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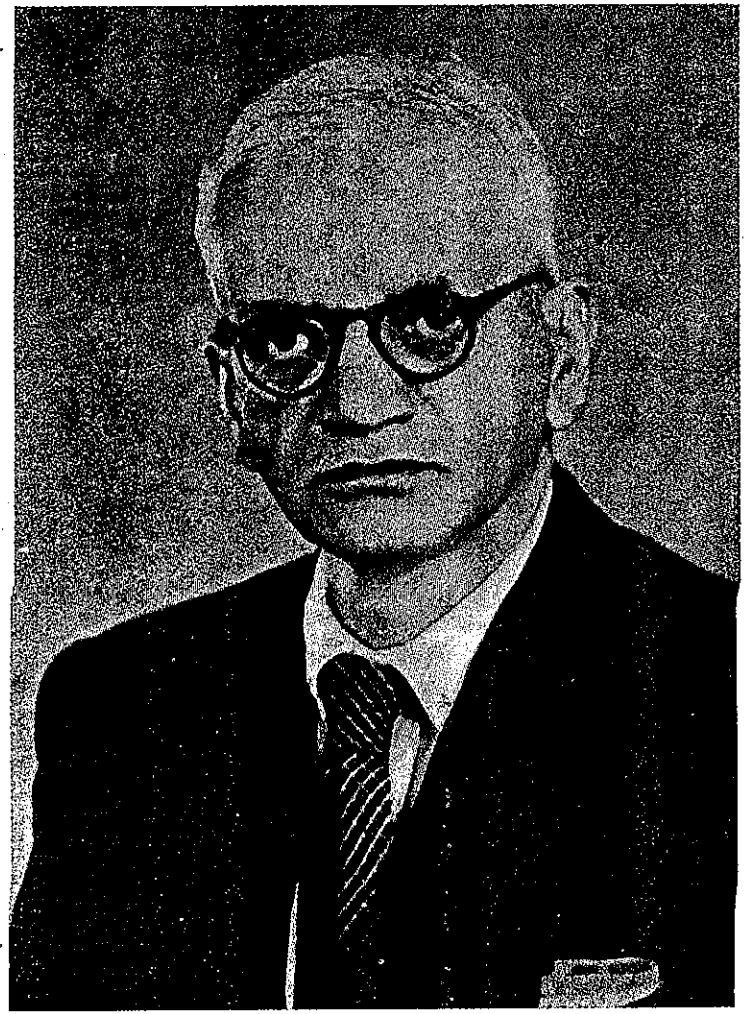

Professor M. Ramaswami 1905-1976

PROFESSOR M. RAMASWAMY

A TRIBUTE

> While it is true that law can and ought to play a dynamic role in the evolution of a just and good society, I must enter a strong caveat against the proposition that the mere intellectual process of discussion and comprehension of the various current theories of law or formulation of new ones in a university law school will alone help forward or result in the establishment of such a society. Fine-spun theories of law, beautifully expressed in appropriate language, may be intellectually or aesthetically satisfying, but they will never by themselves bake even a single loaf of bread. What builds a good and just society is the leadership of great and good men who by their life and conduct have translated into living action ideas of justice springing from their pure hearts.[1]

Professor Ramaswamy passed away on 7 Nov. 1976, but his inspiration and example will always be with us. He was with us at the Faculty only for a brief while (he joined as Professor of Constitutional Law on 5 March 1960, became Dean on 8 January 1963, and retired on 4 March 1965) and yet a lot of us recall him with warmth for his upright administration, inspiring teaching and above all for his outstanding dedication to research and writing animated by a vision of a just and humane law and society. Professor Ramaswamy was, in the truest sense of that term, one of the very few (and among them the foremost) jurists in India.

Professor Ramaswamy contributed a great deal to the development of Indian as well as American Constitutional Law and Scholarship.[2]

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1. *Report of the Committee of the Reorganisation on Legal Education in the University of Delhi*, 40 (Delhi U. Press 1964), (Hereinafter referred to as the *Report*).
2. A selected bibliography of Professor Ramaswamy's writings can be found at the end.

His treatise on the commerce clause of the United States Constitution, published in 1944, is perhaps the best work ever written by a non-American on the United States Constitution and is regarded by American constitutional lawyers as an outstanding treatise. Professor Ramaswamy was invited jointly by the United States Department of State and the Stanford University to deliver a course of three University Lectures on the United States Supreme Court and to lecture on comparative constitutional law problems at the Stanford Law School, California. The lectures delivered by him in 1955-56 were later published as *The Creative Role of the Supreme Court of the United States*.[3] He also visited and lectured at the Harvard Law School, and the Law Schools of the Washington University and the St. Louis University, Missouri.

Professor Ramaswamy's work on the Government of India Act, 1935, entitled *The Law of the Indian Constitution* is rightly acclaimed as definitive work on the subject. His visionary concern with a Constitutional framework for Free India is evidenced by his works *Fundamental Rights* and *Distribution of Legislative Powers in the Future Indian Federation*, both published a few years before India became independent. In *Fundamental Rights* Professor Ramaswamy examined at length individual liberties with reference to the working of the American Bill of Rights and to the position in the United Kingdom. He came to the conclusion, contrary to that of the Simon Commission and the Joint Select Committee of Parliament, 1934), that it was both feasible and desirable to draft a code of fundamental rights without creating a grave risk of a large number of laws being judicially invalidated for violating them. He incorporated into the book a draft Code of Fundamental Rights and also furnished a running commentary to explain the provisions and their effect on human liberties.

Professor Ramaswamy was thus an ardent champion of the bill of rights and its concomitant, an independent judiciary, which would play the role of the arbiter between the conflicting claim of liberty and authority, freedom and order, conscience and social welfare. Yet Professor Ramaswamy did not regard a bill of rights to be in itself sufficient for preservation of freedom and dignity. The embodiment of guarantees for indivdual rights in a Constitutional

3. The book has also been translated into Indonesian and Urdu.

document "can only act as a first barricade of defense against intolearnt majorities making shorrwork of human liberties," but "it is only the vigilance of the people and wide-cult ivation of the spirit of tolerance and of respect for human dignity that can ensure the enjoyment of basic rights to the numbers of any given soniety.[4]" These words of Professor Ramaswamy assume compelling significance for the Indian constitutional and political order at the present juncture.

On the perennial problem of national unity and regional autonomy, a problem which assumes complex dimensions in a vast, multilingual, multi-religious, multi-cultured country like India, Professor Ramaswamy commended the flexible federalism of our Constitution. He had no hesitation in rejecting, for a country of India's size, a unitary governmental set-up which would only work for a small country with people highly disciplined and having a proper sense of values. According to him "Great Britain. . .fulfills these requirements and that is why in that country, in spite of a regime of parlimentary supremacy, the people's liberties are quite secure."[5] He gave two reasons for his misgivings that a unitary form would work satisfactorily in India. First, the concentration of power at one point would kill the spirit of self-reliance necessary for the successful working of democracy. Secondly, such concentration of power in one place might easily lead to a central dictatorship. He remarked : "Both liberty and democracy require proper checks and balances to function with efficiency."[6] He, therefore, viewed federalism as a useful and dynamic technique for harmonising national unity with regional freedom in large areas. To be sure, Professor Ramaswamy did not support a rigid federal structure which would endanger national unity in a pluralistic polity like ours. He was also quite aware of the possibility that "a federal setup which inhibits action at every step by running against problems of divided jurisdiction, while economic and social forces in the country operating cross state lines demand central direction, would place public weal in great jeopardy." He commended articles 249, 252 and 258 of the Constitution as provisions which "soften the rigour of the division of

4. Ramaswamy, *The Creative Role of the Supreme Court of the United States*, 155 (1956).

5. *Ibid.*, 108-9.

6. *Id.*, 108.

powers making it pliant enough to meet the requirements of a modern state."[7]

Professor Ramaswamy was second to none in his commitment to the reform of Indian legal education. But he did not believe in change for the sake of it. He held the reality of the processes of higher education firmly in mind and cautioned us to "hurry slowly" in his solitary dissent to the majority recommendations of the *Gajendragadkar Committee Report on the Reform of legal Education in the University of Delhi.*[8] He accepted unreservedly the recommendation of the majority that the duration of the LL. B. course should be increased.[9] He disfavoured the majority's recommendation of an admission test in substitution of or in addition to the marks yardstick as he felt that it would "create endless difficulties and become unworkable."[10] In the event, no admission test was introduced. He envisaged that the minimum percentage of marks for admission should be increased to 50%. This has now been accomplished, though it took much longer than a period of 2 or 3 years which he had contemplated.[11] Professor Ramaswamy regarded our present syllabus of 30 subjects in six semesters to be a "very heavily loaded syllabus which...cannot be properly assimilated by the students even in a three-years course." He did not favour splitting up the academic year into two semesters which, he felt, would make the course into a "pressure-ridden process." He was not in favour of completely internal examinations and felt that the old rule that at least 50% of the examiners should be "external examiners was sound."[12] He did not

7. *Id.*, 109.
   Article 249 provides that if Upper House of the Union Legislature has declared by resolution supported by not less 2/3 of the members present and voting that it is necessary or expedient in the national interest that Parliament shall make laws with respect to any matter falling within the domain of the states, then it would be lawful for Parliament to make laws for the whole or any part of the territory of India with respect to that matter while the resolution remains in force. This can be done whether there is an Emergency or not.
   Article 258 permits the President to entrust to a State Government, with its consent, functions in relation to any matter to which the executive power of the Union extends. Under article 252 any two more or states mayauthorise the Union. Parliament to legislate in respect of matters falling within the State List.
8. *Supra* n. 1.
9. *I. e.*, from 2 years as it was at that time to 3 years "for regular students in the Day classes" and 4 years "for part-time evening students."
10. *Report*, 46.
11. *Ibid.*
12. *Report*, 56.

favour the wholesale importation of the case-method of instruction as it obtains in America as in his view "An approach to the study of law built up entirely or primarily through the case route, gives a fragmented view of the law."[13] He felt that the lecture system had to be maintained as a "primary teaching tool", but wanted that it should be supplemented by other tools like tutorials, case-discussions and seminars.

It is indeed high time that we undertake a scientific study to evaluate the "case-method" as it operates in our law school. It may be found that some at least of Professor Ramaswamy's apprehensions have proved correct. For instance, there is a general feeling that while the case-method is time-consuming, the semester system cuts into the time available for teaching and fritters it away in conducting examinations. Again there are are some who, with Professor Ramaswamy, feel that the "American internal assessment system" (which we have adopted in our law school with some modification) is "not all suited to our enviroment or condition."[14]

Professor Ramaswamy was convinced that our law school possessed "distinct advantages which, if properly utilized, can provide the nucleus round which we can build up a very good law school" and that we were "just on the way to establish a tradition of scholarship and research in our Faculty."[15] With great passion and hope he exhorted :[16]

> What makes a law school a good law school is primarily the quality of the teachers who teach there and the spirit of dedication which they bring to their chosen calling. I do hope that we teachers in the Delhi Law Faculty will by our conduct and behaviour continually endeavour to be the true votaries of that kind of religion, whose essence was portrayed in such beautiful and memorable words by that great American Judge and jurist the Late Mr. Justice Benjamin N. Cardozo,...when he said : "The submergence of self in the pursuit of an ideal, the readiness to spend oneself without measure, prodigally, almost ecstatically, for something intuitively apprehended as

13. *Report*, 60.
14. *Report*, 61.
15. *Report*, 72.
16. *Report*, 72-73.

[illegible] knows not why—some of [illegible] reason means.

[illegible] that the Faculty of Law of the [illegible] over the years attract to itself a con- [illegible] scholars and students from all parts of [illegible] and students to whom law is the first and last [illegible] and who will continuously endeavour to make [illegible] instrument for the building up a good and [illegible] the Founding Father of our Nation's Constitu- [illegible] heart.

[illegible] our proud trust. May we prove worthy of his hope! [illegible] will be the greatest monument to his memory.

[illegible] unassuming and reticent by nature, yet he was a man [illegible] knowledge and intellectual integrity. Although himself [illegible] in his conversations he often expressed distrust of the [illegible] of moral concerns. He envisaged that the law [illegible] only impart skill and knowledge of the law, but [illegible] young men and women the feeling of Justice of a pure [illegible]

[illegible] reception held on the occasion of Professor Rama- [illegible] retirement the then Vice-Chancellor, Dr. C. D. Deshmukhi, [illegible] Professor Ramaswamy was the personification of the Rule [illegible] No tribute could be truer or more appropriate in his case. [illegible] condolence meeting held in the Faculty on 8 November 1976 [illegible] warmth and admiration were echoed a decade later by his [illegible] who would surely continue to cherish the memory of that [illegible] This issue of the *Delhi Law Review* is most respect- fully dedicated to his memory.*

17. See 1 *Outlaw*, No. 1, p. 2(1975).

*The Board of Editors are thankful to Shri R. V. Raman, Deputy Registrar, University of Delhi for obtaining a copy of Professor Ramaswamy's photograph for publication and for other information.

SEL[illegible]

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RANDOM REFLECTIONS ON "THE POOREST OF THE POOR"

B. SIVARAMAYYA*

[*The author contends that nothing tangible has yet been done for those at the rock-bottom levels of poverty. He urges that extreme poverty must be the criterion of backwardness for conferring educational and employment benefits and pleads for the denial of these benefits to the affluent among the Scheduled Castes and other backward classes*]

INTRODUCTION

Even after thirty years of independence and the four five-year plans, the overall economic inequalities in India are characterized by such comments as "the rich are becoming richer and the poor, poorer" and "the gulf between the rich and the poor is widening". To be sure this feeling seems to have emerged despite impressive legislative activity directed to reduce inequalities. Measures like the abolition of *zamindaries*, ceilings on land-holdings, security of tenure legislation, imposition of progressive tax laws, including death duties, and abolition of the privy purses, etc., have been taken with a view to reducing economic inequalities. The special provisions in favour of the Scheduled Castes and Scheduled Tribes are also intended to reduce or remove economic disparities. Paradoxically, however, economic inequalities seem to have increased.

One explanation to this prevailing feeling is, in the present writer's view, that nothing tangible has been done to improve the conditions of the "poorest of the poor", although the planners recognized the need to ameliorate their position. There has been no real recognition of the fact that those falling below the poverty line can be further

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ranked for purposes of priority.[1] For example, one such broad delineation could be : (*i*) those who have no means of livelihood except the "charity" of the society, like the non-professional beggars, destitutes, etc. ; (*ii*) those who are in a position to earn their livelihood but whose occupational income is of a precarious or seasonal character or is highly susceptible to the vagaries of nature, like that of agricultural labour ; and (*iii*) those who have a fairly steady occupational income—even if it be meagre and inadequate.

But till now, no concerted attention has been paid to alleviate the conditions of the people who are most afflicted with poverty. One would suspect that it is due to the fact that the "poorest of the poor" are not so organized or articulate as to constitute "vote banks" during elections. If we take into account the position before the 20-point Economic Programme, improving the conditions of this segment of the population did not rank high in the priorities of political parties either in power or seeking power. It is submitted that an effective dent in removing poverty is not possible unless urgent attention is paid to the most vulnerable and inarticulate sections of the community at the rock-bottom level of poverty. Article 46 of the Constitution itself so requires[2]. The realization of this goal requires not only an identification of the most vulnerable sections, but also fixation of priorities for ameliorative action based on such identification.

I. "THE POOREST OF THE POOR"

The threshold question arises : "Who are the poorest of the poor"? Prescinding the academic controversy over the criteria for measurement of poverty, it is possible to identify some broad categories of people which fall in this group. Tarlok Singh broadly classifies the urban poor as comprising : (*i*) industrial workers, (*ii*) non-industrial workers, and (*iii*) beggars and mendicants.[3] As to the rural poor he states :

1. The Draft Fifth Five Year Plan in a general way stresses the need to raise the private consumption level of the bottom 30% of the poor through the effective implementation of the objectives of the Plan like the provision for employment opportunities, population control, the National Minimum Needs Programme, etc. The Minimum Needs Programme envisages the providing of facilities like elementary education, supply of drinking water, all-weather roads, developed house-sites for landless labour, etc. There is no specific categorisation of the vulnerable sections.
2. Article 46 of the Constitution of India : "The State shall promote with special care the educational and economic interests of the weaker sections of the people, and in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation."
3. T. Singh, *Poverty and Social Change*, 17 (2nd ed. 1969).

> It may be assumed that *at the very least* the rural poor will include (a) petty cultivators and a proportion of those who may be described as small cultivators, (b) agricultural labourers, and (c) those in 'traditionally poor occupations other than cultivation'.[4]

The significant exclusion of beggars and destitutes in the latter group is perhaps due to the fact that the classification relies on census enumeration which did not include beggars in any occupational group. The following groups may therefore be regarded as comprising a substantial number of the poorest poor : (a) non-professional beggars[5], (b) destitutes, and (c) land less labourers. We examine the position with regard to the first two categories in this paper.

The above categories are not necessarily exhaustive. It is quite possible that some of the village artisans like potters, basket-makers, village servants and others dependent solely upon seasonal work fall in this group. However, the position of village artisans is, generally speaking, not as vulnerable as of some sections of agricultural labour who are reduced to the most degrading form of poverty, that is, begging during a period of drought or other adverse seasonal conditions. This aspect has been well brought out by the Delhi study :[6]

> The traditional occupation of agriculture remains, as yet, subject to vagaries of unforeseen and uncontrolled natural factors like floods and drought, throwing out every time a number of victims in a state of semi-starvation and unemployment. And since they do not often possess the special skills required in the new urban occupations, their occupational mobility and the chances of success in new vocations are greatly diminished and their indigence becomes acute, often leading them to begging and other socially deviant activities.

Similarly, M. V. Moorthy in his study of beggars in Greater Bombay states that 57.89 per cent of the street cases (beggars noticed and interviewed in the streets) and 47.22 per cent of the institutional cases (inmates of Beggars Homes) replied that they had taken to begg-

4. *Id.* at 256.
5. The term is used here to include those who do not take to begging as a means of livelihood because of laziness or because they consider it to be a more lucrative profession.
6. M.S. Gore, *et. al., The Beggar Problem In Metropolitan Delhi*, 149 (1959). See also R.K. Mukherjee, "Causes of Beggary", in Kumarappa (ed.) *Our Beggar Problem*, 20 (1945).

ing because of lack of facilities for earning a livelihood.[7] He also points out that in a majority of street cases, the parents of beggars were engaged in agriculture.

II. THE RANGE OF THE PROBLEM

(i) Beggars

Eradication of beggary received some attention, but very little of the objective has been achieved. The Third Five Year Plan, taking note of the problem, observed :[8]

> Beggary is an age-old social evil which has been allowed to continue for too long and a part from the demoralization it causes, is a source of discredit to the country. The problem has been studied in several places and it is important that States and local bodies should now endeavour to deal with it effectively.

A recent survey[9] puts the number of beggars in India at 5.5 million. Of them 115,500 are below the age of fourteen. According to this survey 51.8% resort to begging because of diseases, 13.9% because they are physically handicapped, 6.5% because of death of parents and 3% because of the death of husbands.

The Third Plan categorized beggars into four groups : (*a*) child beggars, (*b*) those who are diseased, disabled, infirm or aged, (*c*) able-bodied professional exploiters, and (*d*) religious mendicants. In its well justified view the most urgent attention is needed to tackle children who take to begging. The plan noted that such children were often victims of gangs of exploiters. After referring to the statutory provisions enacted to curb the evil, it stated :[10] "Thus, the necessary legislation exists, and the main task now is to ensure its effective enforcement". But the Draft Fifth Five Year Plan does not even refer to the eradication of beggary.

(ii) Destitutes

The dictionary meaning of the word "destitute" is "want of resources" and "want of necessities". It is easy to visualize a large number of people who, though they might not be actually begging, are heavily dependent upon relatives, or on meagre resources for their living. The persons comprising this group may be broadly sub-divided into destitute women, destitute children, physically and mentally handicapped individuals, and old and infirm people.

7. M.V. Moorthy, *Beggar Problem in Greater Bombay*, 38 (1959).
8. *Third Five Year Plan*, 720.
9. *The Indian Express* (Delhi), dated January 8, 1973, p. 4.
10. *Third Five Year Plan*, 120.

(a) *Destitute Children* :

Even in the category of destitutes, destitute children form the most pathetic and the most vulnerable group that needs urgent attention. *The Report of the Committee for the Preparation of a Programme for Children*[11] defined a destitute child as "one who is abandoned, forsaken, deserted, left friendless or forlorn". As noted by the Committee, one of the causes of destitution is abject poverty, or unhappiness (even when the parents are alive) which drive children to desert their homes.[12]

Comprehensive studies as to the extent of destitution among children are lacking ; but one estimate places the number of destitute children at 1.8 million. The Fourth Five Year Plan referring to destitute children observes : [13]

> A review of the development of welfare services during the last eight years shows certain weaknesses. In the previous Plans, inadequate attention was paid to the needs of destitute children. Absence of counselling or advisory services, lack of statistical data, deficiencies in management and supervision at the field level, absence of proper co-ordination between the Central Social Welfare Board and State Departments of Social Welfare have been the other limitations.

Referring to neglected children in equal need of attention, the Fourth Five Year Plan states :[14]

> Among children those who are destitute should receive higher priority....Although the Children Acts in most States and Union Territories cover both neglected and delinquent children, in practice the organization of services for neglected children has not received much attention. This shortcoming has to be remedied.

The foregoing indicates the already existing stupendous undischarged burden on the Indian society.

(b) *Destitute Women* :

Destitution among women may arise due to many causes but death of the husband and desertion by the husband need particular

11. *Report of the Committee for the Preparation of a Programme for Children*, 54 (1969) (hereinafter referred to as the Ganga Saran Sinha Committee Report).
12. *Ibid.*
13. *Fourth Five Year Plan*, 409.
14. *Fourth Five Year Plan*, 411.

attention.[15] As pointed out by The Committee on the Status of Women[16], the higher level of unemployment and under-employment among women signifies that their proportion below the poverty line is likely to be higher than men. Adverting to the lack of reliable data in this regard the Committee observes :[17]

> The Department of Social Welfare has estimated that about one lakh of widows become destitute every year in the age group 20-44. For the age-group above 65, this number is estimated at 48.3 lakhs. It is, however, difficult to understand the basis of these calculations.

Attention should be drawn, incidentally, to a particular kind of hardship to which widows are subjected to in the process of the implementation of land reforms. It is a well-known practice in India to give lands or income from the lands towards the maintenance of widows in a family. This practice finds recognition in relevant statutes which make special provisions dealing with maintenance.[18] But most land reform legislations totally neglect to make any provision to relieve the hardship to poor widows. An exemption could have been envisaged in favour of these women, as in the case of persons serving in the armed forces, and a relaxation of the provisions is no less justified in the former than in the latter. The analogy of the application of the Madras Agriculturists Relief Act, 1938 will be relevant here. Under that Act the following debts, *inter alia*, have been exempted from the operation of the Act : (i) debts due by way of maintenance and (ii) any debt below Rs. 3,000 due to a woman who did not own any other property.[19]

Even if it is assumed that an exemption in favour of poor widows from the operation of land legislations would lead to evasion of the laws on a wide scale, the governments should have compensated widows for the loss of maintenance in all deserving cases. Perhaps, it is still possible to provide relief by making cash grants in favour of poor widows.

