use Dharna as a means of achieving their goal. It is believed in India that Dharna is more effective than the strike and demonstration. Basically Dharna is employed to touch the management's conscience. Dharna is not only a legal activity but it is one of the safest methods of pressing demands. Furthermore, it is unlikely to take a violent turn, whilst Gherao may well become violent, in which case the Government is justified in interfering.

Satyagraha "is a way of conducting war by means of non-violence. As long as men are not very different from what they are now there will be clashes of interests; and it appears desireable that such conflicts should be carried on in the most civilised, economical and effective manner possible."[15] In using non-violent means to press demands on management, Satyagraha is nearer to Dharna than to Gherao. But Dharna is used simply to achieve an immediate purpose, whereas Satyagraha is a long term strategy to achieve equality of rights for the individual. Again, in Satyagraha the workers are also conscious of the degree of justification for the management's position, even while they hold steadfastly to what they consider to be the rights of their own case. The workers distinguish between what is essential and non-essential, and the essential is never surrendered and the non-essential is not demanded. In this respect Satyagraha is closer to mutual negotiation between management and labour. Satyagraha is an ideal method of maintaining industrial peace and good relations, whereas in Gherao the mutual respect of labour and management is lost. Satyagraha is the most legal method and can never lead to any criminal ofience whereas in Gherao there are possibilities of increasing antagonism between management and workers. It would be better for both workers and management if Satyagraha were encouraged as a means of pressing demands.

CONCLUDING REMARKS :—

Reviewing the whole legal position it can be concluded that Gherao simpliciter is not an offence and it is not proper to call it

15. Bose, Nirmal Kumar, *Studies in Gandhism*, p. 116.

illegal. Of course when Gherao takes a violent turn and amounts to criminal restraint, criminal intimidation, criminal trespass or any other criminal offence it is unconstitutional and violative of the laws of the land. The thesis behind considering Gherao similiciter as one of the legal activitites of a trade union is that when stay-in strikes and other forms of strikes and demonstrations are recognised under the law, there seems no reason why Gherao should not also be recognized as one the activities of trade unions. In practice it is very difficult to differentiate between sit-down strike and Gherao. If violence or any other offence is committed in other forms of strike it is illegal and participants can be punished under the law. Similarly workers can be punished if the Gherao leads to any of the criminal offences prescribed under the law. If there is any reasonable apprehension that any Gherao about to be staged will lead to violence and criminal offence, the Government and the law are justi fied in intervening. Apparently Gherao may lead to a worsening of industrial relations between management and labour, but industrial disputes occur in most countries. Though employers may rightly feel that it is a coercive measure, Gherao may also be regarded as indicating dissatisfaction among workers.

Doubts have been expressed by employers and experts in Industrial Relations about Gherao being used to strengthen Trade Unionism in India and they feel that probably Gherao will not help in developing good industrial relations. There is an element of truth in this opinion. But we should not pessimistically regard Gherao as such as destructive in developing healthy industrial relations. Gherao may be a means of bringing the workers together and making the trade union movement more cohesive. If Gherao simply produces a militant attitude among labour it may be destructive; but it can also be useful in making the Government, employers and the public cognisant of workers grievances. Gherao in various forms is not a problem unique to India and has been faced by all countries in the initial stages of industrial development. When sit-down strikes, which include quite a significant number of the ingredients of Gherao, have been recognised in law as the legal right of the workers, we find no reason why Gherao should not also be recognised as one of the activities of the Trade Unions, except where it leads to restraint, criminal intimidation, violence, or any other criminal offence.

By and large the pressure tactics of the workers do not help in maintaining cordial and health industrial relations in industry. Being antipathetic towards the very term Gherao, the employers do not listen to the demands of the workers, even where these demands are justified. At the same time the employers must realise that these are

trying times for the workers, who are facing extreme economic hardship. Employers should be prepared at least to listen to and appreciate the difficulties faced by the workers, even if they are not in a position drastically to improve workers' pay. Major disputes in the industry must be dealt with by bipartite negotiations. Only then we can expect cordial industrial relations.

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PROVISIONAL MEASURES OF PROTECTION IN ARBITRATION UNDER THE WORLD BANK CONVENTION

The Convention on the Settlement of Investment Disputes between States and Nationals of other States[1], sponsored by the International Bank for Reconsrtuction and Development[2], has estabblished the International Centre for Settlement of Investment Disputes.[3] The purpose of the Centre is to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Centracting States.[4] Actual conciliation or arbitration proceedings will be conducted not by the Centre but by conciliation Commission or Arbital Tribunal constituted in accordance with the provisions of the Convention.[5] One of the tasks of such Tribunal may be to prevent the parties before it from rendering the final award ineffective or illusory by interfering with or destroying the object of dispute[6]. In order to enable the Tribunal to cope with this task, Article 47 of the Convention invests it with power to recommend provisional measures of protection. Article 47 reads :

> Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party,

An attempt is made in the present paper to determine the effectiveness or otherwise of this power. Since no occasion has so for arisen under the Convention for recommending provisional measures, our attempt will of necessity be based on an enquiry into

1. Hereinafter called the convention. (18 March 1965) (entered into force. on 14 October 1966) (India is not yet a party to this convention : Edltor) ; 575 *United Nations Treaty Series*, pp. 159 *et seq*; republished in 4 *International Legal Material* (1965), pp. 532 *et seq* ; 60 *American Journal of International Law* (1965), pp. 892 *et. seq*. The International Centre for Settlement of Investment Disputes has published the text of the Convention and the Report of the Executive Directors of the World Bank on the Convention (hereinafter called the *Report*) in its Document ICSID/2 English. The *Report* has been re-published in 4 *International Legal Material* (1965). pp. 524 *et. seq*.

2. See *History of Convention on the Settlement of investment Disputes between States and Nationals of other States : Documents concerning the Origin and the formulation of the Convention*, Volume II (English) (Washington, D.C., 1968), pp. 1 *et. seq*. (hereinafter called the *History*).

3. Hereinafter called the Centre. Article 1 (i). Unless otherwise indicated, Article means Article of the Convention.

4. Article 1 (2)

5. Article 37-40.

6. Article 47.

the attitudes of the Governments that participated in the drafting of the Convention and the instances of provisional measures of protection in the history of international adjudication.

Drafting History of Article 47 :

The first draft of the Convention[7] prepared by the World Bank's General Counsel, Mr. Avon Broches, proposed the rule regarding provisional measures in the following terms :

> Except as the parties otherwise agree, the Arbital Tribunal shall have the power to prescribe, at the request of either party, any provisional measures necessary for the protection of the rights of the parties,[8]

The Preliminary Draft of the Convention,[9] circulated by the Bank to the member Governments, adopted the same formulation of the rule.[10]

At the Consultative Meetings,[11] most of the participating experts favoured the provision. Many suggestions were offered by them to further strengthen and enlarge the rule.[12] Some of these suggestions were : (i) that it should be left to the Tribunal to prescribe such provisional measures as it found necessary even without the specific request of a party ; (ii) that the type of measures to be prescribed should be clarified, the party whose rights would be protected be specified and it may be indicated whether the statusquo to be protected should be the one existing during the execution of contract or the one existing at the time when the controversy arose ;[13] (iii) that the words "necessary for the protection of the rights of the parties" should be substituted by the words "necessary to prevent the frustration of such award as

7. *History*, pp. 19 *et. seq*.

8. Article VI, Section 6, *Id*., pp. 41-42.

9. *Id*., *pp*. 184. *et. seq*.

10. Article IV, Section 10, *Id*., p. 215. The Comment to this Section read : "...unless the parties specifically preclude it from doing so, the Tribunal would have the power to prescribe provisional measures designed to preserve the *Status quo* between the parties pending its final decision on the merits." *Id*., at p. 216.

11. Legal experts designated by 86 members Governments met under the Chairmanship of Mr. Broches on regional basis in Addis Ababa, Santiago de Chile, Geneva and Bangkok between 16 December 1963 to 1 May 1964 to consider the subject of establishing international machinery for settlement of investment disputes and to discuss the Parliamentary Draft. See, *Report*, para 7.

12. See, *History*, pp. 268, 337-8, 515-6.

13. Mr. Broches thought that the provisional measures should preserve *status quo* at the time they were asked for. *Id*., p. 337.

the Tribunal might render"; (iv) that it should be stated in general terms when and what provisional measures could be prescribed and that the applicant should furnish sufficient evidence to the Tribunal to show that his claim was made in good faith and that his rights might be impaired if provisional measures were denied ; (v) that the contracting States should be bound to enforce provisional measures like awards ; (vi) that a provision be added requiring a party not to take any steps which would aggravate or extend the dispute the centre was seized with : (vii) that in order to reduce delay in arbital proceedings, provision be made for award; and (viii) that provisional measures be made enforceable as an award, provided that they were prescribed only when absolutely necessary and when pecuniary compensation was no adequate substitute for them.

But all was not sunshine for the provision. One expert[14] opposed it on the grounds that the binding nature of provisional measures did not go well with arbitration and that the national courts which had no jurisdiction over the dispute could not be required to enforce them. Another expert[15] considered it too broad and felt that it would encroach upon the jurisdiction of local courts in such matters as execution or attachement of property. He pleaded for substititing the word 'prescribe' by the word 'recommend'. He thought that if the Government party did not enforce provisional measures, it should pay compensation if the final award went against it,[16]

In accordance with these views, the Draft Convention[17] proposed the following rule :

> *Article 50 :* (1) Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, prescribe such provisional measures as it deems necessary to prevent or halt any action by either party which might frustrate an eventual award.
> (2) The Tribunal may fix penalty for failure to comply with such provisional measures.[18]

There were different points of view about Article 50 in the Legal Committee.[19]

14. *Id.*, p. 338.
15. *Id.*, pp. 515-16.
16. Mr. Broches felt that the provision did not present any danger because, first, a private investor could never obtain specific perfoamance of such measures against the government ; and secondly, the experience indicated that Tribunals were loathe to ordering such measures. Id., p. 516.
17. *Id.*, pp. 610 *et seq.*
18. Article 50, *Id.* P. 632.
19. Legal experts designated by 61 member States for assisting the Bank's Executive Directors to formulate the Convention met under the Chairmanship of Mr. Broches at Washington, D.C., from 30 November to 11 December 1964 to discuss the Draft Convention. *Report*, para 8.