15. For an illustration, see *Cheriyan* v. *State* (1973) Ker.L.T. 15, where deserted wife had to resort to prostitution to feed her children.
16. *Towards Equality, Report of the Committee on the Status of Women in India*, 161-162 (1974).
17. *Ibid.* (Footnote omitted).
18. The Transfer of Property Act, 1882 (Act 4 of 1882), 39 and the Hindu Adoptions and Maintenance Act. 1956 (Act 78 of 1956), 28.
19. The Madras Agriculturists Relief Act, 1938 (Madras Act 8 of 1938), 3 (iii).

There seems to be some awareness even in the Government about the urgency of measures to protect destitute women and children. The Minster for Social Welfare, answering a question in the Lok Sabha, stated:[20] "Certain social security schemes to cover destitute women and destitute children are proposed during the Fifth Five Year Plan." But we have not as yet noticed any significant developments in this direction.

III. MEASURES TO RELIEVE "THE POOREST OF THE POOR"

The measures to relieve these sections who are at the rock-bottom level of poverty may be designated as curative, rehabilitative and preventive. By a curative approach we mean measures which provide immediate relief ; by rehabilitative approach, measure taken to guard against these groups sliding back into the former state of abysmal level of poverty ; and preventive measures seek to control effectively the further spread and enlargement of the members that constitute the weakest sections of the society. The punitive approach noticeable in the context of anti-beggary legislations may be regarded as an aspect of preventive approach. It must be emphasized that these categories are not rigid and there might be considerable overlapping in them.

Provisions for homes for beggers, and destitutes, orphanages for children and enforcement of Minimum Wages Acts fall under curative approach. The need for rehabilitative approach is exemplified under the enforcement provisions of the Bonded Labour System (Abolition) Act, 1976.[21] The Act, is, indubitably, an essential step to relieve the weaker sections of the society. But if there are no alternative venues of employment provided for them, in all probability they will either join the ranks of destitutes and beggars, or opt for the former status of semi-slavery in a disguised form. Indeed, the Act recognizing this need provides for the establishment of vigilance committees.

Under the preventive approach to poverty, three measures strike the mind. The first is the sterilization of the unfit and compulsory sterilization. The second is prohibition of consumption of intoxi-

20. *Lok Sabha Debates*, Vol. 22, No. 25, col. 137, dated 25-12-72.
21. Section 10 of the Act empowers the State Government to confer powers and impose duties on a District Magistrate to ensure that the provisions of the Act are properly carried out.

    Section 14 lays down that it is the duty of every District Magistrate to inquire whether bonded labour or any other form of forced labour is being enforced by any person within his jurisdiction. Section 13 provides for the constitution of vigilance committees whose function is *inter alia*, to advise the District Magistrate about the implementation of the Act.

cating drinks ("prohibition") and the third is the need to educate "masses" to avoid customs and habits which involve wasteful expenditure. The first measure, though crucial, has, generally speaking, not been favourably received by the administrators and academicians. Sterilization of the unfit checks the irresponsible procreation by those suffering from "highly undesirable physical and mental conditions" and those otherwise unfit.[22] Broadly speaking, if we consider the position before the announcement of the National Population Policy,[23] no leader worth the name ever dared or cared to stress the role of population control in the war against poverty.

The second measure, namely, "prohibition" has been attempted but by and large has proved to be a dismal failure. However, there is still much role left for education and propaganda to inculcate in the people the virtues of temperance. The contribution of wasteful social practices as a causative factor of poverty is often overlooked. In relation to forced labour it has been observed :[24]

> The debt or obligation is seldom contracted for agricultural purposes but arises from conventional social practices attendant on marriages, funerals, religiuos rites, pilgrimages, etc.... [I]n rural society social and economic practices cannot be strictly compartmentalised for treatment by state action.

(a) Beggary

The eradication of beggary among children needs urgent attention. We have already referred to the emphasis placed by the Third Plan on this aspect. No excuse, financial or otherwise, for the continuance of child beggary is legitimate, especially after about thirty years of independence.

Again in tackling the problem of diseased, disabled infirm or aged beggars, the paucity of resources is put forward as an excuse. A report of the Ernakulam Municipality[25] suggested that the government should authorise the municipalities to levy a cess for financing Relief

22. See generally T.A. Baig, "Sterilizing the Unfit," *The Hindustan Times*, July 26th 1976, p 6, col 3 to 5. Also B. Sivaramayya "Towards Protection of the Child—A Study in the Laws of Compulsory Sterilization and Succession", 11 *The Year Book of Legal Studies* 61 (1975).
23. For the text of this Policy, see *The Times of India* (Delhi) April 17, 1976, p. 4 col. 2-5.
24. H. Venkatasubbiah, "Reforms on the Labour Front", *The Hindu* (Madras), July 14, 1975.
25. *Beggar Relief Committee Report and a Scheme to Solve Beggary* 37 (1957, published by the Ernakulam Municipality.

Settlements. In addition to this, two other sources for augmenting the resources for running the Relief Homes may be explored, namely, the surplus incomes of temples[26] and *wakfs*.

It may be recalled that the Commission on Hindu Religious Endowments[27] devoted considerable thought and attention to the question of disposal of surplus income of the religious endowments. It was of the view that the objects for which the surplus income may be utilized be devided into two categories : (i) obligatory, and (ii) desirable. According to the Commission, in the former category the objects and purposes as are essential for the management should be included. If any surplus is left after making provision for the obligatory purposes, the remaining surplus may be utilised for the objects stated in the report by the trustees. For our purposes, items 11, 12 and 13 are relevant. These are :

11. Establishment and maintenance of orphanages for Hindu Children.
12. Establishment and maintenance of asylums for leper or patients and/or persons suffering from serious ailment.
13. Establishment and maintenance of poor homes for destitute and physically disabled Hindu widows, aged people and children.

Similarly, a suggestion has been made in the context of Muslim law of *wakfs*[28], that interest left unclaimed by *wakfs*, institutions and individual Muslims on religious grounds be utilized for running poor homes for old and destitute people. As suggested in the case of Hindu religious institutions, the State governments should enforce, if necessary by legislation, that at least 50% of the surplus incomes of *wakfs* should be utilised for running homes for beggars, old destitutes and destitute women of the Muslim community. Similarly, when a *wakf* fails because the objects are not specified or the objects have become impracticable to execute and have become partly invalid, the *wakfs* must be utilized *cypres* for the above purposes[29].

26. For example, the annual income of Tirupati Devasthanam is nearly Rs. 11 crores, see The *Times of India*, (Delhi) March 18, 1976, page 6, col. 5, under the caption "Current Affairs". The value of wakfs has been put at Rs. 150 crores : see S A. Hussain & A K. Rashid, *Wakf Laws & Administration in India*, iii (2nd ed. 1973),
27. *Report of the Hindu Religious Endowments Commission* (1960-62).
28. Hussain & Rashid, *op cit. supra n. 26*, 76.
29. On the application of *Cypres* doctrine to wakfs see, generally, Hussain & Rashid *op. cit. supra* n. 26, 154-58.

A clarification of policy is necessary as regards the funding and overall administration of Children's Homes. In the present writer's view, the Children's Homes should be run only by the government to prevent the infiltration of communal ideologies in the young minds. On the other hand, the danger to society posed by communalism is much less if relief homes for the aged and adults are run by religious groups on the basis of self-help.

Not only is there an obligation on the State to provide homes for the destitute children but also to rehabilitate them when they grow up. Equally, it is under a duty to rehabilitate handicapped children, especially those belonging to the weaker sections of the community. An estimate puts the number of these handicapped children at 18 million[30]. The Ganga Saran Sinha Committee stated (in relation to the need to provide rehabilitative services for children who are being brought up in 270 orphanages and 14 foundling homes) that :[31]

> The biggest problem, faced by many of the children's institutions, is their inability to provide rehabilitation services when they come of age. The problem appears to be more difficult in the case of boys than girls, for in the case of girls marriage offers itself as a natural and readily available means of rehabilitation. The boys, on the other hand, must be provided employment, housing and other after-care services, and there are obvious difficulties in securing these services for them. Besides, many of the children's institutions are able to provide only sub-standard services to children, during their stay, due to limitations of funds and personnel.

Is it then too much to say that persons who, because of their poverty, have had the disadvantaged background of having been brought up in the orphanages and children's homes should be classified as backward for special protection by way of reservation ? Such reservations are equally valid in respect of handicapped children belonging to the poor sections of the community irrespective of their caste or religion[32].

30. *Ganga Saran Sinha Committee Report, op. cit. supra* n. 11, at 47.
31. *Id.* at 56.
32. It may be pointed out that under the G.C. Ms. No. 1880 Education dated the 29th July, 1967 of the Andhra Pradesh Government, there was a 3% reservation of appointments in Government Services in favour of physically handicapped G. O. At present there appears to be 1% reservation in their favour. *The Report of the Backward Classes Committee* (1969) of the Government of Jammu and Kashmir did not recommend reservation in their favour.

The induction of new categories of weaker sections to share the benefits of reservations, consistent with the principle of efficiency, may well result in dilution of the benefits intended for the age-old "under-dogs" in the society. Therefore, it is necessary to weed out groups who are not "weaker sections" in the real sense of the term and who are not legitimately entitled to share the benefits of reservations.

(b) Need for "Declassification" in Reservation

It is now submitted that to fulfil the objectives behind reservations the economically well-off groups among the Scheduled Castes, Scheduled Tribes and other backward classes (hereinafter referred to as backward classes) should be declassified and disentitled to privileges.

The Chairman of the Backward Classes Commission pointed out[33] :

> .. it is a feature of inequality to treat unequals as equals. Therefore, it is equally essential to declassify those members of backward classes (including scheduled castes) the income of whose parents exceeds more than 20,000 per annum and those whose educational attainments disentitle them to the 'status' of a weaker section of the community.

A forceful judicial echo of this view is found in the judgment of Justice Krishna Iyer in *State of Kerala* v. *N.M. Thomas.*[34] He says[35] :

> But social science research, not judicial impressionism, will alone tell the whole truth and a constant process of re-evaluation of progress registered by the 'under-dog' categories is essential lest a once deserving 'reservation' should be degraded into 'reverse discrimination'.... In fact, research conducted by the A.N. Sinha Institute of Social Studies, Patna, has revealed a dual society among harijans, a tiny elite gobbling up the benefits and the darker layers sleeping distances away from the special concessions. For them Arts. 46 and 335 remain a 'noble romance' the bonanza going to the 'higher' harijans.

Referring to backward classes the then Prime Minister stated in a similar vein[36] :

> Unfortunately even within such a [backward] group these benefits [of the assistance programmes] often go to the strongest and the vocal individuals and sections.

33. *Report of the Backward Classes Commission*, Vol. I, viii (1955).
34. A.I.R. 1976 S.C. 490.
35. *Id.* at 531 (footnote omitted).
36. *The Times of India* (Delhi), dated 24th Oct., 1976 p. 9, col. 1.

Equality before the law contained in article 14 is violated not only when equals are treated unequally, but also when unequals are treated as equals. The latter aspect has been recognized by the Supreme Court, even though it has been put somewhat negatively : "lack of classification creates inequality."[37]

At present a distinct trend is noticeable in most States that even if a person has an affluent and advantageous background, he is entitled to benefits of reservations provided under articles 15(4) and 16(4) of the Constitution on the same footing as members belonging to the disadvantaged and weaker sections amongst his own class. Therefore, he is in a position to take away the opportunities which are legitimately meant for the weaker sections in the real sense of the term. Under the prevailing conditions, this kind of equal treatment of unequals arises because the economic backwardness of a class is determined on the basis of averages, taking into account the general poverty of a class as a whole and no attempt is made to eliminate the affluent and forward among these classes. Thus, as pointed out by Justice Krishna Iyer, the danger of the benefits of these reservations being snatched away by the "higher" among the Scheduled Castes and backward classes presents itself.

Yet another contradiction is noticeable in the existing rules, at least in some States. When considering the award of scholarships the rules rightly do take into account the means of parents, so that a person is disentitled to these scholarships, if the income of parents is above a particular limit. But States like Jammu and Kashmir, do not extend this principle any further. In Kerala admission to seats reserved for backward classes was confined to families whose aggregate income is less than Rs. 6000.[38] The validity of this Government Order was challenged in *State* v. *Krishna Kumar*[39] on the ground that the income ceiling was arbitrary and unconstitutional. The court upheld the validity of the G.O. observing :[40]

> If a group in those castes/communities were able to advance socially and educationally and economically, to make reservations for them would be to deprive the chances of the really socially and educationally backward classes of people in those communities/castes.

The Court also negatived the contention that the limit of Rs. 6000 had been fixed arbitrarily.

37. In *Kunnathat Thathunni Moopil Nair* v. *The State of Kerala and another*, A.I.R. 1961 S.C. 552, equal burden of tax on unequals was held void. In *Joginder Nath* v. *Union of India* AIR 1975 S.C. 511, the argument that equal treatment of unequals would be ultra vires of the Constitution was raised, but the Supreme Court rejected it on facts.
38. This limit has been increased to Rs. 10000.
39. A.I.R. 1976 Ker. 54, cited in *K. S. Jayasree* v. *State of Kerala*, A.I.R. 1976 S. C. 2381.
40. *Id.* at 60.

CONCLUSION

The State has till now neglected one of the weakest sections of the country, namely, the handicapped children, the destitute children and the children who are being brought up in orphanages. Generally, the benefits of special provisions envisaged under articles 15(4) and 16(4) are not extended to them. It is also necessary to eliminate the economically advanced sections among the scheduled castes and backward classes from the purview of the protection envisaged under these articles. It is not a whit early to recognize the backwardness arising out of extreme poverty as suggested by Kaka Saheb Kalelkar, the Chairman of the Backward Classes Commission[41]. For reducing economic inequalities and for effective steps towards the eradication of poverty, not only the curbing of monopolies and concentration of wealth are needed, but also dedicated efforts have to be made to remove the misery of beggars, destitute children, destitute women and the old. On the latter aspect, the action till now has scarcely matched the slogans.

Agri. Lab. 13 & Pol. Wkly 973-76
The planning proces & policies benefit
intermediate sections:
1. a) agrarian reforms (b) reservations
c) abolition of land revenue d) writing-off
co-op. loans.
2. Fiscal legislation touches the honest rich &
the dishonest rich. Growth of black money
3. People at rock bottom level of poverty have
not been touched by ameliorative mea-
a) begging legislation b) lack of a
measures

41. *Report of the Backward Classes Commission*, *op. cit. supra* n. 33, at viii.

THE CONSTITUTIONAL ESTATE OF MINORITY EDUCATIONAL INSTITUTIONS : MYTH AND REALITY

PARMANAND SINGH*

I

[*The fundamental right of the minorities under article 30 (1), though couched in absolute terms, is subject to reasonable restrictions in the interest of minority institutions. In certain cases, this right can also be restricted in public or social interest. Judicial review should, therefore, seek to establish a rational synthesis between the legitimate claims of the minorities' "right to administer" their institutions and the legitimate and expanded role of the state in the progress and welfare of the country through the medium of secular education*].

In *St. Xaviers College* v. *State of Gujarat*[1] a full bench of nine judges of the Supreme Court fully reviewed and reconsidered the various facets of the fundamental right of the religious and linguistic minorities to establish and administer educational institutions of their choice under article 30(1)[2] of the Indian Constitution and broadly speaking, followed and reaffirmed the earlier rulings[3] of the court. The

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1. A.I.R. 1974 S. C. 1389 (hereinafter referred to as *St. Xaviers*.

2. Article 30 reads :
(1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.
(2) The State shall not in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

3. *State of Bombay* v. *Bombay Educational Society*, A. I. R. 1954 S. C. 561 ; *In re : Kerala Education Bill*, A. I. R. 1958 S. C. 956 ; *Sidhrajbhai* v. *State of Bombay*, A. I. R. 1963 S. C. 540 ; *Rev. Father Proost* v. *State of Bihar* A. I. R. 1969 S. C. 465 ; *D. A.V. College* v. *State of Bombay*, A. I. R. 1971 S. C. 1737.
The Court unanimously held that Article 30 (1) was not limited by article 29 (1), namely, for the purpose of the conservation of language, script and culture, because the words "of their choice" occurring in the former article left vast options to a minority to select any type of educational institution it wished to set up.

Court unanimously acknowledged that, while in a multicultural society like ours, a guarantee in favour of the minorities is intrinsically a part of social justice, liberty and equality, reasonable constraints on the exercise of the right conferred by that article would not constitute constitutional anathema. All the nine judges reasserted that the verbal absoluteness of article 30(1) is a myth, and the right is like any other fundamental right, subject to reasonable restrictions or regulations, not only for the purpose of promoting the academic standards of secular education imparted in a minority institution, but also for promoting excellence in the administration of these institutions. The majority and minority opinions, however, differed in their approach to the extent of the regulatory power of the state over minority institutions and also on the test to be applied in examining the reasonableness of a regulation of the rights conferred by article 30(1).

It may, however, be pointed out that in holding as above the court added very little to what was stated by Das C. J. *In re : Kerala Education Bill* case *supra* (hereafter referred to as *Kerala Education Bill*) and repeated in subsequent decisions. But the new grounds stated by Ray C. J. at p. 1394 and by Mathew J. at p. 1432, below) does provide an answer to Gajendragadkar's view expressed in *Indian Parliament and Fundamental Rights*, at pp. 54 57 (1972) He says that article 30 (1) was *purma facie* intended to protect only the language, script and culture of the minorities and did not cover secular education because, "on a reading of Article 29 (1) and 30 (1) together with the heading "*Educational and Cultura Rights*" and the marginal note "*Protection of certaininterests of the minorities*", it is plain that the sole object which the Constituent Assembly had in mind in including these two Articles was to afford to the religious and linguistic minorities a guarantee of their cultural and educational rights."

This view has been simply been countered by Ray C. J. "If the rights : under Article 29 (1) and 30 (1) are the same then the consequence will be that any section of citizens not necessarily linguistic or religious minorities, will have the right to establish and administer educational instituiions of their choice. The scope of Article 30 (1) rests on linguistic or religious minorities and no other section of citizens of India has such a right".

And by Mathew J : "There are religious minorities in this country which have no distinct language, script or culture as envisaged by Article 29 (1). For these religious minorities, Article 29 (1) guarantees no rights. Yet Article 30 (1) gives them right to estabalish and administer educational institutions of their choice." For a detailed discussion on the relationship between article 29 (1) 30 (1) see generallay, D. K. Singh "Educational and Cultural Rights in India", in G. S. Sharma (*ed.*), *Educational Planning*-Its *Legal and Coustitutional Implications, In India* 137-147 (1967) ; M. P. Singh, "Linguistic Minorities and Role of Judicity", *Int' l.J of Legal Research* 35-42 (1970).

The majority took the view[4] that a regulation under article 30(1) could be made only to subserve the interest of a minority institution and nothing could be done to detract from the character of the institution as a minority institution. In saying so, the majority, however, did not go beyond what was tersely stated by Das C. J. in *Kerala Education Bill*[5] that the right to administer could not obviously include the right to mal-administer and by Shah J. in *Sidhrajbhai*[6] that a regulation which could be imposed on the minority institutions must be conceived in the interest of these institutions and not in the interest of the general public or the nation as a whole. If every order which, while maintaining the formal character of the minority institution, destroyed the power of administration was held justifiable on the ground of the national or public interest, the right guaranteed by article 30 (1) would become but a "teasing illusion" a promise of unreality.[7]

In *St. Xaviers*[8] seven (out of the nine) judges adhered to the *Sidhrajbhai* view to test the reasonableness of a restriction on the article 30(1) guarantee. In *Sidhrajbhai* Shah J., after stating that no general principle to test reasonableness or otherwise of a regulation was laid down in the *Kerala Education Bill* and therefore that case was not an authority for the proposition that all regulative measures which were not destructive or annihilative of the character of the minority institution could be imposed if the regulations were in the national or public interest, propounded the following test :[9]

> Such regulation must satisfy dual test—the test of reasonableness and the test that it is regulative of the educational character of the institution and is conducive to making the institution as an effective vehicle of education for the minority community and other persons who resort to it.

It is submitted (with respect) that the *Sidhrajbhai* test of excellence of the minority institution, followed by the majority in *St. Xaviers*, creates an unnecessary dichotomy between the minority interest and the public or social interest. It is difficult to see how article 30(1), like any other fundamental right, cannot be subject to the usual

4. Ray C. J. and Palekar J. 1399, Reddy, and Alagiriswamy JJ. concurred with Ray C. J. 1401, Khanna J. 1422, Mathew and Chandrachud JJ. 1443.
5. *Supra* n. 3.
6. *Supra* n. 3 at 547.
7. *Ibid.*
8. Ray C. J. and Palekar, Reddy, Alagiriswamy, Khanna, Mathew and Chandrachud JJ.
9. *Supra* n. 6, at 547.

compelling public interest test. Surely, this article does grant special protection only to the minorities but the difficulty is how to demarcate the good of the minority from the good of the society as a whole ? How could it be said that a regulation of this right in the public interest would not in the ultimate analysis benefit the minorities who after all are a part of the whole society ? There may, indeed, be cases where a compelling public interest may justify a regulation of the right conferred by article 30(1) for the simple reason that the conscience of the minority cannot be more sacred than the conscience of the whole nation.[10] For instance, the public interest test can be very significant if a state measure seeks to prevent any activity of a minority in the administration of its general educational institution which may seriously impinge upon certain interests of the beneficiaries of the institution such as the students or the teachers whether belonging to that particular minority, or not, or which may impinge upon some social or national interest, like the security of the state, public order, morality, secularism or the like. As Khanna, J. who has, like other judges, adhered to *Sidhrajbhai*, also rightly observes :[11]

> Regulations may provide that no anti-national activity would be permitted in the educational institutions and that those employed as members of the staff should not have been guilty of any activities against national interest. Minorities are as much part of the nation as the majority and, anything that impinges upon the national interest must necessarily in its ultimate operation affect the interest of all who inhabit this vast land irrespective of the fact whether they belong to the majority or minority section of the population.

He rightly thought that it was as much in the interest of the minority as that of the majority to ensure, "*that the protection afforded to minority institution is not used as a cloak for doing something which is subversive of national interest.*"[12]

10. As was observed by Justice Frankfurter (dissenting) in *West Verginia State Board Education* v. *Barnette*, 319 U. S. 624, 653-54, (1943), "that which to the majority may seem essential for the welfare of the State may offend the conscience of a minority, but so long as no inroads are made upon the exercise of the religion by the minority, to deny the political power of the majority to enact laws concerned with the civil matters, simply because they may offend the conscience of a minority, really means that the conscience of a minority are more sacred and more enshrined in the Constitution than the conscience of the majority".
11. *Supra* n. 1, at 1422.
12. Id. (emphasis added).

Ray C. J., remarked ;

> Education should be a great cohesive force in developing the integrity of the nation. Education develops the ethos of the nation.... Regulations are therefore necessary to see that there are no divisive or disintegrating forces in the administration.

Observed the learned Chief Justice :[14]

> *A minority institution should shine in exemplary eclecticism in the administration of the institution. The best compliment that can be paid to a minority institution is that it does not rest on or proclaim its minority character.*

The dominance of national or public interest criterion in assesing the reasonableness of a regulation of the article 30(1) right does not render the well established *Sidhrajbhai* test of excellence irrelevant. Rather it suggests that this test cannot be accepted as a rigid logical formula applicable in all situations. For example, if a minority sets up an institution for imparting police training or marine engineering or a military academy in the exercise of its *free* choice under article 30(1), perhaps very stringent conditions can be imposed by the state in the public interest or the security of state on the minority's "right to administer". A military academy run by a minority community may be subject to stringent state regulations for the effective supervision of arms and ammunitions belonging to the academy by the officers of the state or to the regulations insisting that the arms and ammunitions will be kept in the government armoury and will be issued by a state officer holding charge of the armoury.[15] Obviously, these regulations may constitute serious inroads on a minority's autonomy in administration (in matters such as the composition of its governing body, the selection of the members of the staff, the admission of the students, the control over the assets and the properties of the institution) and yet they will be deemed to be valid regulatory measures in public interest and not hit by article 30(1).

Again, there may be a minority institution which might have employed a substantial number of teachers belonging to the non-minority commuuity or which may have on its rolls majority of the students not belonging to that particular minority community. Obviously such institution will be deriving the largest part of its income from the fees paid by the non-minority students of the institution.[16] In fact,

13. *Id.* at 1398.
14. *Ibid.* (emphasis added).
15. *Id.* at 1467 (Per Dwivedi J)
16. See *Id.* at 1458 (Per Beg J) *A. S.E. Trust* v. *Direct Educatian, Delhi Administratian*, A.I.R. *1976*. Del. 207.

there are many such institutions functioning in this country. It is clear that these teachers and the students cannot be left by the state absolutely at the sweetwill of the management of the minority institution. Obviously, in such a situation a greater degree of state control to ensure proper management and fair treatment by the minority of the majority will be justified in public interest as well as the interest of the educational purposes of the institution.

It is submitted that the view stated above finds ample support from the tenor of the following observations of Shah J. in *Sidhrajbhai* itself :[17]

> Regulations made in the true interest of the efficiency, discipline, sanitation, morality, public order and the like may undoubtedly be imposed. *Such regulations are not restrictions on the substance of the right which is guaranteed. They secure the proper functioning of the institution, in matters educational.*

The above observations show that a regulation for maintaining the academic excellence of an educational institution and for subserving certain social or public interests could legitimately be imposed as these measures did not impinge upon the essence or the "soul" of the right guaranteed but actually secured conditions for the effective enjoyment of the right in the matter of imparting secular education.

The minority view of Dwivedi J. in *St: Xaviers* therefore, rightly recognised that the right under article30(1) is also subject to regulations for the protection of various social interests such as health, morality, security of the state, public order and the like, for the good of the people is the supreme law. The fundamental rights conferred on individuals, on groups and certain minority groups constitute a harmonious framework of liberty in our constitution. Obviously, the rights could have never been intended by the framers to be in collision with one another. Consequently, the rights of the minority under article 30(1) could not be so exercised as to violate the enjoyment by other members of their rights.[18]

It is submitted that, apart from certain implied limitations on the guarantee under article 30(1), the action of an educational institution, including that of a minority institution, would constitute a "state action" within the meaning of article 12, entitling the aggreived citizen to move the appropriate court for the enforcement of his various

17. *Supra* n. 3 at 545 (emphasis added).
18. *Supra* n 1 at 1463.

fundamental rights.[19] For instance, the management of a minority institution cannot refuse admission to a student on the ground of religion, race, caste, language, etc., as this would be violative of article 29 (2)[20]. Again, a minority institution's management cannot punish a member of the teaching staff or a student for the legitimate exercise of his freedom of speech or expression or to form unions or associations as this would be violative of article 19. Further, under article 15(4)[21] state can make any special provision for the advancement of any socially and educationally backward classes of citizens or for the scheduled castes and tribes. Thus a law of protective discrimination can insist for the reservation of the seats for appointment of teachers or for admission of students in an educational institution even with a threat of withdrawal of recognition or aid in case of non-compliance with the law. Obviously such law cannot be ignored by the minority's management, although it may seriously impinge upon its "right to administer" in matters of admission and selection. Similarily, article 28(3) prohibits a minority institution receiving state help from compelling any student to receive religious education against his wishes. If the right to conduct teaching, including religious teaching, is an integral part of the management of a minority institution, this right is again curtailed by this express constitutional restriction. In all such situations, the constitutional limitations are equally applicable to majority and minority educational institutions and the latter cannot be entitled to any exemption under the umbrella of article 30(1) or under the celebrated label of "preferential position" afforded to them. This aspect of the matter (strange though it may seem) has been completely

19. For the concept of "state action" see *Sukhdev Singh* v. *Bhagatram*, A.I.R. 1975 S.C. 1352 where Mathew J. has rightly observed that the governing power wherever located must be subject to constitutional limitations and that the concept of state action needs expansion. It is submitted that the combination of state help or recognition or control and perfoming of an important public function would unquestionably characterise the action of an educational institution as state action. For a further discussion on this concept see T. P. Lewis, "The Meaning of State Action", 60 *Columbia L. Rev.*1083 (1960).

20. Article 29 (2) reads :
> No citizen shall be denied admission into any educationl institution maintained by State or receiving aid out of State funds on the grounds only of religion, race, caste, language or any of them,

21. Article 15 (4) reads :
> Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision tor the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

ignored by the courts in construing article 30(1)[22]. The scope of article 30(1), in our view, cannot be construed in isolation from other relevant provisions of part III which constitute express restrictions on that article and thus further dilute the verbal absoluteness of the guarantee to the minority educational institutions in the public or social interest.

It is submitted that Dwivedi J. has very rightly assailed the view that for a regulation of the article 30(1) right to be valid, it must always be shown to be calculated to improve the excellence of the minority educational institution. In fact, as he has said, the regulatory measures for affiliation, aid or recognition are for the twin objects of maintaining the academic excellence and of maintaining uniformity of standards of education, because,[23]

> [a] regulation prescribing curriculum and syllabus may not necessarily be calculated to improve the excellence of a particular minority institution. Left to itself, a minority educational institution may opt for a higher standard than the one prescribed by the state in its curriculum or syllabus..., [T]he State prescribes the curriculum and syllabus as much from the point of view of excellence of instruction as from the point of view of having a uniform standard of instruction.

Justice Dwivedi's sociological approach for construing a regulation on the touchstone of article 30(1), cannot, in our submission, be discarded. According to him, a regulation which did not go beyond what was necessary for protecting the interests of the society, which included minorities also should be constitutional. However, no hard and fast rule could be prescribed for determining what was necessary. The question had to be examined in the light of the impugned provisions and the facts and the circumstances of each case. What was required was that the *impugned legislation should seek to establish a reasonable balance between the right regulated and the social interest or individual right protected.*[24] The balancing technique thus suggested by the judge will be extremely useful in resolving the conflicts involving a contest between the minorities' rights and a regulation subserving some social or public interest or even promoting secular outlook. This technique pre-supposes that the minority rights are subject to the rational exercise of the legislative power for the advancement of constitutionally permissive objectives and also provides adequate safeguards against

22. Only a very cursory reference on this aspect is made by Dwivedi J *St. Xaviers, supra* n. 1 at 1463.
23. *Id.* at 1466.
24. *Ibid.*

judical subjectivity in weighing the constitutional values with the regulated rights.[25] The technique of balancing the competing interest requires a searching judicial inquiry into the purposes and effect of an impugned regulation on the sociological footnotes of a case-situation. Justice Dwivedi advocated judicial restraint thus :[26]

> The Court should balance in the scale the values of the right regulated and the values of social interest or individual right protected. While balancing the competing interests the Courts should give due weight to the legislative judgement....It is as much the protector of liberty and the welfare of the people as the Court. It is more informed than the court about the pressing necessities of the Government and the needs of the community.

The nub of the argument of Dwivedi J. is that it should not be lightly assumed that the legislature would make laws injurious to the society or to the minorities or that as the minorities cannot find protection in the political process, their interests can be zealously guarded only by the special solicitude of the judiciary. As was stated by Frankfurter J. in *Minnersville School District* v. *Gobitis*, "[to]

25. For instance in *St. Xaviers*, *supra* n. 1 itself Mathew. and Chandrachud JJ. said that as judges they were neither Jews nor Genitile, neither Catholic nor agnostic, and that they could not be justified in writing their private opinions no matter how deeply they might cherish them, yet they seem to have propounded their own theories of education and of minority rights. Seervai, *Constitutional Law of India*, 626-27 (1975)rightly notices that however valuable and stimulating those theories may be they can be and have been disputed. For instance, the view taken by these judges that the real ground for the right under article 30 (1) *was the parental right to determine the education of their children* is coloured with the American decisions on the "due process clause" of V and XIV amendments which have no relevance in the context in which article 30 (1) has been enacted. Moreover, the argument that the child is not the creature of the state and that the parents have the exclusive right to determine their education has been outrightly rejected by Das C. J. in the *Kerala Education Bill* on the gronud of its irrelevence to the construction of article 30 (1).

26. *Supra* n. 1 at 1446. Similar view was expressed by Sastri C.J. in *State of Madras* v. *V.G. Row*, A.I.R. 1952 S.C. 186, 200, to test the reasonableness of a regulation on a fundamental right.

the legislatures no less than to the courts is committed the guardianship of deeply cherished liberties."[27]

It cannot be gainsaid that the state has a legitimate interest in providing adequate conditions for the effective enjoyment by a minority institution of its constitutional right. The Constitution positively obligates[28] the state to secure to every citizen necessary conditions for receiving general education based on reason and science rather than on outmoded dogmas and doctrines. Obviously, the national system of education has to be designed to subserve not only the well-being of the citizens in their intellectual, ethical and financial aspects of life, but also to inculcate amongst them a sense of individual and social conscientiousness to contribute of the welfare of our secular society and to enable them to rise above narrow casteism, communalism or regionalism. Such education has to promote socially needful education elevating national integration[29]. In determining the scope of article 30(1) right one cannot, therefore, ignore the increasing role of the state in the system of general education. The restrictions or regulations imposed by the state as a pre-condition of affiliation or recognition or aid should, if designed to elevate the purposes of such education and to attain or secure a fair and proper administration of such institutions, be viewed as permissible restrictions. At any rate, the activities of a minority educational institution in organising and administering its institution cannot be viewed as a matter of indifference or unconcern to the state representing an organised society.

27. 310 U.S. 586 (1940). That the minorities interests are safe and secure at the hands of the elected representatives in Parliament is clear, for instance, from the second priviso to article 31 (2) approved by *Kesavananda Bharati*, A.I.R. 1973 S.C. 1461, which saves the property owned by a religious and linguistic minority institution from the effects of the 25th Amendment in the matter of payment of the amount to an expropriated owner. Seervai (*Supra* n. 25, 593) rightly feels that this amendment clarifies that article 30 (1) carries with it an implied right to acquire and own property in order to exercise the real and effective choice of a minority of establishing and administering its educational institutions. For an excellent analysis of the judical review of 25th Amennment, See U. Baxi, "The Constitutional Quicksands of Kesavananda Bharati and the Twenty Fifth Amendment", "(1974) 1 *S.C. Cas.* 45. Also see P.K. Tripathi, *Kesavananda Bharati* v. *State of Kerala* : Who wins ?" (1974) 1 *S.C. Cas.* 3.

28. See articles 41, 45, aud 46.

29. Das C.J. in *Kerala Education Bill (supra)*, referred to the preamble of the Constitution and pointed out that nothing provided and stimulated thought and expression in people more than education which clarified our belief and faith and helped to strengthen the spirit of our worship.

Seervai[30] rightly notes that the reference to the absolute nature of the right under article 30(1) by Shah J. in *Sidhrajbhai*[31] was not meant to negative all regulations of the right but to indicate the permissible extent of regulation. The absolute language of article 30(1) precludes only the imposition of restrictions amounting to prohibition [as is permissible under article 19(1)[32]] but it in no way postulates the absense of regulations. The rights conferred in absolute terms are not absolute rights but have to be exercised in an orderly society governed by law and this means regulation so as not to hamper but promote the effective and meaningful exercise of the right[33].

Once the role of the state in the system of general education is properly understood, its regulatory power over the minority institution should depend upon the nature and the type of the educational institution set up by a minority and all other relevent factors. No general or universal test to examine the validity of a regulation of the right under article 30(1) can be laid down. The degree of permissible control would, therefore, vary from situation to situation. The right conferred by that article froms part of a complex group of social interests which would need adjustment and re-adjustment from time to time and in varying situation.[34]

II

The cumulative effect of the various rulings of the Supreme Court, howevere, is that the court has amplified its power of judicial review in relation to matters arising under article 30(1). It has taken upon itself the power to determine when a regulation becomes a restriction upon the right. The moment a regnlation, designed to promote excellence in the administration of a minority institution, moves beyond that and in truth acts as a restriction on the "right to administer", its existence cannot be justified on the ground of

30. See *supra* n. 25 at 631.
31. "The right established by article 30 (1) is a fundamental right declared in absolute terms. Unlike the fundamental freedom guaranteed by Art. 19, it is not subject to reasonable restriction." See. A.I.R. 1963 S.C. at 856-7.
32. *Nerendra Kumar* v. *Union of India*, A.I.R. 1960 S.C. 430.
33. That the verbal absoluteness of the right is illusory is further supported by the observations of Justice Homes in *Hudson Country Water Co.* v. *Mc. Carter*, 209 U.S. 349, 355, 357 (1907) cited by Mathew J. in *St. Xaviers supra* n. 1, 1441. Also see Das J. in *Automobiles* case A.I.R. 1962 S.C.1406, *James*, v. *Commonwealth* 1936 A.C. 578, *Aidelaide Company of Jehovahs Witness Inc.* v. *The Commonwealth*, 67 *Commonwealth L.R.* 116 (1943); *Commonwealth of Australia* v. *Bank of New South Wales*, (1950) A.C. 235 and *Cantwell* v. *Connecticut* 310 U.S. 296, 303-304 (1940) (per Frankfurter J.).
34. *Supra* n. 1, at 1468 (per Dwivedi J.).

public or state interest. A regulation can be made only to assist the interest of the concerned institution. Consequently, even in granting aid, affiliation, etc., to a minority institution, the state cannot impose terms which would stipulate the surrender of the constitutional right, though the right to such affiliation, recognition or aid is itself not a fundamental right[35]. In *Gandhi-Faiz-e-am*[36] Krishna Iyer J. summed up the ratio of *St. Xaviers* as follows,[37]

> The thrust of the case is that real regulations are desirable, necessary and constitutional but, when they operate on the 'administration' part of the right, must be confined to chiselling into the shape not cutting down out of shape, the individual personality of the minority.

Even from this statement of ratio one is not able to discover any criteria to find out when a regulation crosses the zone of permissible regulation and enters the prohibited zone of unconstitutional restrictive prescription. Thus even considerations of excellence for judging the reasonableness of a regulation are bound to vary from case to case and from judge to judge.

The recent decision of the Supreme Court in *Gandhi-Faiz-e-am*[38] shows how a regulation upon the right under article 30(1) may be subject to differnt interpretations even if tested on the touchstone of the excellence of the concerned minority institution. In this case, the real issue before the Court was wheather statute 14-A framed under the Agra University Act which required as a pre-condition of affiliation and recongnition of certian courses of study proposed to be conducted by the petitioner, a muslim minority college, the reconstitution of its managing committee by including the principal and the senior-most member of the teaching staff, was violative of the religious minority's "right to administer"?

Krishna Iyer J. on behalf of himself and Gupta J. declared the impugned provisions as reasonable and calculated to promote the excellence in the administration of the institution and not at all biting into the autonomy of the administration of the minority.

35. The court was unanimous on this point in *St. Xaviers, supra* n. 1: Ray C.J., 1395; Reddy J. 1407; Khanna J. 1425; Mathew J. 1433, Beg J. 1448, and Dwivedi J. 1461.
36. *Gandhi-Faiz-e-am College, Shahajanpur* v. *University of Agra*, A.I.R. 1975 S.C. 1821.
37. *Id.* at 1826.
38. *Ibid.*

Mathew J, in his dissenting opinion adhered to his view in *St. Xaviers* and struck down the impugned regulatory clauses on the ground that they had the effect of compelling a minority college to re-structure its mananging council by including into it certain outsiders and thus cutting into the flesh of the management.

Before we enter into the thicket of the reasonings of the majority and minority opinions in this case, let us turn for a moment to some earlier rulings of the court on the right of a minority to organise its governing council. In *Rev. Patro*[39] an order passed by the Government setting aside the election of the president and the secretary of a minority college and directing the college to constitute its governing body in accordance with the order was struck down by the Supreme Court as interfering with a minority's autonomy in the administration of its own institution. Again, in *Rev. Mother Provincial*[40] certain provisions of the Kerala University Act, 1969 were held to be violative of article 30(1) as they had the effect of displacing the administration of the minority college in question there and giving it to a distinct corporate body which was in no way answerable to the founders of the minority institution.

In the *Guru Nanak University* case[41] section 2(1) (a) of the Guru Nanak University statute required a college, including a minority college, to have a regularly constituted governing body of not more than 20 persons approved by the senate of whom two were to be representatives of the university and the principal of the college. This provision was struck down as violative of article 30(1). Reddy J. for the unanimous court said, "in our view there is no *possible justification* for the provisions contained in clause 2(1) (a)... which decidedly interfere with the right of the management of the petitioner's college."[42] The words, "*no possible justification*" in the judgement seem to the present writer to suggest that had the University satisfied the court that the impugned provision was in the interest of the institution and the society, the provision would have been upheld.

In *St. Xaviers*, section 33(1) (a) of the Gujrat Universits Act required that the governing body of a college should include amongst its members, the principal, a representative of the university and

39. *Rev. Bishop S.K. Patro* v. *State of Bihar*, A.I.R. 1970 S.C. 259.

40. *State of Kerala* v. *Rev. Mother Provincial*, A.I.R. 1970 S.C. 2079.

41. *D.A.V. College* V. *State of Punjab* .A.IR. 1971 S.C.1737.

42. *Ibid.* (emphasis added)

three representatives, one each from the teachers, non-teaching staff and the students. Following the earlier rulings, eight (out of the nine) judges[43] declared the impugned provisions as inapplicable to the minority institutions as they had the effect of displacing the governing body of a minority college and entrusting the management to a new body, thus violently trenching upon the freedom of management.

The principle emerging from the majority judgement in *St. Xaviers* is that the right to carry on the administration of an educational institution must be left to the governing body consisting of persons in whom the minority has faith and confidence. The free choice of the minority in the determination of the personnel of the management, being the essence or the core of the "right to administer", is therefore beyond the pale of regulatory prescription. The administration of the institution could be improved through the agency of the administrative organ and not by displacing it or by introducing into it new elements in the shape of the representatives of different groups. Once the governing body of the choice of the minority comes into being, the manner of its functioning could undoubtedly be subject to promotional regulatory constraints but no external interference at the stage of the formation of a governing body of a minority institution could be allowed.

Mathew J. in *Gandhi-Faiz-e-am*[44], reiterating his position in *St. Xaviers*, held that statute 14-a of the Agra University Act, which was in *pari materia* with section 33(1) (a) of the Gujarat University Act, was obnoxious to article 30(1) as it had the effect of compelling the religious minority institution to include two outsiders in its governing body and thus took away the management right of the minority. According to him, statute 14-A was bad because it required the inclusion in the governing body of persons whom the religious minority did not want to include. The only difference between *St. Xaviers* and *Gandhi-Faiz-e-am* situations was that in the former case

43. Ray C J. and Palekar J., 1400 : Reddy and Alagiriswamy JJ. concurred with Ray C.J., Khanna J., 1426 : Mathew, and Chandrachud JJ., 1444. Dwivedi J. agreed with plurality of the opinions 1469. Beg. J. dissented, 1452. Mathew and chandrachud, JJ. said :

> "That it is desirable to associate the Principal and other persons referred to in section 33 (1) (a) is not a relevant consideration. The question is whether this provision has the effect of divesting the governing body constituted by the religious minority of its *exclusive* right to administer the institution. (emphasis added).

44. *Supra* n. 36.

the regulation insisted upon the inclusion of university nominee and a representative of the students, besides the principal while in the latter only the principal and the senior-most teacher were required to be seated. But this difference in his opinion did not affect the question of the principle of absolute freedom of a minority to constitute its governing body which was stated by him thus[45] :

> The determination of the composition of the body to administer the educational institution established by a religious minority must be left to the minority as that is the *core* of the right to administer.. The right to shape its creation is one thing, the right to regulate the manner in which it would function after it has come into being is another. Regulations are permissible to prevent mal-administration but *they can only relate to the manner of administration after the body which is to administer has come into being.*

The principle thus prescribed by Mathew J. is that the minority has the exclusive right to vest the management of its college in a body of its own free choice and any compulsion from an outside authority to include any other person in that body is an abridgment of the guaranteed "right to administer", howsoever, efficient, well-meant or promotional the regulation may be. With due respect, it is submitted that the dissenting opinion of Mathew J. does not pay heed to the criterion of excellence of the educational institution sought to be attained by the impugned regulatory clauses, but proceeds on a rather exaggerated view of the concept of a minority's autonamy in the administration of its educational institution. This view is probably largely influenced by Chief Justice Hidayatullah's formulation of the principle of absolute freedom of management expounded in *Rev. Mother Provincial.* It is, however, difficult to see why a regulation such as the present one cannot be viewed as a permissible regulation so long as the majority of the governing body are chosen by the minority community.

As no right, howsoever absolute, can be free from rational restrictive harness, it is difficult to see how article 30 (1) confers upon a minority an absolute liberty to constitute its governing body. A regulation seriously impinging upon a minority's right to organize its managing council which is tantamount to the extinguishment of that right will undoubtedly be bad. But there should be no objection, in our submission, to a statutory insistence to induct some representation in a minority's governing council whose inclusion in the opinion of the

45. *Id.* 1834 (emphasis added).

legislature or an affiliaitng university is conducive to the improvement of the excellence in the administrtion of a minority institution. On the contrary, it may be desirable to include some academic experts in such bodies to prevent or cure mismanagement. And if all regulatory measures designed to tone and improve the temper of the administration of an educational institution are constitutionally permissible, there is no reason why a dichotomy should be drawn between a regulation at the pre-composition stage and the post-composition stage.