Some experts[20] were opposed to its inclusion in the Draft Convention on the grounds : (i) that it might interfere with Legislative or admintstrative acts of government ; (ii) that it was superfluous because the question of damages and indeminities could be dealt within the final award : (iii) that it would delay or protract the proceedings; and (iv) that it might harm the defendant.

Most of the experts[21] favoured the retention of clause (1) of Article 50 subject to certain modifications, namely, (i) that the word 'frustrate' being too restrictive should be replaced; (ii) that the word 'prescribe' being too strong should be substituted by the word 'recommend'; (iii) that provision be made for payment of compensation by the applicant if he lost his claim and for this purpose he should be required to offer money guarantee.

Some experts thought that the provision contained in clause (2) of Article 50 regarding imposition of penatly for non-compliance with provisional measures recomended by the Tribunal could be retained.[22] But a majority of the experts was opposed to this provision.[22a] An alternative proposal to the effect that clause (2) should state that refusal to comply with recommendation of provional measures could be taken into account by the Tribunal in its final award was, when put to vote, rejected by a majority of 16 to 6.[23] At this point, Mr. Broches announced that he still assumed that the majority was only opposed to the specific mention of the effect of non-compliance with the recommendation, but the Tribunal would in no way be prevented from taking the fact of non-compliance into account when making its award.[24]

Provisional Measures in International Adjudication :

The power to indicate measures for preserving the *status quo* and preventing the difficulty from being aggravated was possessed by the Central American Court of Justice and the Permanent Court of International Justice (PCIJ). Similar power is enjoyed by the International Court of Justice (ICJ).[25] The General Act for the Pacific

20. See, *History*, pp. 813-14.
21. *Ibid.*, pp. 812-4.
22. *Ibid.*, pp. 813.
22.(a) *Ibid.*, pp. 813-4.
23. *Id.*, p. 815.
24. *Ibid.*
25. Article 41, Statute of International Court of Justice :
"The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party."

Settlement of International Disputes 1928 and its Revised 'substitute' of 1948 also provide for provisional measures to be indicated by the PCIJ or the ICJ respectively and also by the Arbital Tribunal or the Conciliation Commission seized with the dispute. The Locarno Arbitration Convention of 1925 between Germany on the one hand and Belgium, France, Poland and Czechoslovakia on the other hand had invested the Tribunals to be constituted under these Conventions with powers to indicate provisional measures. The *Bryan Treaties* for the Advancement of peace of 1914 concluded between the United States on the one hand and China France and Sweden on the other hand had also given similar powers to the permanent international commissions contemplated by these treaties The constituent instruments of most of the Mixed Arbitral Tribunals of the post World War era contained provisions for interim measures of protection.[26] The Model Rules on Arbitral Procedure adopted by the International Law Commission in 1958 also provide for such measures.

The Central American Court made use of its powers to indicate interim measures on a number of occasions.[27] The history of PCIJ and ICJ contains many examples when the parties requested for the indication of interim measures of protection ;[28] but the Courts granted such requests only in three cases.[29] The Arbitral Tribunal established under the *Buraimi Arbitration Agreement* also exercised protective measures until its disruption.[30]

26. See, E. Dumbauld : *Interim Measures of Protection in International Controversies* (The Hague, 1932), Pp. 129 *et seq.*

27. *Id.*, pp. 96 *et seq* ; M. O. Hudson, "The Central American Court of Justice" 26 *American Journal of International Law* (1932) Pp. 768 *et seq.*

28. *Denunciation of the Treaty of November 2nd. 1865 between China and Belgium* (*Interim Measures of Protection*) PCIJ Ser A No. 8 at pp. 7-8 ; *Case concerning the Factory at Chorzow* (*Indemnity*) PCIJ Ser. A No. 12 at p. 6 and at p. 10 ; *Legal Status of the South-Eastern Territory of Greenland* (*Request for the Indication of Interim Measures of Protection*) PCIJ Ser. A/B No. 48 pp. 277 *et seq ; Case concerning the Administration of the Prince von pless* (*Interim Measures of Protection*) PCIJ Ser. A/B No. 54 Pp. 150 *et seq., Case concerning the Polish Agrarian Reform and the German Minority* (*Interim Measures of Protection*) PCIJ Ser. A/B No. 58 pp. 175 *et seq* ; The *Electricity Company of Sofia and Bulgaria* (*Request for the indication of Interim Measures of Protection*) PCIJ Ser. A/B 79 at pp. 194 *et seq. ; Anglo-Iranian Oil Co. case* (*Request fot the Indication of Interim Measures of Protection*) (*United Kingdom* v. *Iran*) (1951) ICJ Rep. pp. 89 et seq ; *Interande Case* (*Switzerland* v. *United States*) (*Request for the Indication of Interim Measures of Protection*) (1957) ICJ Rep. pp. 105 *et seq.*