The majority judgment delivered by Krishna Iyer J. therefore, very rightly explodes the formula of the absolute freedom of a minority from any external pressure in shaping the creation of its governing body. Acknowledgment of the principle of the freedom of choice in his view, does not imply its inflexible application since "some regulations may impinge marginally upon the composition of the administrative organ though *manifestly* meant to save the institution from mismanagement."[46] Brushing aside the exaggerated emphasis on the composition of the management as against its manner of functioning, the learned judge further highlights, illustratively, how in certain circumstances the regulatory harness could even disqualify certain persons from being seated on a managing body or force some persons on that body for the purpose of either protecting the institution from a likely mismanagement or for bettering its administration. For example, if the law lays down that any person convicted of any offence involving moral turpitude or an undischarged insolvent should not hold office on the governing body, such a regulation affects the structure of the governing body but is indubitably a protection against likely mismanagement. Likewise, supposing the management has to award scholarships to students of merit, decide on courses of study to be undertaken, regulate teacher-student relations and discipline, who than the principal chosen by the minority itself will be better suited to be on the committee to guide it on these vital matters ?[47]

Krishna Iyer J. therefore, rightly held that statute 14-A would not impinge upon the minority's autonomy in administration, for the minority could still have its majority on the governing body. After all these two persons belonging to the minority itself on a sixteen member managing committee, "could bring light, not tilt scales."[48]

46. *Id.* 1826 (emphasis added).
47. *Ibid.* 1826-1827
48. *Id,* 1828

The learned Judge also described the impugned clause as a good example of "constitutional conditions" attaching to funnamental rights.[49]

However, the comparison made by Krishna Iyer J. between *Gandhi-Faiz-e-am* on the one hand and *Proost, Rev. Mother Provincial Guru Nanak University* and *St. Xaviers* on the other brings out graphically the difference between the two situations. While in the latter set of cases the minority's choice in the composition of its managing council was externalized by bringing in it "certain unbidden guests or unwanted outsiders" like the university nominee or by imposing legislative restriction in its number, in *Gandhi-Faiz-e-am* no ceiling on membership, no unbidden guests, no nominees of the University were imposed on the minority institution. The difference was articulated thus :[50]

> There the rules maim, here they improve. There the input upsets the balance, here the addition is minimal and strengthens from within. There are *external* mandates to approve, here an *internal* Principal is proposed to be dovetailed to make administration more proficient....

Thus, once it is shown that the object and the effect of a regulatory measure is to promote the excellence of an educational institution, there should be no distinction between an insider's and an outsider's induction into a minority's management. Moreover, it is very difficult to know who is an insider and who is an outsider. For example, one may argue, that in *St. Xavier* even the principal, the teachers chosen by the minority itself and the students were treated as outsiders by the court. The same were treated as insiders by Krishna Iyer and Gupta, JJ. and perhaps outsiders by Mathew J.[51]

In our submission the mere presence of the representatives of the university, the members of the teaching staff and the students of the minority college would not impinge upon the minority's "right to administer" so long as the minority had its majority on the governing

49. *Id.* 1829.

50. 1828 (emphasis added).

51. *Id.* 1835. Mathew J. said :

> "It is, no doubt, true that it is upon the Principal and the teachers that the whole temper and the tone of college depend. But that does not mean that the Principal and the teachers should be members of the governing council of a college."

body. In fact such a "sprinkling" is more likely to help, make the administration more effective and acceptable to every one affected by it. [52]

Gandhi-Faiz-e-am is a welcome step in the process of demythification of the unrealistic and illogical formula of absolute freedom of a minority to organise its governing body. This decision thus breaks a new ground on the construction of article 30 (1). After this ruling, the promotional regulatory measures may even demand the restructuring of a minority's governing body, hitherto judicially impermissible.

III

This essay would be incomplete without some inquiry into certain other facets of the "right to administer" which have been claimed by the minority managements. These are, their unfettered freedom to choose their own teachers, their exclusive disciplinary control over the staff of their institutions, their right ro admit students of their choice, to use the properties and the assets of their institution, and to impart instruction in their own language, and so on. A brief review of the case-law would show that the Supreme Court has granted a great degree of autonomy to the management of minority institutions. Thus in *Proost*[53], section 48A of the Bihar University Act providing that all staff appointments and terminations were to be made on the recommendation of the University Service Commission and were subject to the approval of the University, was declared invalid as against minority colleges. Likewise, in *Guru Nanak University*[54] statute 17 of the university requiring the Vice-Chancellor's approval for all staff appointments was held to be inhibiting the autonomy of a minority's management. In *St. Xaviers* section 51A (I) (b) and (2) (b) of Gujarat University Act conferring general power of veto on the Vice-Chancellor or his nominee of any action of the governing body of a college in awarding any punishment to the members of the staff and section 52A relating to a reference of any

52. *supra* n. 1 (Per Beg J.), at 1425 : In *Kerala Education Bill* Das C.J. also observed : "The real import of Article 29 (2) and 30 (1) seems to us to be that they clearly contemplate a minority institution with a *sprinkling of outsiders admitted into it. By admitting a non-member into it the minority institution does not shed its character and cease to be a minority institution.* (emphasis added).

53. *Supra* n. 3.

54. *Supra* n. 41.

dispute between the governing body and a teacher, to an arbitration consisting of the representative of the teacher, the governing body and a university umpire, were held as interfering with the exclusive disciplinary control of the minority over its staff,[55] However, the court upheld the provisions of the Act which provided for giving reasonable opportunity to show cause against a penalty proposed to be imposed upon a member of the staff by the governing body. But sections 40 and 41 of the Act which converted the affiliated colleges into constituent colleges and required that teaching in the under-graduate courses was to be conducted only by the university-appointed teachers were held inapplicable to the St. Xavier college run by a religious minority.[56]

The net result of these rulings is that a regulation interfering with a minority's freedom in the selection of teachers of its disciplinary control over the staff of its institution will be obnoxious to article 30(1). It may be submitted that, sections 40 and 41 were rightly declared invalid in *St. Xaviers*[57] as these provisions compelled the religious minority to give up its right to conduct teaching by its own teachers. But the Court struck down section 51—A (1) (*b*) and 2 (*b*) on the ground that these provisions conferred on the Vice-Chancellor an uncannalized, unguided and unlimited power to veto the action of the managing body in the management of its educational institution.[58]

It may be submitted that the power of veto given to the Vice-Chancellor was not a blanket power. It could be properly presumed that the power would be exercised by the Vice-Chancellor or his nominee only in cases where the termination of the service of the teachers was mala fide or by way of victimization or other similar cause. The Court did hold that the state could require that before the disciplinary action was taken against a teacher he should be given a reasonable opportunity of being heard. The court did not object even to the veto power given to the Vice-Chancellor to prevent the abuse of power by the governing body over its staff. The court's insistence simply was that whenever a regulation subjected the disciplinary action of the educational agency to an outside authority like the Vice-Chancellor or his nominee, it should also specify the situations under which the power was to be excercised. For instance,

55. Supra n. 1, Ray C.J., 1400, Reddy J., 1402 : Khanna J., 1427 : Mathew J., 1446-47.
56. *Id.* Ray C.J. 1398 : Khanna J., 1428 : Mathew J. 1445 : Beg J., 1449 : Reddy J., agreed with Ray C.J. Dwivedi J. dissented.
57. *Supra* n. 1.
58. *Id.* Ray C.J. 1400 : Reddy J., 1402; Khanna J. 1427 and Mathew J., 1446-47.

the power of veto could be conferred on such authority for the purpose of seeing that the requirements of natural justice were complied with by the governing body or for ensuring that the action proposed to be taken by the governing body was not by way of victimization or other improper reasons. To this extent the court concedes the regulatory power of the state to take all necessary measures to prevent abuse of power by the governing body. The court, it is submitted, should have gone a step further and should have presumed that in granting or withholding approval the Vice-Chancellor would act according to reason and justice and would record reasons for his decision. Furthermore, as stated by Dwivedi J. when the matter would go before the Vice-Chancellor for approval, both the management and the teacher should be heard by him and he could not decide without giving reasons. The exercise of the power by the Vice-Chancellor was further subject to judicial review which could nullify his order, if it was arbitrary, malafide or illegal.[59] Similarly, the provisions of section 52 A could have been viewed as merely incidental and permissible regulation to prevent the abuse of power by providing a cheap and expeditious method for resolving conflicts between the management and its employees. Both these provisions could have been justified as being necessary in the interest of the excellence of the minority) institutions. After all, a minority cannot be left free to do what it likes with its own institution.

The judicial approach to a minority's autonomy "to administer" its institution tends to weaken the supervisory authority of a university vis-a-vis a minority college. Justice Gajandragadkar's apprehension that the judicial construction of the rights of a minority institution is likely to introduce chaos and confusion in university administration and to weaken any integrated national move on the educational front is, therefore, not without force.[60] The religious and linguistic minorities, do deserve a generous and sympathetic treatment, but they cannot be absolved altogether from their constitutional obligation to conform to the norms of natural justice and fair employment. Nor should they be allowed exaggerated claims of exemptions or concessions from rational statutory demands regarding the service conditions of the teachers and other allied matters.

If the minority institutions choose to opt out of the university or state educational system, then obviously, they will be exempted from the regulations applicable to other educational institutions.

59. *Id.* 1470.
60. P.B. Gajendragadkar, *Indian Parliament and Fundamental Rights*, 54-55 (1972).

But if, on the other hand, they wish to participate in the educational system of the state, they have to fall in line with the general pattern of such system. It cannot, however, be denied that even within such system the minority institutions have to be given *some* autonomy in the administration by reason of article 30 (1) which accords a favoured treatment to them. Consequently, those regulation which are considered by the courts to be substantially trenching upon the "right to administer" will be held inapplicable to the minority institutions though they will be valid as regards the other educational institutions and this involves an inquiry into the problem of equality and minority rights discussed below.

IV

In *Rev. Mother Provincial*[61] a question arose whether a member of the majority community could question the validity of a law applicable to its institution but not to a minority institution as being discriminatory under article 14. Hidayatullah C. J. left the question open because the state promised not to enforce the provisions of the impugned law against a majority institution, if some of its provisions were held invalid against a minority institution. In *St. Xaviers* the question received much thought from the learned judges. Ray C. J. tersely described article 30 (1) as ensuring equality between majority and minority. If the minorities did not have special protection, they would be denied equaliiy.[62] Justices Reddy,[63] Khanna[64] and Mathew[65] referred to the opinion of the Permanent Court of International Justice in *Minority Schools of Albania* and quoted the following passage from the majority opinion as laying down the correct approach towards the problem of equality and minority rights :[66]

> Equality in law precludes discrimination of any kind, whereas equality in fact may involve the necessity of differential treatment in order to attain a result which establishes an equilibrium between different situations. It is easy to imagine cases in which equality of treatment of the majority and of the minority whose situations and requirements are different would

61. *Supra* n. 40.
62. *Supra n.* 1, 1394.
63. *Id.* 1406.
64. *Id.* 1415-16.
65. *Id.* 1433
66. P.C.I.J. Publication of the Court series AB No. 64, p.19 (discussed in detail by Khanna J., in *St. Xaviers*, *Supra* n. 1 at 1415-16).

result in inequality. The equality between the majority and minority must be effective, genuine equality.

It is submitted that the Ray-Reddy-Mathew-Khanna approach that in democracy the idea behind a guarantee in favour of minorities is to bring an equilibrium so that the idea of equality becomes a genuine reality and not a mere abstract sentiment is correct. The truth of the matter is that a favoured treatment is accorded to the minorities in order to create in their minds a sense of security and confidence, of consciousness of equality and of awareness that their cherished liberties are beyond the reach of an oppressive majority adopting an attitude of narrow nationalism or complete assimilation. The favoured treatment is inherent in guaranteed minority rights so shat they are able to preserve and maintain their separate identity or individual personality. Even conceptually, "a minority includes only those non-dominant groups in a population which possess or wish to preserve stable ethnic, religious or linguistic traditions markedly different from the rest of the population".[67]

It is thus clear that any theory advocating identity of treatment of the majority and minority educational institutions negatives the very concept of minority rights. Paradoxically, for the equal protection of the minorities it becomes necessary to afford them differential treatment in some circumstances. The argument of Beg. J. (as he then was) with respect seems to be unsound that the state is in all circumstances bound to give equal treatment to the minority institutions but "it cannot be compelled to give a preferential treatment of them."[68] Similarly the view of Dwivedi J., that "plainly no minority institutions can be singled out for a treatment different from one meted out to the majority educational institution" contradicts the very idea undely special minority rights in a democracy.[69] If the majority and minority

67. See the report of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Year Book of Human Rights* 1950 490. For other definition of the term see *Encyclopaedia Americana*, v. 19, 206; *Encyclopaedia Britannica* v. 15, 542; J.A. Loponce, *The Protection of Minorities*, 3-4 (1960). K. Subbarao says : "the expression 'minority' is a relative term; its meaning depends upon the territorial limit of its operation or the objective of a particular law", *Social Justice and Law*, 95 (1974).

Recently the Delhi High Court has held in *A.S.E. Trust* v. *Director Education Delhi Administration supra* n. 16. that Arya Samaj cannot be considered a religious minority under article 30 (1) in the Union Territory of Delhi. It is only a reformed sect of Hinduism. It further held that article 30 (1) applies only to those religious and linguistic minorities which have claimed political rights separate from the majority community prior to the constitution such as Sikhs, Muslims, Jains, Anglo-Indians, Christians, etc.

68. *Supra n.* 1. 1448.
69. *Id.* 1465.

are treated identically in the sense suggested by Beg and Dwivedi JJ. article 30(1) will be robbed of its constitutional content. The true position seems to be that our Constitution itself classifies the religious and linguistic minorites into a separate entity for preferential treatment in article 30(1). It would therefore follow that article 30(1) is not an exception to article 14, but is a specific application of the doctrine of equality before law to the minority rights.

V

It should, however, be borne in mind that social justice my demand a preferential treatment to the minorities to remove or rectify the imbalance existing in the society and not to cause unnecessary injustice to the majorities. As stated by Khanna J. "the idea of giving some special rights to the minorities is not to have a kind of privileged or pampered section of the population but to give to the minorities a sense of security and feeling of confidence."[70] Article 30(1) is an expression of the anxiety of Indian democracy to dispel any sense of insecurity entertained by the minorities. But this guarantee should not be converted into a palladium of special privilege so as to block the educatioaal progress of the country. The court should therefore seek to establish, a rational synthesis between the legitimate claims of the minorities' "rights to administer" their institutions and the legitimate and expanded role of the state in the progress and welfare of the country through the medium of secular education. A reconciliation of the minority rights in education with wider social, national or educational objectives is ineluctable. This necessarily involves the judicial task of balancing the guaranteed minority rights with constitutionally desired values sought to be protected by a challenged regulation. And in this judicial task, it is submitted, the courts should neither unduly narrow down the protection given to the minorities nor should they unduly exaggerate the autonomy of administration of a minority institution.

The best approach to article 30(1), perhaps, comes from the following words of Krishna Iyer J.[71]

> A benignantly regulated liberty, which neither abridges nor exaggerates autonomy but promotes better performance is the right construction of the constitutional provision. Such an approach enables the fundamental rights meaningfully to fulfil its tryst with the minorities destiny in a pluralist society. This is authentic voice of Indian democracy. *The constitutional estate of the minorities should not be encroached upon neither be allowed to be neglected nor mal-administered.*

70. *Id.* 1415.
71. *Supra* n. 36, at 1824 (emphasis added).

LEGISLATIVE TRENDS IN CONTEMPORARY ARABIA—NATURE, IMPACT AND RELEVANCE

TAHIR MAHMOOD*

[*The author examines modern trends in law reform in the contemporary Arab world and their relevance for non-Arab countries.*]

I. RETROSPECT

Around the middle of the nineteenth century the world of Islam realized the need for a thorough review of its entire legal system. The fast-changing social, economic, cultural and political conditions in the region had made drastic reforms inevitable. For a long time past the Muslim world, firmly believing in the erroneous concept of the "closure of doors of *ijtihad*"[1], had been sticking in an unwarranted way to the overtrodden path of *taqlid*[2]. Overlooking the enormous jurisprudential riches of Islam, its various parts had been content with one or another particular school of *fiqh*[3]. Regarding it as absolutely obligatory to adhere to a chosen school of law *in toto*, they had put the seal of finality and inviolability on certain old, time-worn juristic views and scriptural interpretations. Consequently, while the socio-economic structure of Islamic commonwealth had passed through a metamorphosis, its legal system remained static with no advances in any direction. Muslims, facing the nineteenth century social conditions, were still hugging those interpretations of the *Quran* and the *Sunna*[4] which had been made centuries earlier in accordance with the then socio-economic needs and requirements.

The result was quite natural. Legal system failed to solve the problems newly arising day by day. Something, then, had to be done

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1. *Ijtihad* means deduction of new legal rules out of the classical texts.
2. Literally, imitation; opposite of *ijtihad*, denoting the principle of adherence to traditional interpretation of legal texts.
3. Jurisprudence, law.
4. Traditions of the Prophet.

to meet the situation. It was at this juncture that reformers and jurists stressed the need for an immediate review of the entire legal system. Having appreciated the correct implication of the Quranic verse of *ul-il-amr*[5], the rulers co-operated with the reformers. The situtation gradually changed due to their joint efforts. Attention was paid to the outdated aspects of law. Principles of legislation found in Islam were made use of. Thus came a revolution. The world of Islam witnessed a legal renaissance.

The ball was set rolling while the grandeur of the late Ottoman Empire was still existent. The work began with the implementation of *tanzimat* and establishment of the *nizamia* courts.[6] Once the principle of codification was adopted, a large number of codes appeared on the statute-book one after another—the Commercial Code in 1850, the Penal Code in 1958 and the Civil Code in 1876. Laws relating to family, personal status, succession, gift and wakf, were not incorporated in the Civil Code.[7] At the same time the jurisdiction of the religious (*Shar'i*) courts was confined to these matters only ; other civil matters (covered by the Civil Code of 1876), as also penal or commercial cases, were entrusted to the new *nizamia* (secular) courts. This indeed was the point in Isamic leglal history which gave birth to the concept of Muslim "personal law" as a separate entity distinct from other parts of the legal system.

During the years that followed an all-out effort was made at the Empire headquarters to codify the "personal law" as well. In 1915 the Sultan introduced the first instalment of reform in the family law.[8] Two yeais later the Ottoman Law of Family Rights, 1917 was enacted.[9]

Thus, around the third decade of the current century a dominant part of the legal system—civil law, penal law, commercial law and personal law—had been codified in the Ottoman Empire. Private law of property and succession constituted, probably, the only exception.

During the next five years the political and geographical structure of the Muslim world underwent a momentous change. The Ottoman Empire came to as tragic an end as glorious was its beginning.

5. In this verse the *Quran* directs its followers to obey God, the Prophet and those "who are in-charge of your affairs."
6. For details see C L. Ostrorog, *The Angora Reform* (1927).
7. *Majallat al-Ahkam al-Adliya*, 1876.
8. For details see T. Mahmood, *Family Law Reform in the Muslim World*, 16-18 (1972).
9. *Ibid.*

Turkey lifted its face on the world map as a modern republic. Tired of the conflicts of opinion among the local *ulama* regarding the place of Islam in the future laws of the country, Mustafa Kamal Pasha ventured to repeal by one stroke of pen the Civil Code of 1876, the law of Family Rights, 1917 as well as the uncodified Islamic civil laws. All these were replaced by a new comprehensive Turkish Civil Code in 1926. This step put an end in the new republic to the principle of separation between "personal law" and general civil code. Turkey, once the Vatican of of the Muslim world, thus staged a final walk out from the block of those nations which, in subsequent years, maintained this separation.

II. REFORM ZONES

The Arab countries separated from the erstwhile Ottoman Empire retained for quite some time the imperial legacy of codified and reformed laws. Gradually, with the rise of Arab nationalism, due importance was given to local conditions and temperaments. The Ottoman laws were, then, gradually repealed one after another and replaced by locally enacted national legislation in various countries. In some parts of the Arab world, e.g., Egypt and Sudan, legal development had taken place locally, from the days of the Ottam Empire itself, independent of the progress made under the imperial regime; and it continued there even after the abolition of the Caliphate. The laws separately enacted in different parts of Arabia before and after the downfall of Turkey may be grouped into three classes, viz., civil-commercial laws, penal-criminal laws and personal-private laws.

(i) Civil-Commercial Laws[10]

In Lebanon the Ottoman Civil Code of 1876 was replaced in 1932 by the Law of Obligations and Contracts. The Ottoman code had not been enforced in Egypt which was granted independenc in juridical matters by the imperial rulers. From the beginning of the current century, efforts were made by Egyptian lawyers to develop the civil law in the country. In 1948 a new Egyptian Civil Code, drafted by Abdur Razzaq Sanhuri, was enforced in supersession of the reforms hitherto effected. Sanhuri may be rightfully called the Jeremy Bentham of Arabia. The Iraqi Civil Code of 1951, too, was an embodiment of Sanhuri's legal acumen and legislative draftsmanship. The Syrian

10. All these laws are in Arabic or French. Unfortunately no comprehensive study of these laws has so far been made in English. The account given here is based ont he author's personal study of the Arabic texts of laws.

Civil Code, 1949 was also heavily drawn on his draft of the Egyptian law. Later, Sanhuri was called upon to codify the civil laws of Kuwait.

The Arab countries of North Africa which, after the War, had come under the suzerainty of France or Iatly did not lag behind in the matter of law reform. With the co-operation of Muslim and French jurists, new civil codes were enacted in Algeria, Tunisia, Morocco and Mauritania. Among these, the Libyan Civil Code of 1953 was not much different from its Egyptian counterpart.

In Egypt along with the civil code a new comprehensive Commercial Code had also come into force. Lebanon, too, enacted a new Commercial Code in 1943. In Tunisia a national Commercial Code and a Maritime Code were enforced in 1960.

Though fundamentally based on Islamic jurisprudence, all the modern civil and commercial codes of the Arab states were influenced by French-Italian laws and Egyptian judicial precedents.

(ii) Penal-Criminal Laws[11]

A penal code was enacted in Sudan as early as 1899. Its provisions ware remarkably similar to those of the Indian Penal Code, 1860, since both were drafted by British experts. New comrehensive penal codes were enforced in 1918 in Iraq and in 1937 in Egypt. The Lebanese government set up a commission for drafting a modern penal law which could replace the Ottoman Penal Code of 1858 applicable there. The draft prepared by the commission, which was greatly inspired by the French criminal jurisprudence, became the Lebanese Penal Code, 1944. Four years later Lebanon adopted a new criminal paocedure code. Jordan and Syria got their national penal and criminal procedure codes by adapting the Lebanese laws to their respective local needs.

During 1950-1960 locally enacted comprehensive penal codes came into force in Tunisia, Morocco and Algeria. All these had their source in Franco-Arab criminal law. In 1961 Mauritania followed suit. The Libyan Penal Code of 1953 was based partly on the Egyptian-Syrian penal codes and partly on Italian criminal law. Kuwait, Bahrian and Qatar also reformed their penal and criminal procedure laws by means of statutes, ordinances and imperial decrees. The penal laws gradually adopted in Southern Yemen were modelled on the pattern of the Indian Penal Code.

11. This account, too, is based on the author's study of the texts of the relevant laws in the Arabic language.

(iii) Personal-Private Laws[12].

The principle of the exclusion of laws relating to personal status and private property from the general civil code, the foundation of which was laid in the Ottoman Empire in 1876, was srtongly held all over the Arab world after the termination of the Turkish religious and political dominance. This does not, however, mean that the Arab states have kept these laws static. The process of reform, codification and nationalisation in the Arab countries did not spare family law and succession.

In Egypt a review of the traditional family law had begun in the second decade of this century. In its background there was the impact of the *Salafiya* movement. Thoughts of Muhammed Abduh, Rashid Rida and Shaykh al-Maraghi had revolutionized popular thinking in Egypt. After enforcing piecemeal reform relating to marriage and divorce during 1920-25, Egypt enacted a comprehensive law of inheritence in 1943 and similar laws of bequest and guardianship in 1946. Recently, these various laws have been incorporated into a code of personal status and succession.

In Sudan, during the British regime, a law relating to the working of religious courts was enacted in 1915. Its provisions recognized the authority of the Grand Qadi to enforce non-*Hanafi* legal rules in the country in superession of the otherwise prevailing *Hanafi* laws. By means of this significant provision for judicial legislation most of the Egyptian reforms of family law were adopted in the Sudan during 1916-1960. Much later, some of the new Egyptian legal principles were enforced also in Kuwait.

Lebanon, Jordan and Syria had retained the Ottoman Law of Faimly Rights, 1917 even after attaining independence. While in Lebanon it is still applicable, Jordan replaced it by a new law locally enacted in 1951. In Syria the efforts of Sheykh Ali al-Tantawi resulted in the enactment of a comprehensive Law of Personal Status in 1953. Shaykh Muhammed Ju'ayt of Tunisia assisted his government in putting on the country's statute-book the Code of Personal Status, 1956. In the years that followed. Tunisia enacted some more laws, including an Adoption Act[13]. In regard to the reform of law in the Arab world this tiny state has in fact remained in the fore-front.

12. English translations of most of these laws have been prepared by this author. These are found in the book cited *supra* n. 8.
13. For details of this law see T. Mahmood, "Law relating to Children : Recent Reforms in Tunisia", (1973) S.C.J. 23-27.

Morocco adopted in 1958 a Code of Personal Status and Succession, as comprehensive as its Tunisian counterpart but much less drastic than that in the extent of deviation from the traditional law. Algeria and Iraq reformed family law in 1959. Southern Yemen adopted a new Code of Family Law in 1972. In Libya the Marriage and Divorce Law of 1973[14] introduced some reforms in the locally prevailing *Maliki* matrimonial law.

III PURITAN BELT

Among the few Arab States which have taken no steps for the reform or codification of their legal system, our attention is first attracted by Saudi Arabia—the heart of the Islamic world. In 1927 an abortive effort was made there to codify the country's law. The later rulers adhered to the puritan *Wahhabi*[15] ideology which would discard innovation of all kinds in religious matters. And the law, according to the traditional Islamic concept, is very much a matter of religion. The Saudis have, therefore, preferred to keep the legal system in an "as is, where is" condition. The country has no civil, commercial or penal code in the modern sense of the term and no statutory family law either.

In North Yemen a majority of the people, as also the ruling class, follow the *Zaydi* division of *Shia* religious-cum-jurispurdential thought. The ideology of this division is as much puritanical as that of the *Wahhabis*, though the two run in quite different channels. The North Yemenis, too, like their Saudi brethern have not adopted any code or statute. The constitutions in both the countries accord protection to the Shari'a and declare that it shall be the source of all laws.

The *Ibadi* sect of Islam in the Sultanate of Oman represents a third puritan faith in the Arab world. The law and jurisprudence of the *Ibadis* significantly differ from those of *Sunnis* as well as *Shias*. In that country also the twentieth century legislative trends, found in that reformist zones of Arabia, have failed to penetrate.

The tiny states of the United Arab Emirates constitute another part of the Arab world where civil, commercial, penal, family and property laws, remain more or less uncodified. Only in Abu Dhabi a code of civil-penal laws is said to be in progress which is reportedly based on the Jordanian codes.

14. Law No. 176 of 1973.
15. A neo-Hanbalite puritan movement which in the first half of the current century swept Saudi Arabia and Qatar and whose influence reached also the Indian subcontinent.

It is significant to note that in all these countries, including Saudi Arabia, North Yemen and Oman, the Sultan or Amir has assumed the power to settle "affairs of the state" by means of ordinances and proclamations. In recent years a large number of ordinances have been issued in different states, some of which do have legal significance. These may, indeed, be regarded as parts of the commercial and administrative laws of the respective countries.

A special reference must be made here to the Republic of Libya During the monarchal regime of King Idrisl-I, Libya had enacted its civil, penal and commercial codes, all enforced in 1953. After the political revolution of 1969, the new leaders of the country launched a "cultural rennaissance", an important phase of which was the revival of traditional Islamic jurisprudence. In pursuance of this programme all the three codes of 1953 have been drastically amended during 1972-75 in order to adapt their provisions to the *Quran* and the *Sunna*. In the field of family law, however, the same programme has brought about some significant reforms[16].

IV. THE NATURE OF REFORMS

The above survey leads to two or three definite conclusions. First, none of the nineteen Arab nations has completely abandoned Islamic law and jurisprudence. All of them have, of course, subjected these to a reconstruction. For this purpose, most Arab countries have adopted the principles of codification and statutory reform; a few have achieved reconstruction of religious thought by moving in the direction of puritanic idealogies. Second, in every Arab country certain civil matters (which, in India, are referred to as "personal law") have been kept seperate from the local general civil code. In most Arab countries "personal law", too, has been reformed and codified; but nowhere has it been merged into the civil code dealing with subjects like contract, torts, transfer of property (other than succession and endowment), partnership, master-servant relationship, agency and the like. Third, the style, extent and sources of reform in respect of civil, penal and commercial laws have been quite different, all over the Arab world, from those relating to the codification or reconstruction of family and private-property laws.

The Ottoman Civil Code of 1876 was, of course, derived from the *Hanafi* law. This cannot, however, be said about the modern

16. A detailed study of the post-revolution legal developmants in Libya will be found in T. Mahmoad, "Legal System in Modern Libya: Reflorescence of Islamic Laws" 18 *Journal of the Indian Law Institute* (1976), 432-54.

Arabian civil codes. In the Egyptian Civil Code of 1948 "Islamic" law was retained, but this did not mean retention of the *Hanafi* legal principles. Bidding farewell to the outmoded doctrine of *taqlid*, Sanhuri not only applied the method of *takhayyur* (eclectic choice between the rules of various schools of Islamic law itself), he also freely exercised the power of *ijtihad* (formation of new rules) wherever it was necessary. The juristic techniques like *qiyas* (analogical deduction), *hiyal* (devices) and *masalih al-mursala* (public interest), were made use of without any reservation. The Iraqi, Kuwaiti and Syrian civil codes were also prepared on the same lines. The civil codes of North African Arab states were drafted with no inhibitions whatsoever agaist the novel ideas of twentieth century western jurisprudence. What we have said here about the various Arabian civil codes is also true of the commercial codes of mondern Arabia. The codified penal laws of all Arab states will, on a close examination, be found to be too far from the traditional Islamic principles of *uqubat* and *jaza* (crimes and punishment). Compared with the civil codes the deviation from the traditional law here has been much more drastic. It was, however, supposed to have emanated from an extra-ordinarily liberal use of the method of *ijtihad*.

As regards the reforms introduced in family law and succession etc., no aid was taken in any Arab country from extrinsic legislative sources. In this area the style and extent of *ijtihad* were limited. The reformers did give up *taqlid* here too ; but mostly they chose the most suitable principles of law from the vast selection already available in the framework of Islamic law itself. No discrimination was generally made in this regard between *Sunni* Islam and *Shia* Islam or between their respective legal divisions. With the aid of Islamic legislative principles of *takhayyur* (eclectic choice), *talfiq* (combination of two apparently different verdicts) and *siyasa shariya* (permissible public policy), consistency was brought about between the system of family law and the modern socio-economic conditions. In this connection, recourse was also had to the views of otherwise forgotten jurists of the past, like Ibn Shubrama and Ibn Hazm Zahiri. Thoughts of certain great scholars of Islam, e.g., Ibn Taymiya, Ibn Qudama and Ibn Qayyim—who always regarded *ijtihad* as a living source of legal evolution and never favoured *taqlid*—came to the aid of the reformers. Thus, without any extrinsic aid, necessary reforms were effected in various aspects of family law and succession; and in many Arab countries these laws were also compaehensively codified.

V. CONTENTS OF REFORMS

Among the reforms introduced in the civil-penal-commercial laws under the new codes are[17] :

(i) abolition of the *hadd* (revealed punishment) for the offence of theft ;

(ii) amendments in the *hadds* for homicide and apostasy ;

(iii) changes relating to the offence against prohibition (*sharb al-khamr*) ;

(iv) reform of the principle of *ta'zir* (discretionary punishment) ;

(v) restriction of capital punishment ;

(vi) introduction of solitary confinment and correctional methods ;

(vii) liberal concession to local custom and professional usage in contractual and commercial transactions ;

(viii) permission for banking and insurance ;

(ix) validation of transactions relating to monetary lones and interests ;

(x) reform of the principles relating to evidence and civil and criminal judicial procedure ; and

(xi) extension of secular courts' powers with its consequential effect on the jurisdiction of religious courts.

All these reforms have, in varying degrees, been introduced in nearly all those Arab countries where new civil, penal and commercial codes have been prepared and enforced. A noticeable exception, however, is found in Libya where, as said above, most of the aforementioned reforms have been undone in recent years.[18]

The most imortant among the reforms introduced in the area of family law, succession and related fields are.[19]

(i) abolition of polygamy in Tunisia and its judicial control in Syria and Iraq ;

(ii) intervention of courts in husband's power to inflict unilateral divorce in Tunisia, Algeria and Iraq ;

(iii) derecognition of divorce pronouced under effect of intoxication, anger or provocation and abolition of "triple divorce" in Egypt, Sudan, Jordan, Syria and Morocco ;

17. *Supra* notes 10-11.
18. *Supra* n. 16.
19. *Supra* n. 8.

(iv) fixation of one year as the maximum period of gestation in Egypt, Sudan, Tunisia, Morocco, Algeria, Mauritania and Syria ;

(v) imposition of obligatory bequests in favour of orphaned grandchildren (hitherto excluded from inheritance) in Egypt, Syria, Tunisia, Morocco and Kuwait ;

(vi) general permission for bequest to heirs in Egypt, Sudan and Iraq ;

(vii) validation of adoption in Tunisia[20] ;

(viii) abolition of family wakfs in Egypt, Syria, Tunisia and Libya ;

(ix) strict governmental control on public wakfs in Iraq, Morocco, Algeria, Lebanon, Kuwait, Libya and Egypt ; and

(x) officially sponsored juristic verdicts in favour of the religious validity of birth control in Egypt, Jordan and Tunisia.[21]

The sanction for each of the aforementioned reforms in the laws of personal status may be found in one or another juristic verdict (or in a synthesis of two or more or them) available within the fabric of the broad framework of traditional Islamic jurisprudence. On the contrary, in respect of the reforms in civil-commercial laws—and much remarkably for the amendment of penal laws—the reformers were obliged, as is obvious from the account given above, to have recourse to the widest possible dimensions and range of *ijtihad*.

VI. RELEVANCE OF ARAB LEGAL MODERNISM

Outside the Arab world, among the non-Arab Muslims, we notice a general tendency of favouring complete segregation of "personal law" from all other parts of the legal system and advocating a special treatment of that branch of law in the matters of reform and codification. For instance, in Pakistan, in spite of the demands for the establishment of an Islamic state and the government's full support therefor, the retention of pre-partition civil, penal and commercial laws, without adapting their provisions to the Islamic legal principles[22] has not been objected to till this date. On the contrary, when the government set up a family law commission and

20. *Supra* n. 13.
21. See for delails, T. Mahmood, *Family Planning: the Muslim Viewpoint*, chap. V (1977).
22. Some of the pre-partition codes of the subcontinent still applicable in Pakistan are : the Penal Code, 1860; the Criminal Procedure Code, 1898; the Civil Procedure Code, 1908; the Evidence Act, 1872; the Contract Act, 1872 and the Transfer of Property Act, 1882.

also later when on the basis of its recommendations the rulers introduced some reforms in matrimonial and inheritance laws[23], the *ulama* and the laity raised a hue and cry the echo of which reached even across the country's borders. Similarly, Muslims of the Philippines, Sri Lanka, Thailand, Kenya, Tanzania and Ethiopia, have, of and on, demanded maintenance of the status quo in regard to their personal law. The polemical debates regarding the reform of Muslim personal law and enactment of an Indian civil code in our country are too well-known to be specified here.[24]

The survey of the recent legislative trends in the Arab world, made in these pages, does indicate that this world-wide tendency of non-Arab Muslims is not wholly baseless. An important question, then, is what is the lesson that the non-Arab followers of Islam get from the Arab legal renaissance ? In all Arab countries Muslims constitute the dominant majority and, with the exception of Lebanon, their state religion is Islam. Therefore, in the Arab world the rulers (whether elected or nominated) can, at least to some extent, claim to be the repository of the legislative authority referred to in the Quranic verse of *ul-il-amr* (decreeing obedience to those who are "in-charge of your affairs"). There, the agreement of the *ulama* and the rulers may be regarded as *iima* (consensus) under Islamic jurisprudence; decisions of representatives can be accepted as embodiments of *iima-al-umma* (community consensus). Undoubtedly, in such situations Islam shows the way to its followers. It tells them how and when to accept the decisions of "persons in-charge of affairs" and the popular consensus, direct or indirect. These teachings and guidelines of Islam will be quite relevant, apart from the Arab world, also in those non-Arab countries where Islam is the state religion or the religion of a dominant majority. So, Iran, Indonesia, Malaysia, Somalia, Afghanistan, Pakistan, etc., can easily tread the path shown by the Arab world and take lead from it in the matters of law reform and codification.[25]

But, let us ask ourselves : what is the guidance of Islam for those Muslims who live as a religious minority in a country officially or dominantly following a religion other than Islam ? And what is its teaching

23. *Supra* n. 8, Cpapter XVI.
24. See, for details, T. Mahmood, *An Indian Civil Code and Islamic Law* (1976).
25. Some of these countries, e.g., Iran, Indonesia and Pakistan, have fully reformed their legal system. Like the Arab states, Iran, too, has not, however, merged "personal law" in its Civil Code of 1935; but it did reform personal law in 1967. (See this author's work, *supra* n. 8, Chapter XI). In Indonesia and Pakistan also almost the entire legal system is codified.

for the Muslim inhabitants of a professedly secular country where religion has no say in the affairs of the state (while legislation is exclusively a state affair)? Obviously, in both these situations there are possibilities of conflicts between the traditional *Shari'a* laws and the changing legislative and judicial trends regarding the responsibilities of the *laissez fair* state. Who are, then, *ul-il-amr* in these countries in the sight of the *Quran*? What could be the forms of *iitihad* and *iima* there? Who has the right and the power to develop the law by using the Islamic legislative tools like *siyasa shari'ya* (permissible public policy) and *hiyal* (lawyer's devices)? Should the Muslims of these countries, too, assert that "personal law" be kept altogether segregated? If yes, would it mean that they should keep their traditional laws (imported from Arabia during the early centuries of Islam) in watertight compartments, shutting their eyes to the enormous legal development in contemporary Arab states?

The answers to these and like questions will determine the angles and dimensions of proximity and consistency between 'Arab Islam' and 'non-Arab Islam'. It is high time that scholars having a real insight in the *Quran* and *Sunna* and in the sociology and jurisprudence of Islam, derived from these sources the correct, satisfactory answers to the said questions. They will be doing a valuable service to the fraternity of non-Arab Muslims—specially those living in secular states—perplexed by the local quandaries they find themselves in and flabbergasted by the amazing legal development in contemporary Arabia.

We venture only to say that the non-Arab followers of a religion in whose birth place the law has been so remarkably developed cannot be obliged, under their faith, to remain idle spectators of all that progress. The Islamic code of life, with the help of which modern Arabia has revolutionized its legal systems, must be containing guidance in respect of law reform also for the Muslims of non-Islamic and secular states.[26]

26. An Urdu version of this paper was presensed at the seminar on "The Problems of Reconstruction of Socio-Religious Thought in Islam" organized by Jamia Millia Islamia, New Delhi on 26-28 December, 1976.

CONSTITUTIONAL IMPERATIVES AND RELIGIOUS DOCTRINES : SOME DILEMMAS FOR THE COURTS

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[*The author examines in the light of the legislative and judicial responses some of the complex and vexing problems which arise with regard to freedom of religion.*]

INTRODUCTION

The cardinal principle that a secular and democratic state should not interfere with the religious belief of individuals has found acceptance and expression in the constitutions of many progressive nations. For example, the Constitution of the United States of America[1] enjoins the state to ensure the free exercise of religious belief and prohibits, in the peculiar historical circumstances in which the nation was born, the establishment of a state religion. Similarly, the politico-social context in which India gained her independence warranted the existence of such a freedom as a fundamental right of every citizen under the Constitution.

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1. The First Amendment of the United States Constitution provides :

> The Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof....

For a historical note, see generally 16 *American Jur. 2d.* 336-40 (1964). For a good discussion on the "non-establishment" clause and the right to free exercise of religion, see J. M. Dodge, "The Free Exercise of Religion : A Sociological Approach", 67 *Michigan L. Rev.* 679 (1969); D. A. Giannella, "Religious Liberty, Non-establishment, And Doctrinal Development, Part I—The Religious Liberty Guarantee", 80 *Harvard L. Rev.* 1381 (1967). See further by the same author "Part II—The Non-establishment Principle", 81 *Harvard L. Rev.* 513 (1968); A. Schwarz, "No Imposition of Religion : The Establishment Clause Value", 77 *Yale L. J.* 692 (1968); D. Cote, "Establishment Clause Analysis of Legislative and Administrative Aid to Religion", 74 *Columbia L. Rev.* 1175 (1974).

In any multi-religious society the freedom to propagate, profess and practise religion is of equal concern to every religious group. And the society must so order the exercise of religious freedom by any group as not to interfere with, offend, or prevent the free exercise of the freedom of other religious groups or jeopardise public order, morality and health. The legislature and the courts in India have, in the interest of inter-communal harmony in a pluralistic society, engrafted upon the freedom of religion a variety of restrictions in consonance with the constitutional objectives. In so doing, they have succeeded in eroding a certain amount of dogmatic orthodoxy and harmonised religious liberty with the interests of a secular state. It is interesting to see how this has been achieved and it is important to note the still unresolved impediments to the perfect solution of the problem of religious pluralism. This paper focuses on the dilemmas posed by the constitutional impertatives on the one hand and the exercise of religious doctrines on the other and endeavours to assess the legislative and judicial responses to these dilemmas. Towards this end, some areas of conflict which have confronted the courts and the legislatures as well as some potential conflict situations have been chosen at random for analysis.

I. THE BELIEF-PRACTICE DICHOTOMY

The Constitution of India guarantees to its citizens freedom in matters of religion.[2] It also protects the rights to conserve cultural

2. Article 25 reads :
   (1) Subject to public order, morality and health and to the other provisions of this part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.
   (2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law—
   (a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice ;
   (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

   Article 26 reads :
   Subject to public order, morality and health, every religious denomination or any section thereof shall have the right—
   (*a*) to establish and maintain institutions for religious and charitable purposes :
   (*b*) to manage its own affairs in matters of religion ;
   (*c*) to own and acquire movable and immovable property ; and
   (*d*) to administer such property in accordance with law.

   For commentaries on these articles and critical analysis of the cases on the subject, see Seerval, *Constitutional Law of India*, 566-599 (2nd ed. 1975).

rights. It may be noted at once that restrictions by the state upon the free exercise of religion are allowed under the Constitution on grounds of public order, morality and health. Article 25 (2) (a) authorises the State to regulate or restrict any economic, financial, political and other secular activities which may be associated with religious practice and under article 25(2) (b) the state could legislate for social welfare and reform, even though by so doing it might interfere with religious practices. A question then arises whether modifications or reforms of personal laws are in consonance with constitutional provisions.

When the Hindu law was modified by abolishing polygamy, a number of petitions challenging its validity were instituted. It was argued in the Madras and Bombay High Courts that legislation[3] enforcing monogamy infringed the religious freedom guaranteed by the Constitution. In *Srinivasa Aiyer* v. *Saraswati Ammal*[4], the Madras High Court followed the American precedent of *Reynolds* v. *U.S.*[5] which distinguished religious belief from practice and held that the state could regulate and restrict a practice, if it was thought necessary to do so in the interest of social welfare and reform. Similarly, the Bombay High Court on identical facts in *State of Bombay* v. *Narasu Appa*[6] made a distinction between religious belief and practice and upheld the legislation which enforced monogamy among Hindus. In this case also the "belief-action" dichotomy laid down by the American law in *Davis* v. *Beason*[7] was accepted. Chagla C.J. observed[8] :

3. Madras Hindu (Bigamy Prevention and Divorce) Act, 1949 (Act 6 of 1949) :
   Sec. 4 —
   (1) Notwithstanding any rule of law, custom or usage to the contrary, any marriage solemnized after the commencement of this Act between a man and a woman either of whom has a spouse living at the time of such solemnization shall be void.
   (2) If a party to a marriage which is void under sub-section (1) has completed eighteen years of age at the time of the solemnization of such marriage he or she shall be deemed to have committed an offence under section 494 or section 495 I.P.C. as the case may be.

   The Bombay Prevention of Hindu Bigamous Marriages Act, 1946 (Act 25 of 1946), like the Madras Act provided for the prevention of bigamous marriages among Hindus and made bigamy an offence.
4. *Srinivasa Aiyer* v. *Saraswati Ammal*, A.I.R. 1952 Mad. 193.
5. *Reynolds* v. *U. S.*, 98 U. S. 145 (1879). But see *Sherbett* v. *Verner*, 374 U. S. 398 (1963), where the belief-action dichotomy was discarded.
6. *State of Bombay* v. *Narasu Appa*, A.I.R. 1952 Bom. 85.
7. *Davis* v. *Beason*, 133 U. S. 637 (1889).
8. *Supra* n. 6, at 86.

> What the State protects is religious faith and belief. If religious practices run counter to public order, morality or health or policy of social welfare...then the religious practice must give way before the good of the people of the state as a whole.

Later, when Parliament enacted the Hindu Marriage Act, 1955[9] it was challenged again on the ground that it violated article 25. The Allahabad High Court in *Ram Psarad* v. *State of U.P.*[10] cited the observation of Justice Chagla with approval and upheld the validity of the Act. The basis of the decision rested mainly on the belief-action dichotomy.

The distinction drawn by these High Courts and the American cases referred to above between religious belief and practice has been rejected by the Supreme Court in *Commissioner of Hindu Religious Endowments* v. *Lakshmindra*[11]. It was observed by Mukherjea J.[12]:

> The guarantee under our Constitution not only protects the freedom of religious opinion but it protects also acts done in pursuance of a religion and this is made clear by the use of the expression "practice of religion" in article 25.