29. *Denunciation of China-Belgium Treaty, Electricity Co. of Sofia and Anglo-Iranian Oil Company cases*, see f.n. 28 *supra.*

30. J. L. Simpson and H. Fox : *International Arbitration*, (London, 1956) pp. 162 *et seq.*

Procedure under the Convention for Recommending Provisional Measures :

After the constitution of the Tribuual[31] until the award is rendered, any party to dispute may request the Tribrnal to recommend provisional measures for the preservation of its rights.[32] The request shall specify the rights to be preserved, the measures the recommendation of which is requested and the circumstance that require such measures.[33]

Since quick action may be necessary for preservation of the rights of a party, the Tribunal is required to give priority to the consideration of such request.[34] If the President of the Tribunsl considers the request as urgent, he may propose a decision to be taken by correspondence[35] or even convene the Tribunal for á special session.[36]

Since the object of the recommendation of provisional measures is to preserve the respective rights of the parties, the Tribunal is invested with the power to act *proprio motu* or to recommend measures different from these requested by a party[37]. This enables the Tribunal not to remain a mere approving or disapproving, but to work more freely for rendering impartial justice to all parties concerned. It also enables the Tribunal to so frame its recommendation as not to prejudge the issues of jurisdiction or merits to be dealt with later.[38]

The measures of protection being purely 'provisional', the Tribunal may at any time modify or revoke its recommendation.[39] But before so doing the Tribunal shall give an opportunity to each party to present its observations.[40] This would not only help the

31. Rule 6 (1), Rules of Procedure for Arbitration Proceedings (Arbitration Rules), ICSID/4, p. 82. (Unless otherwise indicated, Rule means Rule contained in Arbitration Rules.

32. Rule 48 (2).

33. Rule 39 (1) and Note 'A' to Rule 39, Arbitration Rules, p. 105.

34. Rule 39 (2).

35. Rule 16 (2).

36. Note 'C' to Rule 39, Arbitration Rules, p. 105.

37. Rule 39 (3) and Note D, to Rule 39. *Id.*, p. 105. *In the Anglo Iranian Oil Co., case* 1951. ICJ Reports pp. 89 *et seq.*, the ICJ had in fact recommended provisional measures different from those requested by the applicant United Kingdom. See, S. Rosenne. *The Law and Practice of the International Court* (Leyden, 1965), Vol. I, pp. 426 *et seq.*

38. See also, Sir G. Fitzmaurice : "*The law and Procedure of International Court of Justice*, 1951-4 : Questions of Jurisdiction, Competence and Procedure", 34 *British Yearbook of International Law* (1958) at pp. 118 *et. scq.*

39. Rule 39 (3).

40. Rule 39 (4).

avoidance of surprises or of unintentionally unfair dispositions, but also enable the Tribunal to know the minds of the parties and formulate its recommendation accordingly.[41]

The power to make recommendation is entirely a matter of Tribunal's discretion and not a right of the applicant. Tribunal may require the applicant to furnish security if strong reasons of justice so demand.[42]

Problem of Jurisdiction :

The decision to recommend provisional measures of protection may involve a difficult choice for the Tribunal in those cases in which the respondent denies, in regard to the dispute, jurisdiction of the Centre or the competence of the Tribunal. This is so because if the measures are recommended without deciding upon the question of the Centre's jurisdiction or the Tribunal's competence, the respondent would, by adopting such measures, be needlessly prevented from exercising its legitimate rights in a matter which may eventually be found to be outside of the Centre's jurisdiction or Tribunal's competence. On the other hand if the Tribunal postpones its recommendation until it has decided, upon such question of jurisdiction or competence, the very purpose of the provisional measures of protection may be defeated by the respondent making the ultimate remedy a mere illusion through destroying the object of the dispute and presenting a *fait accompli*.[43]

This dilemma has also been faced by the ICJ. The Court has found a sound practical way out of the difficulty : Without saying anything about the reasonable probability of jurisdiction, which may prove a source of embarrassment later, the Court orders interim measures of protection after only satisfying itself that apparently there is nothing in existence which may take the merits of the dispute com-

41. Note E to Rule 39, Arbitration Rules, p. 105.

42. See, Dumbauld, *op. cit. supra*, n 26, p. 162.

43. See, I.F.I Shihata, *The Power of the International Court to Determine its Own Jurisdiction :Competence la Competence* (The Hague, 1965) pp. 171 *et. seq.*; H. Lauterpacht, *The Development of International Law by the International Court* (London, 1958) pp. 110 *et. seq.* ; J. Stone : *Legal Controls of International Conflict* (London, 195) p. 132; Fitzmaurice, *op. cit. supra*, n. 38, pp. 107 *et seq.* Dumbauld; *op. cit. supra*, n. 26, pp. 184 *et. seq.*