The petitioner, a trustee of a religious trust, challenged the validity of the Madras Religious and Charitable Endowments Act, 1951[13] on the ground that it violated articles 25 and 26 of the Constitution. One of its provisions (section 21) gave wide powers to the Commissioner (and other officers) to enter the religious institution or any other place of worship for the purpose of discharging the statutory duties. The Supreme Court referred to the "well-known" custom universally observed by the religious institutions restricting to only a few persons access to the *sanctum sanctorum*. It also referred to the

9. Section 5 of the Hindu Marriage Act, 1955.
10. *Ram Prasad* v. *State of U. P.*, A.I.R. 1957 Allah. 411.
11. *Commissioner of Hindu Religious Endowments* v. *Lakshmindra* [1954] S. C. R. 1005; A. I. R. 1954 S. C. 282 followed in *J. Swami* v. *State of Tamil Nadu*, A. I. R, 1972 S. C. 1586
12. *Id.* at 1024. For a thorough analysis of this case and the relationship between articles 25 and 26 see P. K. Tripathi, "Secularism: Constitutional Provision and Judicial Review", in G. S. Sharma (ed.), *Secularism: Its Implications for Law and Life in India*, 165, 171-174 (1966). The present writer has heavily relied on this work respecting the interpretation and scope of these articles while dealing with this and other cases referred to in the ensuing pages. For further criticism of the Lakshmindra's case, see M. Ghouse, *Secularism, Society and Law in India*, 126-127 (1973)
13. The Madras Religious and Charitable Endowment Act, 1951 (Act 19 of 1951).

practice where fixed hours of worship and rest for the idol were observed and the sanctity of the deity was zealously guarded. The Supreme Court concluded that the impugned provision was *ultra vires*.

In *Lakshmindra*, the Court had to deal pointedly with the interpretation of the words "matters of religion" in article 26 (*b*). The scope and interpretation of article 25 was not, in a way, directly in issue unlike the polygamy abolition cases discussed earlier. The different contexts in which the Supreme Court and the High Courts were called upon to construe these articles made a difference in their approach to the belief—practice dichotomy. The result was that while the High Courts restricted the religious freedom of an individual contained in article 25 (1) in the light of the overriding provision contained in article 25 (2), the Supreme Court took a broader view of the religious liberty of a denominational head contained in article 26 (*b*). In other words, it recognised that the management of its own affairs by a religious denomination in "matters of religion" which is protected by article 26 (*b*) is but an integral part of the freedom to practise one's religion guaranteed under article 25 (1).

Although the Supreme Court rejected the belief—action dichotomy, the decisions of the High Courts[14] have not been overruled. The principle that even if a practice is religious, it is subject to state control in the interest of social welfare and reform is still valid.

Not all acts done in pursuance of religious belief can claim constitutional protection. Under the ruling of *Lakshmindra* only those acts or practices that are essential and form part of the religion can be saved under the guarantee of religious freedom. And "what constitutes an essential part of the religion is primarily to be ascertained with reference to the doctrine of that religion itself.[15] The two principles laid down by the Supreme Court, namely, (*i*) that our Constitution not only protects freedom of religious opinion but also acts done in pursuance of religion and (*ii*) what constitutes an essential part of the religion is to be ascertained with reference to the doctrine of that religion, are not as simplistic as they sound. For, in certain circumstances a practice may form an essential and inseparable part of the religion with reference to the doctrine of that religion and it may be extremely difficult to distinguish the one

14. *Supra* nn. 4 and 6. An excellent account of the cases on Religious and Charit able Endowments may be found in J. D. M Derrett, *Religion, Law and the State in India*, 494 (1968).
15. *Supra* n. 11, at 1025.

from the other. For example, Muslims believe that sacrificing an animal on a special occasion is their religion as it is enjoined by the *Quran*. The act of sacrificing is, therefore, an essential part of the religion with reference to the doctrine of that religion, namely, Islam. When a Muslim sacrifices an animal, he is merely acting in pursuance of his religious belief.

In *Mohd. Hanif Quareshi* v. *State of Bihar*[16] the Court was called upon to adjudge the essentiality of cow-slaughter to the practice of Muslim religion. The facts of the case briefly stated were as follows : The Bihar state enacted laws banning cow-slaughter to improve agricultural and animal husbandry.[17] The petitioner contended that it violated his fundamental rights under article 25 of the Constitution inasmuch as on the occasion of the *Baker Id* day it was the religious practice of the community to sacrifice a cow. The poor members of the community usually sacrifice a cow for every seven members, whereas an alternate practice would require one sheep or goat for each member which would entail considerable expense. Therefore, a total ban imposed by the state would prevent the petitioner from sacrificing a cow. The holy *Quran* commanded the people to pray unto the Lord and make sacrifice. *Hedaya*[18], the most authoritative commentary followed by the courts in India, spells out the modes of sacrifice as one goat per person or a cow or a camel per seven persons. The Court stated that the "very fact of an option seems to run counter to the notion of an obligatory duty".[19] Therefore, the court concluded, it was not obligatory for a person to sacrifice a cow. It found supporting evidence to the proposition in the history of the religious practices of Muslim rulers living in those parts of India where cow-slaughter was prohibited.[20]

16. *Mohd. Hanif Quareshi* v. *State of Bihar* (1959) S. C R. 629 ; A. I. R. 1958 S. C. 731. For an illuminating discussion of this case, see U. Baxi "The Little Done, The Vast Undone'—Some Reflections on Reading Granville Austin's *The Indian Constitution*", 9 *J. I. L. Inst.* 323, 348—354 (1967).

17 Article 48 of the Indian Constitution provides :

> The State shall endeavour to organise agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter, of cows and calves and other milch and draught cattle.

In furtherance of this directive, the U. P. Prevention of Cow Slaughter Act, 1955 was enacted.

18. Ali-Marghinani, *The Hedaya or Guide*, 592 (Grady ed. 1870).

19. *Supra* n. 16 at 650.

20. *Supra* n. 16, at 651.

The Court's logic that as the religious duty of a Muslim to make a sacrifice does not confine him to sacrifice a cow inasmuch as the injunction brooks of an option to sacrifice a goat or a camel instead, such duty is not obligatory, is not entirely convincing. A person might be enjoined to do either A or B or C. The fact that he has the option to perform any one of these does not take away the obligatory character of the duty itself. The economic assumption of the option is clear ; it would be cheaper for seven persons to sacrifice one bigger animal rather than one person to sacrifice even a small animal. By taking away the individual's right to cooperate with others for a less expensive method of performing his duty, the state is striking at the very root of the obligation itself.

As regards the evidence of the religious practices of the Muslim rulers who prohibited cow-slaughter upon which the Court relied, it is sufficient to refer to what Upendra Baxi has said[21] :

> ...what Baber, or his progeny, did in this regard as monarchs of certain parts of India need not affect the Islamic precept.

Be that as it may, this case demonstrates the difficulty in the application of the rules formulated by the Supreme Court in the *Lakshindra* case.

II. THE ESSENTIAL NON-ESSENTIAL DICHOTOMY

As noted, the Supreme Court in *Lakshmindra* classified religious practices into two categories : essential and non-essential. It was ruled that non-essential practices could not claim constitutional protection whereas essential practices connected with religion could, provided of course that they do not run counter to public order, morality and health.

In a multi-religious and cultural society like that of India, it is extremely difficult to shift essential from non-essential religious practices. The Supreme Court was confronted with such an unenviable task in (for example) *Durgah Committee, Ajmer* v. *Syed Hussain Ali*.[22] The respondents who were the *Khdims* (servants) of the *Durgah* (tomb) of a Muslim spiritual leader challenged the validity of an Act[23]

21. U. Baxi, *op. cit. supra* n. 16, at 349 in footnote 91.

22. *Durgah Committee, Ajmer* v. *Syed Hussain Ali*, [1962] 1. S. C. R. 383, A. I. R. 1961 S. C. 1042.

23. Durgah Khwaja Saheb Act, 1955 (Act 36 of 1955). It was claimed by the respondents that the right to manage the affairs of the Durgah, to receive the "offerings" and other customary practices were an essential part of their religion.

which empowered the Durgah Committee to determine their privileges, functions and powers on the ground that their freedom to practise religion was thereby infringed. The Court sustained the Act as it was intended only as a regulatory measure. On the question of the determination of the essentiality or otherwise of a religious practice which claims protection under the Constitution, Gajendragadkar J. observed[24] :

> Whilst we are dealing with this point, it may not be out of place incidentally to strike a note of caution and observe that in order that the practices in question should be treated as a part of religion, they must be regarded as its essential and integral part, otherwise even purely secular practices which are not essential or an integral part of religion are apt to be clothed with a religious form and may make a claim for being treated as religious practices within the meaning of Art. 26. Similarly even practices though religious may have sprung from merely superstitious belief and may in that sense be extraneous and unessential accretions to religion itself.

The "note of caution" struck by Justice Gajendragadkar was prompted by the broad and liberal interpretation given to articles 25 and 26 in *Lakshmindra*, reiterated in *Raetail Panachand Gandhi* v. *State of Bombay*[25] and "perfected" in *Venkataramana Devaru* v. *State of Mysore*[26]. In *Lakshmindra* referring to the right of a denomination to manage its own affairs in matters of religion, the Court said that observation of ceremonies, giving of food, recital of texts or oblation of the sacred fire would be regarded as "matters of religion", if the tenets of the religion prescribed them.

Taking the cue from this decision the Supreme Court in *Ratilal*[27] ruled that religious practices or performance of acts in pursuance of religious belief are as much part of religion as faith or belief[28]. It was further held that no outside authority had any right to say that those were not essential parts of religion and it was not open to

24. *Supra* n. 22, at 411-12.
25. *Ratilal Panachand Gandhi* v. *Bombay*, [1954] S.C.R. 1055 ; A.I.R. 1954 S.C. 388. The petitioner in this case challenged the validity of the Bombay Public Trust Act, 1950, which provided for the appointment of the Charity Commissioner as a trustee of the public trust by the Court without any reservation in regard to religious institution. It was alleged by the petitioner that the Act interfered with the religious rights. The Court upheld the contention.
26. *Venkataramana Devaru* v. *State of Mysore* [1958] S. C. R. 895 ; A. I. R. 1958 S. C. 255.
27. *Supra* n. 25.
28. *Id.*, at 1065.

the secular authority of the state to restrict or prohibit them in any manner they liked[29]. *Devaru* put a seal of endorsement on these principles and took it as "settled that matters of religion in Article 26(*b*) include even practices which are regarded by the community as part of its religion".[30] The combined effect of all these decisions was that the Court left it to the community to determine what are "matters of religion" or whether a particular practice is an essential part of the religion.

Thus, the note of caution is justified as the authority to determine the essentiality or otherwise of the alleged religious practice claiming constitutional protection must, in the final analysis, rest with the court. This power of the court as the final arbiter to declare or reject practices which are or which are not essential and an integral part of religion itself was asserted by Justice Gajendragadkar himself in *Shri Govindlalji* v. *State of Rajasthan*[31]. Not only was this power asserted, but a rule was also formulated as to how a Court should proceed to solve the problem of the essential and non-essential dichotomy, when conflicting evidence is produced before the Court in respect of rival contentions as to competing religious practices. He observed[32] :

> This question will always have to be decided by the Court and in doing so, the Court may have to enquire whether the practice in question is religious in character and if it is, whether it can be regarded as an integral or essential part of the religion, and the finding of the Court on such an issue will always depend upon the evidence adduced before it as to the conscience of the community and the tenets of its religion.

However much the "note of caution" we have referred to may be justified under the circumstances, the fact remains that the learned judge took upon himself the risk of pronouncing religious practices as "merely superstitious belief and may in that sense be extraneous and

29. *Ibid.*
30. *Supra* n. 26, at 909.
31. *Tilkayat Shri Govindlalji* v. *State of* Rajasthan; [1964] 1. S.C.R. 561 ; A.I.R. 1963 S.C. 1638.
The Nathwara Temple Act, 1959, was challenged *inter alia* on the ground that the right to manage and administer the property of the temple were religious matters and hence *ulrta vires* of articles 25 and 26. The Court rejected this contention and upheld the Act. For critical comments, see P. K. Tripathi, *supra* n. 12, at 188-192.
32. [1964] 1. S.C.R. 561, at 621.

unessential accretions to religion itself." For what is "superstition" to one may be an article of faith to another[33].

III. INDIVIDUAL *Versus* DENOMINATIONAL RIGHT

Article 25(1) guarantees the fundamental right of an individual freely to profess, propagate and practise religion. It is also a fundamental right of a denomination under article 26(b) to manage its own affairs in matters of religion. It may, however, so happen that if a denomination is allowed to manage its own affairs in matters of religion, the rights, both religious as well as civil, of the individual members of the very denomination may be jeopardised. How are we going to resolve such a conflict ?

The Supreme Court was confronted with this challenge in *Saifuddin Saheb* v. *State of Bombay*[34]. The head of the Dawoodi Bohra Community challenged the validity of a Bombay Act of 1949 which invalidated all kinds of ex-communication on the ground that it contravened his religious freedom under articles 25 and 26. Invalidating the Act, the majority held that the power of the head of the Dawoodi Bohra to excommunicate its member was a matter of religion and was, therefore, within the protection afforded by the Constitution. But according to the dissenting opinion of Sinha C.J.[35] such a power was not a matter of religion and hence the impugned Act was protected under article 25(2) (*b*) as a measure of social welfare and reform.

The cleavage of juristic opinion has arisen due to the fundamental difference in their respective approaches to the problem. The majority opinion (particularly that of Das Gupta J.) resolved the conflict exclusively from the perspective of article 26 (*b*). The first task before Justice Das Gupta was, therefore, to examine whether the impugned Act interfered with the right of the Dawoodi Bohra community to manage its own affairs in religious matters. The answer to this question should naturally depend upon whether the "power of ex-communication on religious grounds forms part of the management by the community, through its religious head, of its own

33. Latham, C.J.'s observation in *Adelaide Company of Jehovah's Witnesses Incorporated* v. *The Commonwealth*, Commonwealth L.R. 116, that "what is religion to one, is superstition to another", was rejected by Justice Gajendragadkar as of no relevance. *Id.*, at 622. *See also* H.M. Seervai, *Constitutional Law of India*, (Vol. I) 577 (2nd ed. 1975).
34. *Saifuddin Saheb* v*State of Bombay*, A.I.R. 1962 S.C. 853. For critical analysis of this case see Ghouse, *op. cit. supra* n. 12, at 200-205.
35. *Id. Saifuddin* case, at 865.

affairs "in matters of religion"[36]. Relying on the article by Hazeltine[37] and following the Privy Council decision in *Hasanali* v. *Mansoorali*[38], Justice Das Gupta was of the view that the "unquestioning faith in the Dai as the head of the community is part of the creed of the Dawoodi Bohras".[39] Accordingly, the Act "clearly" violated article 26 (*b*). In view of this he considered unnecessary to deal with article 25.[40]

Another strong reason which led the learned judge to uphold the validity of the Act was that the guarantee of religious freedom under article 26 (*b*) was made subject only to public order, morality and health unlike the guarantee in article 25 (1) which is made subject to other provisions of Part III of the Constitution in addition to public order, morality and health. Since the Act invalidated all kinds of ex-communication, including ex-communication on religious grounds, it was of no consequence that the civil rights of the member belonging to that denomination were affected. The learned judge said[41] :

> It might be thought undesirable that the head of a religious community would have the power to take away in this manner the civil rights of any one person. The right given under Article 26 (*b*) has not however been made subject to preservation of civil rights.

Ayyangar J.[42], who concurred with Justice Das Gupta, approached the problem from the standpoint of both Articles 25 (1) and 26 (*b*). In his opinion, the head of Dawoodi Bohra was both a spiritual as well as the temporal head of the community. He not only had the power to ex-communicate any member belonging to that denomination but was also under an obligation to apply the trust property for purposes recognised as valid according to the doctrines and tenets of the Bohra religion. To allow any member who denounced the authority of the Dai and dissuaded himself from the religious doctrines, to have the use and enjoyment of the trust property would be regarded as breach of trust on the part of the Dai.

36. *Id.*, at 869.
37. *Id.*, 868.
38. *Hasanali* v. *Mansoorali*, A.I.R. 1948 P.C. 66.
39. Saifuddin case, *supra* n. 34, at 869.
40. *Id.*, at 870.
41. *Id.*, at 969.
42. *Id* , at 870-876.

Accordingly, the learned judge held that the impugned Act which deprived the Dai of the power and the right to ex-communicate was violative of his right to parctise religion guaranteed by article 25 (1). Since the impugned Act interfered with the rights of the Dai as the trustee of the property of the denomination it was also violative of article 26.

Sinha C.J. dissenting from the majority, adopted a totally different approach. He observed.[43]

> I am not called upon to decide, nor am I competent to do so, as to what are religious matters in which the Dai-ul-Mutlaq functions according to his religious sense. I am only concerned with the civil aspect of the controversy relating to the constitutionality of the Act, and I have to determine only that controversy.

It was upon this premise that Justice Sinha proceeded to resolve the conflict. According to him, action of the Dai in the purely religious aspect was not the concern of the Court, but his actions touching the civil rights of the members of the community could be questioned and were not immune from state's control. Thus the law passed by the Bombay State nullifying all kinds of excommunication was valid under article 25 (2) (*b*).

Justice Sinha referred to article 25 and said that every member of the community has the right, so long as he does not in any way interfere with the corresponding rights of others, to profess, practise and propagate his religion. And since everyone is guaranteed his freedom of conscience, the learned judge asks pertinently : "Can an individual be compelled to have a particular belief on pain of a penalty, like ex-communication?"[44] He then declares that "The Act is, thus, aimed at fulfilment of the individual liberty of conscience guaranteed by Article 25 (1) of the Constitution and not in derogation of it."[45] It was further observed that the Act in so far as it protects the civil rights of the members of the community had not gone beyond the provisions of article 25 (2) (*b*).[46]

Commenting upon the instant case and upon the stand taken by the majority judges, P. K. Tripathi[47] points out "the failure on the part of the Court to appreciate the relationship between the rights

43 *Id.*, at 865.
44 Id., at 863.
45 *Id.*, at 866.
46 *Id.*, at 865.
47 See P K Tripathi, *op. cit.*, *supra* n. 12, at 185.

guaranteed in articles 25 and 26." In his view the rights guaranteed to the denominations in article 26 are ancillary to the rights guaranteed to the individual in article 25. Highlighting the philosophy of fundamental rights in the Constitution (including those concerning religion) and its concern for the individual liberty, and dignity. Tripathi forcefully maintains that :[48]

> In this scheme of liberty there is guaranteed to the individual *not only freedom of religion*, but where religion tended to become a menace to his liberty and dignity, there is also guaranteed to him *freedom from religion* ; because without the latter the former guarantee alone will be incomplete, and even meaningless.

Before we proceed to evaluate these conflicting views, let us also notice here the conflict which may arise between an individual's freedom of religion and the denominational freedom in another set of circumstances. Article 25 (2) (*b*) protects any law passed by the state entitling all classes and sections of Hindus to have free access to religious institutions of a public character. But, as we have seen, the Constitution also protects under article 26 (*b*) the right of a denomination "to manage its own affairs in matters of religion". When a state enacts a law contemplated under article 25 (2) (*b*), a denomination may challenge its validity invoking article 26 (*b*).

The Supreme Court was called upon to resolve such a controversy in the *Devaru* case.[49] The Gowda Saraswat Brahmins challenged the validity of the Madras Temple Entry Authorisation Act, 1947, contending that the Venkataramana temple was a private temple belonging to them and that the said Act interfered with their religious rights. It was contended that according to their religious practice they had the right to exclude certain low-caste Hindus from entering the temple for offering worship. Section 3 of the Temple Entry Authorisation Act entitled "persons belonging to the excluded classes to enter the temple and offer worship therein in the same manner and to the same extent as Hindus in general". Since

48. *Id.*, at 170 (emphasis added). Many writers of Constitutional Law subscribe to the views expressed by Tripathi. See for example, M Ghouse, *op. cit. supra* n. 34, at 202, 208. M.C.J Kagzi, *The Constitution of India*, 577-78 (3rd ed. 1975). The present writer concurs with these views, but has recorded his own comments on this question in the text that follows
49. *Venkataramana Devaru* v *State of Mysore*, [1958] S.C.R. 895, A.I.R 1958 S.C. 255.

this provision provided for the temple being thrown open to communities other than the Saraswat Brahmins, it was argued that it violated article 26 (*b*).

The appellants also argued that while article 25 was made subject to other provisions of Part III of the Constitution, there was no such limitation under article 26 (*b*) and hence article 26 (*b*) must be held to prevail over article 25 (2) (*b*). They further contended that while article 26 (*d*) was expressly made subject to a law made by the state, the right guaranteed under article 26 (*b*) was not so subject. Accordingly, they maintained that the Act infringed the right under article 26 (*b*) and hence was void.

As regards the first contention the Court held[50] that it was the religious freedom in article 25 (1) which was made subject to theother provisions of fundamental rights and not the restriction in article 25 (2). Therefore, any law passed in furtherance of article 25(2) (*b*) will control the right conferred in article 25 (1) and the limitation in article 25 (1) does not apply to that law.[51].

The Court also held (with respect to the second contention) that the argument of the appellants would have been valid, had the impugned provisions not been protected under article 25(2)(*b*). According to the Court[52], since both these provisions, namely, article 25(2)(*b*) and 26(*b*), are of "equal authority", neither being subject to the other, the question was one of harmonising the scope and effect of these provisions. By applying the rule of harmonious construction the Court gave effect to both these provisions. It was observed :[53]

> ...after giving effect to the rights of the denomination what is left to the public of the right of worship is something substantial and not merely the husk of it, there is no reason why we should not so construe Art. 25 (2) (*b*) as to give effect to Art. 26 (*b*) and recognise the rights of denomination in respect of matters which are strictly denominational, leaving the rights of the public in other respects uneffected.

Thus it was held that the Saraswat Brahmins could prevent the entry of other classes of Hindus on special occasions when religious services are performed. On other occasions the excluded classes had

50. *Id.*, at 916-917.
51. *Id.*, at 918.
52. *Ibid.*
53. *Id.*, at 920.

the right given by the Temple Entry Authorisation Act to have access to the temple to worship in the same way as Hindus in general.

Thus while in the *Saifuddin* case the denominational freedom took precedence over individual freedom, in the *Devaru* case individual freedom was protected as against denominational freedom. How do we reconcile these apparently conflicting decisions ? When will denominational freedom prevail over the individual's freedom and *vice versa* ? It is submitted that where the religious practices of the denomination run counter to the constitutional objectives, the right of the individual must prevail, but where the tenets or the religious practices of the denomination do not run counter to the constitutional objectives the rights of the denomination should take precedence over those of the individual.

For example, let us visualise that in the foreseable future a uniform civil code is adopted providing for an option in favour of certain denominations to adopt and implement some progressive measures such as abolition of polygamy or invalidating extra-judicial divorce. Suppose the denominational head opts to implement such measures within its community on pains of penalty, e.g., denying certain community benefits to a member who does not approve of the steps taken by the head. A member challenges the right of the head of the denomination who threatens to curtail his religious freedom, specially in so far as the code does not do so directly. How would a court react ? According precedence to individual freedom over denominational freedom cannot be the rule of the thumb. In the given illustration, upholding the denominational right obviously promotes a better value than that of preserving an individual's right. Illustrations can be multiplied to include progressive optional legislation and denominational implementation of laws such as compulsory sterilization.

Perhaps, the better alternative while harmonizing these competing claims would be to resort to what is known as "balancing of interest" approach.[54] According to this approach, the judiciary performs the task of identifying and appreciating the constitutionally aspired objectives concretised in the form of secular interest in the challenged legislative measure and to balance them against an equally important social value of upholding an individual's right to free exercise of religion. This balancing technique, as pointed out by Mohammad Ghouse, will be useful "if the values underlying the religious freedom

54. See Giannella, *supra* n. 1, at 1381-90.

of a litigant are balanced not against the general interest served by the challenged legislation but against the special benefit that may accrue to the society by its enforcement against the litigant[55].