Also see the Statement of Sir Frank Soskice, Council of United Kingdom, at the Public Sitting of the ICJ in the *Anglo-Iranian Oil Co. case* (*United Kingdom* v. *Iran*). *ICJ Pleadings*, pp. 401, *et. seq.*

pletely outside of the scope of its Jurisdiction.[44] By of added precaution, that Court may expressly add that its order on request for interim measures does not prejudge the ultimate decision on the question of jurisdiction.[45]

Viewed against this background of the experience of ICJ, the task of the Tribunal under the Convention seems much simpler. Under Article 36, every request for arbitration has to be screened by the Secretary General of the Centre in order to see that it does not lie manifestly outside the jurisdiction of the Centre.[46] It is only after such screening that the request will be registered and the Tribunal constituted to dispose of the dispute. Thus, the initial determination of jurisdiction made by the Secretary-General, a situation unknown to the ICJ, may afford a good starting point for the Tribunal to take a decision on an application for recommending provisional measures.

Nature of Recommendation :

The power of the Tribunal to recommend provisional measures exists in an area not assigned to any special agreement of the parties. In other words, the parties may, by means of their agreement, not only prevent the Tribunal from recommending any provisional measures but also authorise it to indicate such measures in a much more binding form. If the parties have not entered into any special agreement, the Tribunal would only have the power to 'recommend' provisional measures and not 'order' them. However, the use of the word 'recommend, in Article 47 shall not give a feeling of total impotency of the Tribunal. There are two good hopeful reasons for this : First, a recommendation made by an international Tribunal, specially after receiving the observations of the parties concerned, would have a considerable moral authority. Secondly, such recommendation being

44. See, Shihata, *op. cit* , p. 176.

For a more strict understanding of the requirement, see, Lauterpacht, *supra*, p. 112 : "...in cases in which its (ICJ's) jurisdiction is challanged or doubted the Court will, without committing itself in any way, make order for interim protection provided that there is in existence an instrument such as a Declaration of Acceptance of the Optional Caluse, made by both parties to the dispute which, *prima facie* confers jurisdiction upon the court and provided that there are no reservations attached to that instrument which clearly exclude jurisdiction of the Court." This view of Lauterpacht was not acceptable to the Majority of the ICJ in the *Interhandel case*, (1957) ICJ Reports pp. 105 *et seq.*

45. See, Rosenne, *op. cit supra*, no. 37. pp. 424 *et. seq.* Lauterpacht, *op. cit supra*, n. 43, pp. 111 *et. seq.*

46. For the contents of such request see, Rule 2, Rules of procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules), ICSID/4, p. 29.

a sort of warning, the party that fails to comply with it would be estopped from denying knowledge of the probable consequences of its non-compliance and the Tribunal may take such consequences into account in its final award.[47]

The recommendation must be made only of such provisional measures as preserve the existing rights of the parties, without conferring any new rights. Since the fact of non-compliance with a recommendation may affect the award, the Tribunal would do well to avoid, unless authorised by the parties to act *ex aequo et bono*,[48] making any recommendation for promoting or adumbrating settlement. However, the Tribunal may still enjoy reasonable freedom of making suggestions or expressing wishes for showing a way to the parties of settling their dispute.[49]

Conclusion

The power to recommend provisional measures of protection is a useful instrument for making the adjudicatory process effective. Its judicious exercise my not only prevent the dispute from getting aggravated, but also save the final award of the Tribunal from being stultified by intermediate action of one of the disputants. The psychological climate prevailing within the framework of the international adjudicatory regime established by the Convention on the bedrock of the principles of good faith and *pacta sunt servanda* is likely to make the parties comply with protective measures even though they will only be 'recomended' and not 'ordered' by the Tribunal. Strength to this hope is given by the attitude of respect generally shown by the States in the past to the orders of international tribunals and by the support that the protective formula received at the various drafting stages of the Convention.

It is also hoped that the examples of respectful compliance by the States with the directions of international tribunals would give lead to the non-State parties making use of the Convention to be equally submissive.

*Arshed Massod**

47. Note B to Rule 39, Arbitration Rules, p. 105. Also see, Lauterpacht *op. cit. supra*, n. 43, p. 254 ; Fitzmaurice, *op. cit. supra*, fn. 38, pp. 123 *et. seq.*

48. Article 42 (3).

49. See also Fitzmaurice, *op. cit. supro*, n. 38, p. 120.

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A NON-DISCRIMINATORY TAX IN *STATE OF MADHYA PRADESH V. ABDEALI**

The object of Article 304 (a)[1] of the Indian Constitution is that the goods from other states should be treated on par with the local goods. Neither they should be treated any worse nor they should be given any special privilege because of their foreign origin. However, the judgment in *Abdeali's* case is not in tune with the provisions of Article 304 (a).

In this case, by a notification made under Madhya Bharat Sales Tax Act, 1950, sales tax was imposed on shoes, chappals etc. on the point of sale by the importer or manufacturer. However, exemption from tax was granted in certain cases. The notification laid down three conditions for the grant of exemption : one of the conditions was that the sale must be of such shoes, chappals, country shoes and footwear as were hand-made and not manufactured on power machine ; the second condition was that the sale price must not exceed Rs. 12-8-0 ; and the third condition was that the sale must be by the manufacturer or any member of his family. This exemption was granted in the interest of small manufacturers who were unable to compete with large-scale manufacturers of footwear made on machine.

The respondent carried on business of importing and selling footwear of different types including the locally exempt variety. He was denied the exemption on this variety also on the ground that the third condition, i.e., sale must be by the manufacturer or any member of his family, was not fulfilled. The net result of the third condition was that if a dealer imported the locally exempt variety from outside the state and sold within the state, he had to pay the sales tax, but if he sold the similar shoes locally manufactured by him or any member of his family, he was given the exemption. It is difficult to understand how the tax was regarded by the Supreme Court as non-discriminatory when in result it was discriminatory.

* A.I.R. 1963 S.C. 1237.

1. Art. 304 : Notwithstanding anything in Articale 301 or Art. 303, the Legislature of a State may by law—

(a) impose on goods imported from other states (or Union territories) any tax to which similar goods manufactured or produced in that state are subject, so however, as not to discriminate between goods so imported and goods so manufactured or produced ;

The Supreme Court justified the tax on the ground that if the outside manufacturers had come to the taxing state to sell the shoes themselves, the exemption would not have been denied to them as well and as such there was no discrimination between the local goods and the goods of other states. But it is respectfully submitted that this approach does not seem reasonable. The outside manufacturer would have to spend a lot on travel etc. in order to get the exemption whereas the local manufacturer could avail the exemption without incurring any expense. Also, Article 304 (a) refers only to the similarity of goods i.e. the imported goods and the local goods should be treated alike and such it is immaterial who is selling them. So any condition not in tune with the provisions of Article 304 (a) must not be permitted. The object of the exemption was to benefit the small manufacturers and that object could also be fulfilled even if the third condition was not there and then the discrimination against imported goods would also have been avoided. There is no reason why the exemption was not given when the manufacturer sold the footwear to a dealer in the importing state of himself coming there to sell them. The exemption should have been allowed in respect of all hand-made shoes costing not more than Rs. 12-8-0, irrespective of the fact who was selling them. The tax in the present case was discriminatory against the imported goods in as such as the exemption was not made available to them.

A tax must be judged from the total effect upon the imported goods and the similar local goods.

In Firm Mehtab Majid & Co. v. *State of Madras*,[2] a tax was imposed on imported hides or skins at their sale price but the tax on the hides or skins tanned within the state of Madras though ostensibly on their sale price, was really on the sale price of those hides or skins when they were purchased in raw condition and that was substantially less than the sale price of the tanned hides or skins. Hence the tax was held to be discriminatory offending against Article 304 (a). Similarly *in State of Madhya Pradesh* v. *Bhai Lal Bhai*[3], a sales tax was imposed on tobacco leaves, manufactured tobacco etc. However, similar goods manufactured or produced in the state of Madhya Bharat were not subjected to the tax. The Supreme Court condemned it for being discriminatory. It will not be out of place to mention here that the Supreme Court of United States has been very sensitive towards such discriminatory taxes and has not hesitated in quashing such statutes. Even in Australia a discriminatory tax was

2. A.I.R. 1963 S.C. 928
3. A.I.R. 1964 S. C. 1006

condemned as violative of freedom guaranteed by Section 92 in *Fox* v. *Robbins*[4].

In the context of *Abdeali's* case, it will, perhaps be appropriate to mention American drummers cases. In *Robbins* v. *Shelby Country Taxing District*[5], a state statute imposed license fee on "all drummers and all persons not having a licensed house of business in taxing district offering (goods) for sale—by sample" obviously, an exemption was made in favour of those sellers who had regularly licensed place of business within the district. In another case, *Emert* v. *Missouri*,[6] the Supreme Court of United States held :

"A State can imposes a tax or license fee if the article offered for sale is in the possession of the seller (even) if it is the product of another state) provided that it is a general tax on all sales within that State".

It is submitted that what is true for a tax is also true for an exemption from tax and hence our reasoning in Abdeali's case.

A good example of non-discriminatory tax is found in *Andhra Sugar Ltd.* v. *State of Andhra Pradesh*.[7] The same rate of tax was levied on purchases of all cane required for use, consumption or sale in a factory. There was no discrimination between cane grown in the state or cane imported from outside and so it was upheld by the Supreme Court.

In fact, Article 304 (a) is the qualiflying clause for state taxing power. A state can impose a tax on goods within its allocated field only after satisfying the conditions laid down in Article 304 (a)

*Shyam Sunder Vats**

4. (1909) 8 C. L. R. 115
5. 120 U. S, 489 (1886)
6. (1895) 156 U. S. 296
7. A.I.R. 1968 S. C. 599

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A SURVEY OF LAW STUDENTS OF THE FACULTY OF LAW, UNIVERSITY OF DELHI, 1968-69.