IV. PROSELYTISM AND RELIGIOUS LIBERTY

Recently the question whether proselytisation is a part of religion and whether the state can regulate the methods of proselytisation arose for decision. In *Yulitha Hyde* v. *State*[56], the petitioner belonging to a Roman Catholic Church was prosecuted under the Orissa Freedom of Religion Act, 1968 for having resorted, for the purpose of proselytisation, to some methods which were forbidden by and punishable under the Act. The validity of the Act was challenged on two counts : first, the state legislature had no competence to legislate upon matters covered by the Act; and second, the Act infringed the fundamental rights of the petitioner under article 25 (1). The Orissa High Court held that the state legislature had no competence to legislate on the subject. Nevertheless, the court also expressed its opinion on the second question. In order to appreciate the views of the court on the second question an examination of the relevant provisions of the impugned Act is necessary.

Section 3 of the Act prohibited conversion by the use of "force", "fraud" and "inducement". Section 2 defined "force" as including, inter alia, "threat of divine displeasure" or social excommunication. "Fraud" included in its definition "misrepresentation or any other fraudulent contrivance". The term "inducement" was defined so as to include "offer of any gift or gratification either in cash or in kind" and "the grant of any benefit either pecuniary or otherwise."

The petitioner contended that these definitions were too wide and that their extended meaning encroached upon religious freedom. It was also alleged that if the impugned Act intended to prohibit the use of force or fraud as methods of conversion, a mere reference to

55 Ghouse, *supra* n. 34, at 138. See also Mohd Imam where he says that in deciding whether or not a restriction on particular religious practice is justified on grounds of public order, etc. for promoting social reforms, the task of the court is to balance freedom of religion on the one hand and the social interest on the other. M. Imam, *The Indian Supreme Court and the Constitution*, 171 (1968). See further S.P. Sharma, "Freedom in Matters of Religion," in M. Imam (ed), *Minorities and the Law* 263-277 (1972).

56 *Yulitha Hyde* v. *State*, A.I.R. (1973) Ori. 116. The whole Act was declared *ultra vires* the Constitution, as the State Legislature had no competence to enact on the subject.

these words should have been enough. The Court rejected this contention holding that the extended meaning given to the word "force" under the Act "did not import anything very foreign into the word inasmuch as the two acts which are now included in the definition do fit into the essential concept of the word."[57] Fraud or misrepresentation were not regarded as normal methods of converting people. Accordingly, the court was of the view that the law which prohibited conversion by such unfair means was justified and valid.

As regards "inducement" it was held that the definition was capable of covering some of the methods of proselytising. For example, the court said[58] that invoking the blessing of the Lord or to say that "by His Grace your soul shall be elevated" might come within the mischief of that definition. Therefore, the court was of the view that prohibition of conversion by inducement offended article 25 (1).

The Madhya Pradesh High Court in *Rev. Stainislaus* v. *State*[59] was confronted with similar issues relating to forcible conversion. The petitioner challenged the constitutional validity of the M. P. Dharma Swatantrya Adhiniyam, 1968 (Freedom of Religion Act) which penalised a person who procured conversion by force, fraud or allurement, on the ground that it contravened article 25. The Act defined force, fraud and allurement in language identical to that of the Orissa statute discussed above. The court, unlike the Orissa High Court, held that the Act was within the legislative competence of the state and that it did not infringe the constitutional guarantee in article 25 (1). Tare C. J. said[60] :

> As liberty cannot be construed to be a licence so also freedom of religion cannot be construed to be the right of an individual to encroach upon similar freedom of other individuals by questionable methods.

Moreover, according to the court, the Act was saved under the restrictions provided in article 25 (1) on grounds of public order, morality and health. The expression "public order" was given a very wide connotation drawing ample authority from various decisions of the Supreme Court.[61] It was stated that the word "public" had to be read with the other two phrases, viz. morality and health, as implying public morality and public health.[62]

57. *Id.*, at 121.
58. *Ibid.*
59. *Rev Stainislaus* v. *State*, A.I.R 1975 Madh. Pra. 163.
60. *Id.*, at 166.
61. *Id.*, at 169-172.
62. *Id.*, at 168.

The present writer agrees with the decision. If one reads the report of the Christian Missionary Activities Enquiry Committee[63], one soon realises the harm that might be caused to the society by converting people by objectionable methods. The allurements of material benefits, the enormous flow of foreign money into our country for missionary work, and the offensive methods of proselytising the employed[64], are good reasons which summon state's intervention in the interest of public order and morality. If in the garb of religious freedom, different communities in India are permitted to proselytise in such a manner, there would be all too soon an unhealthy competition between the religious communities to take precedence over each other. This, it is submitted, ought not to be allowed. After all, the Constitution itself lays down that religious freedom is not an absolute freedom.

V. CONSCIENTIOUS OBJECTOR AND MUSLIM LAW REFORM

A challenge to muslim law reform could be grounded squarely on religious scriptures or a more sophisticated strategy might be adopted as an alternative. In the latter case, a constitutional attack may be launched against the reforms by relying upon American precedents where the term "religion" was given a wider and more comprehensive meaning. Let us first discuss the traditional scripture-based argument.

The objector to Muslim law reform invariably contends that his right, *inter alia*, to divorce unilaterally or to enter into plural marriage is sanctioned by *Quran* and it is a religious right guaranteed under the Constitution. A closer look, however, would reveal that these rights, even according to religious law, are not absolute rights. While the *Quran* sanctions polygamy, it also lays down certain conditions which have to be satisfied before such a right could be exercised. The verse permitting polygamy is[65] :

63. See the *Report of the Christian Missionary Activities Euqury Committee, Madhya Pradesh*, vol. I, pp. 113-118 (1957) The writer thanks Shri Ram Panjwani, Dy-Advocate General of Madhya Pradesh, for a copy of this report. At the time when this manuscript is being sent to the press, it has been reported that the Supreme Court has upheld the Freedom of Religion Acts passed both by the Madhya Pradesh and the Orissa States. The Supreme Court has said that there is no fundamental right guaranteed under Constitution to a citizen to convert another person to one's own religion. See the *Times of India*, 18 Jan 1977, col 2 at p 2.
64. *Id.*, at 136-137.
65. The *Quran*, Ch. IV Verse 3.

> "marry of a woman who seem good to you, two, three, or four : and if ye fear that ye cannot do justice (to so many) then one (only) or (the captives) that your right hand possess. Thus, it is more likely that ye will not do injustice".

Taking the proviso "if ye fear that ye cannat do justice then only one..." as a positive injunction and not merely a declaratory order, almost all the Arab countries have restricted polygamy.[66] The verse permitting polygamy was revealed to prophet at a time when due to holy war many women became widows and children orphans. In order to protect them the *Quran* gave permission to marry more than one wife in the interest of the widows and orphans. Judging from the circumstances under which the verse was revealed and the conditions which enjoin upon a person before he can have more than one wife, it can safely be concluded that the right to plural marriages is not a privilege nor an absolute right.

Also, the right to divorce the wife unilaterally was never meant to be an absolute right. Muhammad Ali[67] points out that the impression that a Muslim husband may put away his wife at his caprice is a grave distortion of the Islamic institution of divorce. While the *Quran* sanctions divorce being pronounced by the husband, certain limitations are placed upon the exercise of this right.[68] The *Quran*[69] lays down specific procedure to be followed before the parties can obtain divorce. The disputes between the husband and the wife are to be referred to judges from the respective people of the two parties. The judges are required to effect reconciliation between the spouses. If reconciliation is not possible, then divorce can be obtained.

There are several other restraints placed upon the powre of the husband to pronounce divorce. For exemple, when the wife is divorced irrevocably, the husband cannot marry her again unless the wife has been married to a third a person and is divorced by

66. See T Mahmood, *Family Law Reform in the Muslim World* (1972), J.N.D Andersan, *Islamic Law in the Modern World* (1959); see by the same author the following : "A Law of Personal Status For Iraq", 9 *Int'l & Comp L Q* 542 (1960); "The Tunisian Law of Personal Status", 7 *Int'l & Comp* L.Q. 262 (1158); "Reform in Fomily Lpw in Morocco", 2 *J. of American Law*, 145 (1958).
67. Maulana Muhammad Ali, *Divorce in Islam* (The Woking Muslim Mission & Liberty Trust, Surrey England). Date of Publication not given.
68. M R Zafar, "Unilateral Divorce in Muslim Personal Law", in T Mahmood (ed.), *Islamic Law in Modern India*, 167, 169-173 (1972).
69. The *Quran* VI : 35.

him after having sexual connection with her.[70] This is called *halala*. Further, the delegated divorce (*talaq-al-tawfid*) provides that the wife can, at the time of entering into a marriage contract, stipulate for the right of divorce from the husband in the event of his marrying a second wife or upon the happening of a specified event.[71] Thus commenting upon the nature of the Muslim husband's right to pronounce divorce (*talaq*) Abdur Rahim observes :[72]

> If the exercise of a particular right is likely to lead to abuses, the law would guard against such a contingency by imposing conditions and limitations. There are certain limitations imposed by the law upon the right of the husband to dissolve the marriage.

Our courts have never been faced with such a challenge based on religious scriptures.[73] Nevertheless, should reforms be introduced in future, the courts might be confronted with a more sophisticated argument pleaded successfully by the "conscientious objectors" in the American courts.[74]

While our courts are still wrestling with the problem of distinguishing the extraneous and unessential from the essential and integral parts of the religion, the American courts have been faced with the challenging task of freeing the religious belief from orthodox or parochial dogmas. A brief reference to some of these cases may help us in appreciating the further nuances and subtleties that the Indian courts might be called upon to decide in future. Inasmuch as our courts have frequently drawn inspiration from the American judiciary in the past, it is not unlikely that in the context of Muslim law reform they might seek assistance from American pronouncements and redefine the concept of religious belief itself.

In a series of decisions handed down by the United States Supreme Court in conscientious objection petitions[75] involving the question of refusal to participate in war, it had occasion to interpret section 6 (j) of the Military Training Act that exempts from

70. See A.A.A. Fyzee, *Outlines of Mohammadan Law*, 155-157 (4th ed. 1974).
71. *Id.*, at 158-159.
72. Abdur Rahim *Muhammad Jurisprudence*, 333 (1958).
73. The right of unilateral divorce or polygamy has not been challanged as the state has not legislated upon these subjects.
74. See for example *United States* v. *Seeger*, 380 U. S. 163 (1965); *Welsh* v. *United States* 318, U.S. 333 (1961).
75. See H C. Macgill. "Selective Conscientious Objection : Divine will and Legislative Grace", 54 *Virginia L. Rev* 1355 (1968); Comment, "The Conscientious Objector and the first Amendment : There But for the Grace of God", 34 *U. Chicago L. Rev.* 71 (1966); Note, "Religious Conscientious Objections", 21 *Stanford L. Rev.* 9 1734 (1969).

military service persons who by reason of "religious training and belief" are conscientiously opposed to war in any form, that term being defined as "belief in relation to a Supreme Being involving duties superior to those arising from human relations but not including essentially political, sociological or philosophical views or a merely personal code." In *U. S.* v. *Seeger*,[76] and *Welsh* v. *United States*,[77] the Court refused to confine that term to orthodox and parochial religious beliefs. The conscientious objector's sincere and meaningful belief, which occupies in the life of its possessor a place parallel to that filled by God, would be sufficient. The Court in fact went further to add that the sincerity of the belief must be determined by reference to the registrant's "own scheme of things". In other words, the court must judge whether the belief plays the role of religion and functions as a religion in the registrant's life.

Our courts might be faced with what one might call "a conscientious objector" to Muslim law reform. That is, the objector might challenge progressive legislation denying him the scripturally upheld right of polygamy and unilateral divorce on the ground that his sincerely held belief which parallels belief in God in his "own scheme of things" militates against the said change. The court, in such a situation might have to draw a line between a liberal interpretation in the interest of expanding individual religious freedom that prejudices law reform and a restrictive interpretation that sanctions the reform.

It is not difficult to predict what stand the Supreme Court would take if Muslim law reforms are objected to on grounds similar to that advanced in the American Law. For, the Supreme Court has already rejected the definition of religion given by the American Supreme Court in *Davies* v. *Beason*,[78] where it was held that the term "religion" has reference to one's views of his Creator and the obligations they impose of reverence for His Being and character and of obedience to His will. While refusing to follow this definition our Supreme Court observed :[79]

76. *Seeger* case, *supra* n. 74.
77. *Welsh* case, *supra*, n. 74.
78. *Devies* v. *Beason*, 133 U.S. 333 (1810).
79. See *Lakshmindra* case, *supra* n. 11, at 1023. Lest there may be some confusion of thought as to whether the Supreme Court has by rejecting the definition of religion given by the Ameriean Courts, broadened or narrowed down the definition of religion, it is submitted that I have interpreted this observation of the Supreme Court as taking a narrower view of religion. See for a contrary opinion on the point N.A. Subramaniam, "Freedom of Religion", 3 *J.I.L. Inst.* 323, 325 (1961].

> We do not think that the above definition can be regarded as precise or adequate.... We have great doubt whether a definition of "religion" given above could have been in the minds of our Constitution-makers when they framed the Constitution.... A religion undoubtedly has its basis in a system of belief or doctrines which are regarded by those who profess that religion as conducive to their well being, but it would not be correct to say that religion is nothing else but a doctrine or belief.

Thus, our courts are not likely to be influenced by a broader definition of religion[80] adopted by the American judiciary. This, it is submitted, would support Muslim law reforms.

Another possible, albeit not very forceful, argument that may be raised against reform of Islamic law in India is that such an effort by the legislature will infringe the cultural rights guaranteed by the Constitution. Article 29 (1) of the Constitution provides :

> Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.

The argument, it seems, is put forward by mistakenly identifying the practices of polygamy and the right of unilateral divorce exclusively with Muslim culture. The question whether reform of Muslim personal law violates the constitutional provision depends on whether the cultural identity of Muslims[81] in India depends solely or partly upon their religious law. It may be pointed out that Muslims in India are not a unicultural community. Their cultural symbols

80. On the question whether broader view of religion should be taken in the context of personal law reform Ambedkar said :

> The religious conceptions in this country are so vast that they cover every aspect of life, from birth to death. There is nothing which is not religious and if personal law is to be saved, I am sure about it that in social matters ...we will come to a stand still....I personally do not uderstand why religion should be given this vast expansive jurisdiction so as to cover the whole of life and to prevent the legislature from encroaching upon that field.

See 7 *Constituent Assembly Debates*, 781 (1968).

81. Upendra Baxi commends caution in respect of legislation involving Muslims and stresses the need to avoid a "bull-in-China shop" approach on the part of the state in its endeavours to implement article 44 as he apprehends that such an approach "may be perceived as an assault on the distinctive cultural identity of Indian Muslims." See U. Baxi, "Muslim Law Reform, Uniform Civil Code and the Crisis of Commonsense", in T. Mahmood (ed.), *Family Law and Social Change*, 24, 31 (1975).

and practices widely differ according to their regional location, historical background and social status.[82] The attack on reforms on the ground of cultural identity is based on unfounded assumptions and misguided premise that ignore these wide cultural variations among Muslims. A large section of Muslim males is too sophisticated to exercise polygamy, and still a larger section is economically too poor to afford this luxury. In fact, exercise of polygamy by a Muslim individual is viewed and accepted by Muslim society rather critically and almost disapprovingly. Being an exception in its occurrence and regarded as of doubtful social moral quality, polygamy is not a commonly shared cultural value of the Muslim community. Therefore, reform of Islamic law will not affect the cultural rights or identity of the Muslim community and hence cannot be unconstitutional.

CONCLUSION

We have seen that the Indian judiciary has endeavoured its best to solve complex problems connected with religion and religous practices. They have to a great extent succeeded in severing matters which are religious from matters which are secular. They have delineated (though not with precision) the contours of the essentials and non-essentials of a particular religion. They have tried to distinguish between the "rational" and "irrational" and "genuine" and "superstitious" beliefs.

True, it is the function of the court to face up to the dilemma posed by constitutional imperatives and religious freedom. It is the duty of the court to work out a balance between the competing claims of an individual and the state and between an individual and the community. But one gets the feeling that the courts could have avoided, while harmonizing these competing claims, making reference to the rationality or otherwise of an act connected with religion ; or for that matter, the court could have avoided the irksome task of declaring a belief to be genuine or superstitious,[83] "extraneous" or "unessential accretion" of religion.

It may be pointed out in this context that neither in England nor in the United States does a court determine whether practices

82. For example, a Moppla Muslim of Kerala differs so much from his counterpart in Delhi or Lucknow.

83. P. Parameswera Rao says that "the scissors of superstition may not be a safe and reliable instrument to cut short the difficulty in deciding what are matters of religion." See P.P. Rao, "Matters of Religion", 5 *J I.L. Inst.* 509, 513 (1963).

are religious in the absolute sense, nor do they sit in judgement upon the communities' view of what constitutes religion or religious matter.[84] This judicial technique could have been employed by our judiciary to best advantage. In a country like India which comprises of multi-religious communities with vast superstitious beliefs and diverse religious practices the task of the judiciary is more difficult than that of its counterpart in other countries.

84. See J.D.M. Derrett, *Religion, Law and the State in India*, 480 (1968)

LEGISLATIVE POWER IN INDIA : SOME CLARIFICATIONS

M. P. SINGH*

[*The author repudiates the general notion that article 245 of the Constitution is the primary source of all legislative powers of Parliament and state legislatures in India and argues that article 245 simply defines or demarcates the territorial jurisdiction of Parliament and state legislatures, while the substantive power to make laws is derived from some other provisions of the Constitution. Incidentally, he also contends that neither the entire source of legislative power is exhausted by the chapter on "Legislative Relations" (Ch. I of Part XI) read with the three legislative lists in the Seventh Schedule to the Constitution, nor is legislation the exclusive domain of Parliament and state legislatures.*]

I. THE PROBLEM

Certain questions may never come up for specific determination by the court, but their close association with matters in issue may call for incidental remarks from the court. And, unless such remarks are prima facie implausible, in course of time they may acquire credence and be taken as if they were legal exioms for the purposes of subsequent application and development of law. This seems to have happened with the question of location of legislative power in the Indian Constitution. Never has a court been specifically asked to pronounce on the location of the source of legislative power in the Constitution. More specifically, no court has so far been asked : does article 245 confer legislative power on Parliament and state legislatures or does it merely define the territorial extent of their laws ? If article 245 does not confer such legislative power which other provisions of the Constitution confer, the power on Parliament and the state legislatures ? Are Parliament and the state legislatures the exclusive repositories of legislative power or is the power shared by other authorities also ? These are questions which require thorough examination if we are to avoid controversies which surreptitiously

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affect the smooth functioning of the Constitution. This paper offers such an examination.

As the very first opportunity to interpret the Constitution, in *A.K. Gopalan* v. *State of Madras*[1] two of the Supreme Court judges remarked that the opening words of article 245[2] viz. "Subject to the provisions of this Constitution," qualify all legislative powers of Parliament and state legislatures[3]. The remarks were incidental and unnecessary to resolve the dispute before the court[4]. It is also doubtful whether this point was raised or argued by any of the parties. Complete slience of the other three judges on this point buttreses the doubt. But the *obiter* has unfortunately come to be treated as one of the fundamental principles of our constitutional law. In practice, it has been applied to test the validity not only of laws but also of the legislative powers *vis-a-vis* the other provisions of the Constitution and if there appears any conflict between the two, the power is negatived to the extent of such conflict without a serious effort to harmonise or reconcile them. In other words, it has been utilised to attribute conflicts between constitutional provisions in disregard of the most fundamental principle of construction that law makers must be supposed not to have intended to contradict themselves.

Of course, the grant of legislative power must be read in the light of the other provisions of the Constitution, particularly those which prescribe procedure and impose limitations on its exercise. But

1. A.I.R. 1950 S.C. 27 (hereinafter referred to as *Gopalan*).
2. Article 245 reads :
   Extent of laws made by Parliament and by Legislatures of States :
   (1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the legislature of a State may make laws for the whole or any part of the State.
   (2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation.
3. The remarks were made by Kania C.J. and Das J. in *Gopalan, supra* n. 1. Kania C.J. said (at p. 33); "Under Art. 245 (1) the legislative powers conferred under Art. 246 are also made "Subject to the provisions of the Constitution."
   Similarly Das J. said (at p. 107) : "By Art. 245 (1) the legislative power is definitely made 'Subject to the provisions of this Constitution."
   Das J. reiterated his stand in *Re the Delhi Laws Act*, A.I.R. 1951 S.C. 332, 432.
4. The controversy related to the validity of the Preventive Detention Act, 1950 which was challenged on the ground that it violated some of the fundamental rights of the petitioner guaranteed in Part III of the Constitution. The challenge was based on article 13 which prohibits the making of laws taking away or abridging the fundamental rights.

at the same time neither the procedure nor the limitation can be construed to deny or negate the legislative powers, because the Constitution-makers cannot be supposed to have granted a power which they did not intend to be exercised. However, following upon the meaning attributed to the opening words of article 245, the provisions imposing limitations have been construed irrespective of their effect on the powers. This is tantamount to holding that those provisions of the Constitution which impose limitations are supreme and those which confer power are subordinate and that the latter should not be given effect if there appears any conflict betweent he two. One or two examples will clearly establish this approach of the court.

In *Atiabari Tea Co. Ltd* v. *State of Assam*[5] the court was asked to construe the states' power to impose "taxes on goods and passengers carried by roads or inland waterways" under entry 56 of state list *vis-a-vis* freedom of trade and commerce guaranteed in article 301[6]. The court decided[7] that article 301 prohibits imposition of any tax under entry 56 unless the President sanctions such imposition under the exception provided in article 304 (*b*)[8]. Had the court seriously considered that entry 56 was meant to be acted upon in the same manner as article 301 was meant to be enforced, it would have tried to find out when a law on entry 56 is consistent with article 301 and when it is not and accordingly, would have held that in the former case the law will be valid while in the latter it will be invalid unless saved by the exception in article 304 (*b*). But the court, without any serious effort in that direction, adopted a patently erroneous

5. A.I.R. 1961 S.C. 232.
6. Article 301 reads : "Subject to the other provisions this Part, trade, commerce and intercourse throughout the territory of India shall be free."
7. *Supra* n. 5, at 255. This point has been very well analysed and criticised by Professor P.K. Tripathi in *Spotlights on Constitutional Interpretation*, 45 (1972). He says that "the result that as long as article 301 stands no valid legislation can at all be made under entry 56 of the state list is patently unsatisfactory." For further elaboration of this aspect see M.P. Singh, "Freedom of Trade and Commerce v. Power of Taxation", 17, *J.I.L. Inst.* 367, 378-380 (1975).
8. The relevant part of article 304 reads :
   Notwithstanding anything in article 301 or article 303, the legislature of a State may be law...
   (*b*) impose such reasonable restrictions on the freedom of trade, commerce and intercourse with or within that State as may be required in the public interest :
   Provided that no Bill or amendment for the purposes of clause (*b*) shall be introduced or moved in the legislature of a State without the previous sanction of the President.

reasoning that the authority of law "under which alone a tax can be levied is to be found in Art. 245 read with corresponding legislative entries in Schedule VII" and that while that authority was subject to the other provisions of the Constitution freedom enshrined in article 301 was not[9]. Even a cursory reading of the Constitution will show that authority to tax is to be found in article 246 read with the corresponding entry and not in article 245[10]. However, to give superiority to one provision (article 301) over another provision (article 246 read with entry 56 of list II) of the Constitution, the court did nor hesitate to say what it did, which in effect amounts to saying that entry 56 is unconstitutional because it conflicts with article 301. The reasoning in *Atiabari* was latter extended to entry 57 of state list[11] in *Automobile Transport Ltd.* v. *State of Rajasthan*[12].