1. Introduction

The Research Group[1] of the Faculty of Law undertook a survey of their students to obtain background information on some matters. This information was thought necessary to know the type of training they had before coming to the Law Faculty, their reasons for coming to the Faculty and other personal factors like their marital status and financial position. It was hoped that this information would enable the Faculty in general to plan and make improvements in the field of legal education. The questionnaire also provided an opportunity to judge the impact on the students of the recent changes introduced in the method of instruction, notably the Case Method. A census type of survey was conducted and all the students of the first and third year classes were approached. This procedure, it was hoped, would give the Group he expectations and the impessions of the first year students ("freshers") as well as the experience of the final year students. For reasons of economy, including that of time and effort, the second year students were left out of the survey. As the survey would be undertaken in the coming years also by the Group, it was hoped that the second year students would be covered in the succeeding year when they enter the final year.

The present survey (1968-69) covered 383 from the first and final year classes belonging to the Day and Evening shifts, out of a total of 676 students, that is 56.50% students on rolls. The present survey covered 230 of the 447 students admitted in the first year and 153 out of the 229 Third year students. Twenty-five of our informants were girls; fifteen belonged to the first year and the rest to the final year.

2. Who are they ?

Only 5.7% of the students surveyed have fathers who are lawyers. One student is the son of a judge. The occupational breakup

1. The Research Group consisted of some teachers of the Delhi Law Faculty. Such surveys for the subsequent two academic years have been also completed. The Reports are being prepared and would be published later.

of the parents is as follows :

Business	105	21.48%
Central Government Employment	50	13.09%
Farming	44	11.52%
Employed in business firms	24	6.28%
Lawyers	22	5.73%
Accountants	12	3.14%
Provincial Government Employment	12	3.14%
School teachers	6	1.57%
Doctors	6	1.57%
Industry	4	1.04%
Scientist	1	0.26%
Judge	1	0.26%
Army	1	0.26%
Other occupations	19	4.97%
Unspecified	34	8.90%
Not answered	42	10.94%

The Survey indicates that about 36.38% of the students are married. The apparently higher percentage of married students may be attributed to the fact that many of the evening students are employed and married. It is believed that the percentage of day students in this regard might be considerably less than the above figure. 73.33 per cent of the married students (77 out of 105) have children.

Regarding the parental income, the following figures bringforth interesting facts :

Annual Income	No. of students	%
More than Rs. 50,000	13	3.40%
More than Rs. 15,000 and less than 50, 000	117	30.62%
More than Rs. 3000 but less than 15,000	168	43.97%
Less than Rs. 3000	63	16.49%
Did not answer	22	5.73%

The above figures show that 16% of the students come from the "poorer" section of the community, on the assumption that those having an annual income of rupees three thousand or more are regarded as belonging to the "higher income group."

3. What they studied ?

The academic background of the first and third year students suggests the superior background of the new entrants. Forty-five

out of the 226 students of the first year, that is 19.91 per cent of the students, are post-graduates, whereas only 8 out of the 150 third year students viz. 5.33% who answered the question (3 have not answered the question) are post-graduate. Even if we give allowance to the fact that some post-graduates students might have discontinued their studies, still the difference is appreciable. The increase in the quality of admissions is noticeable by reference to another figure also. Among the first year students 30.08 per cent (68 out of 226) hold an honours degree in B. A. whereas the corresponding figure for the third year students is 25.85 per cent (38 out of 147 who answered the question).

Majority of the students had their graduation in Arts like History, Philosophy etc. 50.88 per cent of the first year students (115 out of 226) and 69.07 per cent of the third year students (105 out of 152) fall into this categorsy. The second large group is drawn from commerce colleges. Fifty-three out of two hundred and twenty six (23.45%) in the first year and twenty-five out of one hundred and fifty two in the third year (16.44%) have graduated in commerce. It will be of intertst to know that four students in the first year possess a Bachelor's degree in Engineering while there are no students belonging to this discipline among the third year students. A decade ago it would be rather unusual to have an engineering student seeking admission in law.

As regards the medium of instruction, among the first year students 85 out of 223 (38.11%) studied in English medium at the High School level and 186 out of 227 (87.93%) at the University. The figures for the third year students are 48.00 per cent (72 out of 150) and 91.39 per cent (138 out of 151) at the High School and the University levels respectively.

The superior quality of the new entrants is noticeable in another direction also. While none among the 149 third year students who answered the question secured sixty per cent or more marks in the Bachelor's degree, there are seven such students in the first year. 34.51 per cent of the first year students (78 out of 226) secured fifty per cent or above in their degree courses. 23.48 per cent among the third year students (35 out of 149) fall in this group.

4. Where did they have their pre-college education ?

As is to be expected a large majority of the students had their High School education in Delhi. 66.01 per cent of the third year students and 56.08 per cent of the first year students belong to this category. The next best represented states are : 10.45% Punjab, 5.88% Haryana and 5.2% U.P. The relative figures for the first-year students are : 16.52% Punjab, 8.69% Haryana and 6.08% U. P.

5. Why do they come to the Law School ?

The motivations of students in coming to the Law school indicates a wide variety of answers which may be summarised by the following table :

Reason	%Third year		%First Year	
Lawyer	57/153	37.25%	75/230	32.60%
I.A.S.	12/153	7.84%	24/230	10.43%
P.C.S.	21/153	13.07%	15/230	6.52%
Family Business	10/153	6.53%	22/230	9.56%
Parental Desire	8/153	5.22%	3/230	1.30%
Enjoyment	12/153	7.84%	18/230	7.82%
Bettering employment position	11/153	7.18%	22/230	9.56%
Teaching & Research	5/153	2.26%	6/230	2.60%
To be a post-graduate student	4/153	2.61%	5/230	2.17%
Nothing else to do	6/153	3.92%	3/230	1.30%
I do not know	2/153	1.30%	17/230	7.39%*
Convenience	2/153	1.30%	9/230	3.91%
Other	4/153	2.61%	11/230	4.78%

6. Response to the Case Method

The survey reveals that the response of the students to the case method is very encouraging. In this context it should be remembered that a number of teachers adopt the "volunteering method" of approach in eliciting the answers. While about 9% of the first year students regularly participated in the class room discussions, almost twice this percentage (18% approximately) of the final year regularly participated in class-room discussions. About 12% of the first year students never participated in the discussion, but only about 7% did not participate in the final year. Thus about 85%, it is interesting to note, have either regularly or otherwise participated in the discussions.

*This figure includes those who did not answer the question.

As to the reason why they did not *regularly* participate in the class room discussions, about 15% of the students mentioned language deficiency as the reason. 38.05 per cent of the students (102 out of 268) who answered the question give lack of preparation as the reason.

7. Desire to Practise law after receiving the law degree :

A fairly large number of third year students, about 48%, expressed a desire to practise law, whereas only 19% of the first year students expressed such a desire.

THE UNBORN VICTIM

The Medical Termination of Pregnancy Act, 1971 came into force from April 1, 1972. According to rules framed under the Act, Boards would be set up in the States and Union Territories, which will certify the qualifications of medical practitoners authorised to destroy the unborn, the unwanted and the nameless who has committed no wrong.

In the eyes of criminal law only the human beings who are born alive (in Coke's words, "reasonable creatures in being") can be the victims of murder or man-slaughter. Thus, to consider the definition of human being, one obviously would think about three stages, the moment of conception, the moment when the foetus is viable, and the moment of birth. According to common law rule it is only the last stage, when the child has independent existence, that one becomes capable of being the victim of homicide. It simply means that in the law of homicide a child *en ventre sa mere* (conceived but not yet born) is not considered on the same footing as a living human being.

The law of property has taken into account the existence of an unborn child for consideration of property rights. The passage in the Blackstone Commentaries, I, 130, upon the child *en ventre sa mere* runs "an infant in (sic) ventre sa mere, or in the mother's womb, is supposed in law to be born for many purposes". There is a fiction that a child *en ventre sa mere* is a person in being for the purposes of acquisition of property by the child itself or being a life chosen to form part of the rules against perpetuities. This fiction has undoubtedly been adopted in the law of Scotland.

In many other modern legal systems we find rights given to the unborn child. It is capable of receiving inheritance or donations on the condition of being born alive. It has the right of maintenance out of its reserved inheritance in the example of Roman *missic ventris monime*. Its ownership of a right is necessarily contingent indeed for he may never be born at all ; but it is nevertheless a real and present ownership. It may be right to say that law begins by taking cognisance of living human being. This, however, does not mean that it should remain blind to their pre-natal existence.

A child can maintain an action in tort for injuries sustained when it was *enventre sa mere*. Such an action is commonly allowed in the United States, and has been allowed in Canada and South Africa. There is no direct authority in this field in India. But there would seem to be no valid principle by which an existing but

unborn child should be deprived of the protection of the law against wilful or negligent injuries inflicted upon it

The terminology of 'born alive' or 'capable to be born alive' is much involved in fixing the time of birth. Clearly these two stages will never take place unless there has been the very first stage which is the moment of conception. Today and indeed for a very considerable period it has been accepted by biologists that in a strictly scientific and physiological sense there is life in an embryo from the time of conception. And there is no qualitative difference between an embryo at the moment of conception and at the moment of quickening. If life is fully present from the moment of conception, then the right to life must begin at such stage. One might wonder why the law should not go even further and protect the life of the foetus which is not yet viable. One might expect the law to extent its protection of the life to the moment of conception. For instance Christians strongly stressed the sanctity of life from the very beginning. It is, therefore, to be emphasised that the Criminal law may not only forbid the killing of life but should also prohibit the prevention of life coming into existence.

Generally, a person should be allowed by law to do what he likes with his own body. Similarly a woman may have all right to terminate her pregnancy. The counter argument is that there is more than just the woman's own body involved that is the nonviable foetus. The legal protection must, therefore, be extended towards the nonviable foetus, who is not so radically different from a human being.

The existing law already permits termination of pregnancy when it is necessary to preserve the life of mother. Besides that all abortive operations would lead to the murder of the unborn child.

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