Again in *Golak Nath* v. *State of Punjab*[13] this approach based on the remarks in *Gopalan* was taken to its logical conclusion. Five judges led by Subba Rao C.J. held that an amendment of the Constitution was a law and since every law-making power was subject to the provisions of the Constitution by virtue of the opening words of article 245, an amendment could not be permitted to abridge or curtail the fundamental rights included in Part III of the Constitution[14]. Had these judges not relied on this reasoning which emerges from the remarks in *Gopalan*, perhaps the decision—or at least the reasons for the decision—in *Golak Nath* would have been different. In any case the court would have felt the necessity of reconciling the power to amend the Constitution with the limitation imposed by the fundamental rights, instead of subordinating the power to the limitation so easily.

9. *Supra* n. 5, 248; (1961) 1 S.C.R. 809, 847-48.
10. In later decisions the Supreme Court itself has said that "The power to legislate is given to thd appropriate legislature by article 246 of the Constitution." *Harakchand* v. *Union of India*, A.I.R. 1970 S.C. 1453, 1458 affirmed in *Union of India* v. *H.S. Dhillon*, A.I.R. 1972 S.C. 1061, 1070.
11. Entry 57 of State List reads : "Taxes on vehicles, whether mechanically propelled or not, suitable for use on roads, including tramcars subject to the provisions of entry 35 of List III."
12. A.IR. 1962 S.C. 1406, 1422. Through in result the court made a departure from *Atalbari supra* n. 5, the reasoning adopted by the court was the same.
13. A.I.R. 1967 S.C. 1643.
14. *Id.* 1658, 1659. To quote Subba Rao C.J. (at 1658, 1659) :

> The limitation in Art.245 is in respect of the power to make a law and not of the content of the law made within the scope of its power.
>
> * * * *
>
> Further there is internal evidence in the constitution itself which indicates that amendment to the Constitution is a 'law' within the meaning of Art. 245.

Of course, *Golak Nath* has been overruled,[15] but the meaning assigned to the opening words of article 245 remains unaffected as regards the legislative power of Parliament and state legislatures.

No more illustrations are needed to bring home the submission made above that the incidental remarks in *Gopalan* have raised some provisions of the Constitution to the status of supremacy, while some others have been subordinated. Such a result could never have been intended by the Constitution-makers. And equally, had this matter been brought before the court for its careful consideration, it would have, hopefully avoided the result brought about by following the meaning attributed to the opening words of article 245.

II. IS ARTICLE 245 A SOURCE OF LEGISLATIVE POWER ?

The prevailing meaning of the opening words of article 245 is based upon the presumption that article 245 is the source of all legislative powers conferred on Parliament and the state legislatures and therefore they are all subject to the qualification imposed in the opening words.[16] Here lies the fallacy. The text of article 245 does not support that meaning nor can it be supported by logical or any other rule of construction. On the contrary, a number of complications and absurdities follow if article 245 is taken to be a source of legislative power.

(a) Rules of interpretation disapprove source theory :

The words of article 245 are quite plain and simple and are capable of one and only one meaning. The context in which they are used merely strengthens that meaning. If we look at article 245, shedding away all preconceived notions, it simply says that while Parliament can make laws for the whole or any part of the territory of India, a state legislature can make laws only for the territory of the state or any part thereof. The express clarification in clause (2) that no law of Parliament shall be deemed invalid on the ground that it has extra-territorial operation, necessarily implies that the laws of state legislatures shall be invalid if they have extra-territorial operation. The use of the words "extra-territorial operation" in clause (2) also implies that the subject-matter of clause (1) is the territorial operation of laws made by Parliament and the state legislatures. In other words, article 245 simply lays down the territorial jurisdiction of Parliament

15. See *Kesavananda Bharati* v. *State of Kerala*, A.I.R. 1973 S.C. 1461.
16. See *Supra* nn. 9, 11 & 14. See also P.B. Gajendragadkar, *The Indian Parliament and Fundamental Rights*, 175 (1972) and V.S. Deshpande, *Judical Review of Legislation*, 55 (1975). *Cf.* n. 10 *supra*.

and the state legislatures to make laws and it has nothing to do with the legislative power or its source which, as will be seen later, is mainly the subject-matter of article 246 and also of some other provisions of the Constitution.

Since the subject-matter of article 245 is only the territorial jurisdiction of Parliament and state legislatures, its opening words qualify only that jurisdiction, i.e., they save those provisions of the Constitution which lay down either that the laws of Parliament and state legislatures shall not extend to certain areas or territories or that they shall extend to them subject to the exceptions made in those provisions.[17] Had these provisions not been there in the Constitution, it is submitted, article 245 would have been unnecessary and the territorial operation of laws of Parliament could be settled on the ground that, being the legislature for the whole of the country, its laws could operate in whole or any part of the territory of the country and they could not be invalid even if their operation was extended beyond that territory because it was the highest law making organ of a sovereign nation. Similarly, the operation of laws of the state legislatures could be settled on the ground that one state could not make laws for the other states. Absence of a provision corresponding to article 245 in other federal Constitutions gives conclusive support to this submission. Hence there should be no doubt that Parliament and the state legislatures could make laws even in the absence of article 245.

Now look at the marginal note to article 245 ("*Extent of laws* made by Parliament and Legislatures of States")[18] and compare it with the marginal note to article 73 ("*Extent of executive power* of the Union")[19] and the marginal note to article 162 ("*Extent of executive power* of State")[20]. Had article 245 been concerned with the legislative power of Parliament and state legislatures, as article 73 and 162 are concerned with the executive power of the Union and the states respectively, the marginal note to article 245 would have read : "*Extent of legislative power* of Parliament and State Legislatures."[21]

17. See, for example, articles 240 (2), 244, 364, 370, 371 A (1) (a) (2) (c) and (2) (d); para 5 (1) and (2) of the Fifth Schedule, and paras 12, 12A, 12B, and 19 (a) of the Sixth Schedule to the Constitution.
18. Emphasis added.
19. Emphasis added.
20. Emphasis added.
21. Emphasis added. It may be noted that for the purpose of interpretation the marginal note to an article of the Constitution stands on a footing different from the marginal note to a section of a statutre. See *Bengal Immunity Co. v. State of Bihar*, A.I.R. 1955, S.C. 661, 667.

Going beyond the marginal note, articles 73, 162 and 245 open with the same words "Subject to the provisions of this Constitution", but then they are followed by the words "the executive power" in both articles 73 and 162, whereas article 245 does not use the expression "the legislative power" or even the word "power". This contrast between the language of articles 73 and 162 on the one hand and the language of article 245 on the other, clearly indicates that the latter is not concerned with legislative power; rather, as is manifest from its language, it is concerned with the extent of the territorial operation of laws which Parliament and state legislatures may make under the legislative power conferred on them elsewhere. Had article 245 been concerned with legislative power it would have been worded like articles 73 and 162 clearly incorporating all the legislative powers in its text. But since that is not the case, the meaning attributed to article 245 cannot be justified.

In this regard the provisions that vest executive power of the Union in the President (article 53) and the executive power of the state in the Governor (article 154) also offer some guidance. These provisions vest the executive power in the two executive heads and also state that they shall exercise it "in accordance with this Constitution". There is no corresponding provision in respect of legislative power i.e., neither the Constitution specifically and expressly vests the legislative power in any one organ of the Union or the states, nor does it mention anywhere that it should be exercised in accordance with the Constitution. From this it should not be inferred that the Constitution does not give the legislative power to anybody or that it need not be exercised in accordance with the Constitution or that it may be exercised in disregard thereof. The only submission is that not only article 245 does not expressly vest the legislative power in Parliament and state legislatures, but there is also no scope to read it in that article by way of implication.

The submission that article 245 is not concerned with "power" finds unqualified support from its context. The articles immediately following it use the word "power" again and again making it quite clear that it is they which confer "power" and not article 245. No convincing reason can be adduced to justify the use of the words "power to make law" in all the four clauses of article 246, if that power had already been conferred by article 245. The repeated use of the word "power" in article 246 and latter articles of Chapter I of Part XI and its absence from article 245 suggest that the Constitution-makers wanted to make it indisputably clear that

the subject-matter of article 245 is not "power" and perhaps in the quest for that clarification they omitted the word "power" from article 245 which at one stage existed in its clause (2). Thus, in addition to the language of article 245, its context also disapproves the attributed meaning.

The language of article 245 being clear, and its context making it clearer, there is no need to invoke any other aid for its interpretation However, to dispel any remaining doubt it may be mentioned that even the constituent history and background of article 245 do not support the meaning assigned to it.[22]

22. As is well known, article 245 is an adaptation of section 99 of the Government of India Act, 1935 just as article 246 is of section 100 of that Act. Section 99, with which we are immediately concerned, read :

> *Extent of Federal and Provincial Laws* : (1) Subject to the provisions of this Act, the Federal Legislature may make laws for the whole or any part of British India or for any Federated State and a Provincial Legislature may make laws for the Province or any part thereof.
>
> (2) Without prejudice to the generality of the powers conferred by the preceding sub-section, no federal law shall, on the ground that it would have extra-territorial operation, be deemed to be invalid...

Clause (2) of section 99 was omitted by the India (Provisional Constitution) Order, 1947, and the words "for the whole or any part of British India or for any Federated State" in clause (1) were replaced by the words "including laws having extraterritorial operation for the whole or any part of the Dominion." It was this modified section which was adopted as clause 179 in B.N. Rau's draft of the Constitution. That clause read :

> *Extent of Federal and Provincial Laws* (*cf.* Government of India Act, 1935, s. 99). Subject to the provisions of this Constitution the Federal Parliament may make laws, including laws having extra-exterritorial operation, for the whole or any part of the territories of the Federation and a Provincial Legislature may make laws for the Province or for any part thereof."

See 3 B. Shiva Rao (ed.), *The Framing of India's Constitution*, 74 (1966)

In its first reading, the Drafting Committee gave to clause 179 the present language of clause (1) of article 245 with the exception that the words "including laws having extra-territorial operation" were retained within brackets and the commas before and after them were omitted. (B. Shiva Rao, *loc. cit.* at 447). In the next revision the bracketed words alongwith the brackets were omitted (B. Shiva Rao, *loc. cit.* at 474-75). No reasons were supplied for the change. On further revision, again without giving any reasons, the changed clause 179 was numbered as clause 179 (1) and a sub-clause (2) was added to it which adopted the language of clause (2) of section 99 but excluding its sub-clause (B. Shiva Rao, *loc. cit.* at 484). The new clause read :

> Without prejudice to the generality of the *powers conferred* by the preceding clause, no law made by Parliament shall, on the ground, that it would have extra-territorial operation, be deemed to be invalid. (Emphasis added).

Nor can such a support be found in the interpretation of section 99 of the Government of India Act, 1935 to which article 245 corresponds[23]. Though a reference to *power* was expressly made in clause (2) of that section, which was deliberately omitted from clause (2) of article, no authentic pronouncement was made till the adoption of the Constitution or thereafter upto *Gopalan* that the opening words of section 99 had the meaning now assigned to the opening words of article 245[24]. On the contrary, the commentators on the Government of India Act 1935, had clearly expressed much before the drafting of the Constitution that that section defined the territorial ambit of the provincial and federal laws and accordingly the opening words qualified

In the final revision, sub-clause (2) of clause 179 was brought to the present form of clause (2) of article 245. Though again no reasons were supplied for the change, yet it may be inferred that the opening words, "without prejudice to the generality of the *powers conferred* by the preceding clause". of the original sub-clause (2) of clause 179 gave an impression that sub-clause (1) thereof conferred powers and therefore they were omitted to put it beyond controversy that article 245 had anything to do with *power*. (emphasis added).

The drafting history of article 245 supplies no more clues to ascertain the intention of the Constitution-makers because the article as framed by the Drafting Committee was adopted by the Constituent Assembly without any discussion and even the two amendments to it were not moved. See 8 *Constituent Assembly Debates*, 793.

23. For section 99 of the Government of India Act, 1935 and the drafting history of article 245 see the preceding note.

24. Perhaps the remotest support can be found in the following obiter of Spens C. J. in *Governer-Gen. in Council* v. *Raleigh Investment Co. Ltd.*, 214 I. Cas. 244. Explaining that clause(2) of section 99 did not restrict the extra-terriorial jurisdiction of federal laws to the matters mentioned therein he took up entry 23 of the Federal Legislative List—"Fishing and fisheries beyond territorial waters"—to illustrate his point and said (at p. 254) :

> It would not be right to derive the power to legislate on this topic merely from the reference to it in the List, because the purpose of the Lists was not to create or confere powers, but only to d stribute b:tween the Federal and the Provincial Legislatnre the powers which have been conferred by ss. 99 and 100 of the Act.

Perhaps reference to section 100 alone would have been enough but since the Chief Justice was emphasising that the federal legislature could not make laws for fishing *beyond territorial waters* if section 99(2) permitted to make extra-territorial laws only with respect to the matters mentioned in its sub-causes, he mentioned section 99 also to make it clear that there were no limitations on the extra-territorial operation of the laws made by the federal legislature.

that ambit[25]. In view of the territorial distinctions between India, British India, Provinces, Indian States, Federated States, Excluded Areas and Tribal Areas recognised by the 1935 Act, which put substantial limitations on the territorial jurisdiction of federal and provincial laws, that could be the only sound interpretation of section 99. The legislative history of section 99 fully supports such interpretation of that section[26]. The Constitution-makers must be presumed to have known that interpretation of section 99 as well as the reasons for its inclusion in the Act. Since the problem of the Indian States was not solved till after final shape was given to article 245 and since special arrangements were to be made for the scheduled and tribal areas and some other territories, they should be presumed to be adopting article 245 for similar reasons as lay behind section 99 and also with the same meaning as was given to that section with the additional clarification that the word "power" was removed from clause (2) of the article which existed in clause (2) of the section.

Thus, the literal meaning of article 245 finds full support in the context as well as the history of that article. That being so, the literal meaning should be accepted without regard to the consequences. But as a matter of fact in this case adherence to the literal meaning will smoothen the working of the Constitution and will bring

25. See, for example, N.R Aiyangar, *The Government of India Act*, 1935, 118(1937); M. Ramaswamy, *The Law of the Indian Constitution*, 191(1938); S M Bose, *The Working Constitution in India*, 203(1939); G N Joshi, *The New Constitution of India*, 240-41 (2d ed 1941).

26. The Parlimentary debates do not have any discussion on section 99(1) though there is same disscussion on section 99(2). See *Parlimentary Debates Commons*, 299, columns 1323—1328, and 300 *Parliamentary Debates Commons* columns 1964 and 1264. But this discussion does not disclose any reasons for the adoption of clause(1) of section 99. However, the *Report of the Joint Committee on Constitutional Reforms* (1934) is quite clear on this matter. Para 159 of the report entitled "The Area of Federal Jurisdiction" reads (v. 1, part I, page 89) :

> The area of federal jurisdiction will extend in the first instance to the whole of British India. As regards the States which have acceded to the Federation, the federal jurisdiction will extend to them only in respect of those matters which the Ruler of the State has agreed [in his Instrument of Accession to accept as Federal.

Para 144 of the report (page 80), which deals with the jurisdiction of Provincial legislatures, is more clear :

> It is proposed that the powers of Provincial Legislature should not extend to any part of the Province which is declared to be an "Excluded Area" or a "Partially Excluded Area"... In neither case will any Act of the Provincial Legislature apply to the Area, unless by direction of the Governor...

harmony in its various provisions while, as will be seen below, thep revalent meaning of artiele 245 will lead to various contradictions and absurdities.

An objection to the literal meaning of article 245 may be raised by those who rely (and most of us rely) on its opening words to locate the power of judicial review of legislation[27]. Perhaps it was that impression which led Kania C.J. add Das J. to make their remarks in *Gopalan*[28] and it is that impression which led to the general acceptance of the distorted meaning of article 245. Reserving a full discussion on judicial review in the Indian Constitution for some other occassion, it is enough to say here that the impression that the power of judicial review emanates from or depends on the express words in the constitution is not correct. A general perusal of the world constitutions will reveal that there is no basic difference in language between those constitutions which recognise judicial review and those which do not. By and large, it is an accepted proposition that the U.S. Constitution, under which judicial review in the present sense of the term was established for the first time[29], does not contain a word on judicial review[30]. On the contrary, the power of judicial rewiew is fully recognised under the British North America Act, 1867, although it grants legislative power to Canadian Parliament "notwithstanding anything in this Act"[31]. Similarly, section 65 of the Government of India Act, 1915, which conferred legislative power on the Indian legislature, had no words corresponding to the opening words of article 245, yet judicial review was recognised

27. See, for example, V.S. Deshpande, *op. cit., supra* n. 16 and D.D. Basu, *Limited Government and Judicial Review*, 291 (1972).

28. Though Kania C.J. did not cite any specific provision, Das J. specifically cited article 245 (1) ; see A.I.R. 1950 S C. 27, 107-108.

29. See *Marbury* v. *Madison*, I Cranch. 137 (U.S. 1803)

30. E.S. Corwin, "Judicial Review" in 1 *Encyclopaedia of the Social Sciences*, 457 (1932); R.H. Jackson, *The Struggle for Judicial Supremacy*, 4 (1962) ; L. Hand, *The Bill of Rights*, 10 (1967) ; A.M. Bickel, *The least Dangerous Branch*, 1 (1962); Boudin, 1 *Government by Judiciary*, 114 (1932) ; Crosskey, 2 *Politics and the Constitution*, 1028 (1953). *Cf.* H. Wechsler, "Towards Neutral Principles of Constitutional Law," 73 *Harvard L. Rev.* 1, 2 (1959); C. L. Black, *The People and the Courts*, 6 (1960). It may be noted that even Chief Justice Marshall in *Marbury v. Madison*, 1 Cranch, 137 (U. S. 1803), did not rely on any specific provision of the Constitution to establish the power of judicial review.

31. The British North America Act, 1867, s. 91.

under that Act and even prior to that[32]. As against this, there are constitutions which expressly lay down that the Constitution is the supreme law of the land and yet all efforts to establish judicial review under them have failed in practice[33]. For the existence of judicial review of legislation in common-law countries except England, one might like to agree with Professor Mc Whinney that the history of these countries accounts for it[34]. And in the Indian context

32. It may, however, be noted that section 80A(1) of the Government of India Act, 1915, which was inserted in 1919 empowering the provincial legislatures to make laws, used the words "subject to the provisions of this Act.": But at the same time it may also be noted that section 80A (1) had specific reference to "territories" constituting that province while there was no reference to "territory" in section 65. It suggests that the words "subject to the provisions of this Act" in section 80A (1) qualified the operation of laws and not the law-making power as such.

Note may also be taken of the words inserted in 1916 at the end of section 84A (1) which provided that the laws repugnant to the provisions of the Act will be void to the extent of such repugnancy. But even in the absence of these words the legal position could not be in any way different because the courts had already established their power to judge the validity of laws. See *Emperor* v. *Burah*, 3 Cal. 63 (1877) and *R.* v. *Burah*, 3 A.C. 889 (P.C. 1878).

33. See, for example, the Constitution of Japan, article 98. *Cf.* M. Cappellatti and J.C. Adams, "Judicial Review of Legislation: European Antecedents and Adaptations", *79 Harvard L. Rev.* 1207 (1966). In this article the authors have tried to show how in many countries outside the common-law world the American doctrine of judicial review has been expressly incorporated in their Constitutions, but they have not been able to cite even a single instance in any of these countries where judicial review in the American or Indian sense has been exercised.

34. E. McWhinney, *Judicial Review in the English speaking world*, 13-14 (4th ed. 1969). He says (at pp. 13, 14) :

> The historical origins of direct judicial review in the Commonwealth countries seem to reduce to the fact that the Privy Council originally exercised that power in relation to the overseas Empire, just as it did in relation to thirteen American colonies before 1776. The essential premise on which the Privy Council proceeded was that colonial legislatures were subordinate legislative bodies vis-a-vis the United Kingdom Parliament, and that their enactments were therefore subject to review by the Court on the same basis as, for example, regulation passed by local government.

He goes on to say (at p. 15) :

> Since *none of the Constitutions of the Commonwealth contains express provision for direct judicial review* the carry over of the practice by both the Privy Council and local appellate tribunal, long after the parliaments have ceased to be subordinate legislative bodies vis-a-vis United Kingdom Parliament, would seem primarily due to the fact *that the practice has become ingrained over the years and its historical roots and justifications have been forgotten*, an example perhaps of long-time user and practice ripening into a binding "convention" of Constitutional Law. (emphasis added).

CF. H.M. Seervai, *Constitutional Law of India*, 9 (1967).

we may authoritatively quote from the recent openion of Ray C.J. that "Judicial review is not to be founded on any Article[35]".

Accordingly, the notion that judicial review emerges from the words of the constitution should be abandoned and so also the distortion of the literal and natural meaning of article 245. Insistence on reading judicial review in article 245 will be self-defeating and will produce results which the adherents of that view would never agree to accept. We now turn to a number of difficulties, and indeed absurdities, which arise from the view that article 246 is the source of all legislative powers and that its opening words qualify them.

(b) Source theory produces absordities and anomalies

It may be noted that articles 247, 249, 250 and 253, which are included in the same chapter (Chapter I of Part XI) in which article 245 finds place, open either with the words "Notwithstanding anything in this Chapter" or with the words "Notwithstanding anything in the foregoing provisions of this Chapter". Certainly, these words cover article 245, which is the first article in that Chapter, and logically they would also mean "notwithstanding anything in article 245" which, read with the opening words of article 245, means "notwithstanding anything in this Constitution". Accordingly, it should mean that Parliament can make laws under articles 247, 249, 250 and 253 "notwithstanding anything in this Constitution," including the fundamental rights. Would those who read article 245 as the source of all legislative powers agree with this result ? Presumably, they would not; if they did, they would contradict their own stand that all legislative powers are subject to the provisions of the Constitution. Articles 249, 250 and 253 are so wide that the entire Constitution will be upset if Parliament is supposed to enact laws under their authority "notwithstanding anything in this Constitution."

To avoid this situation, as well as to defend their stand, the supporters of the purported meaning of article 245 might suggest (as a student of the Constitution is made to understand) that the non-obstante clauses of articles 247, 249, 250 and 253 cover only article 246. But on what principle of construction can we substitute for the words "this Chapter" or "the foregoing provisions of this Chapter" used in these articles the word and figure "article 246" in the non-obstante clauses of these articles, particularly in view of the fact that wherever the Constitution-makers wanted to make an exception only to article

35. *Smt. Indira Nehru Gandhi* v. *Raj Narain*, A.I.R. 1975 S. C 2299, 2318.

246 they did it specifically[36]. There can be no doubt that while the words "this Chapter" cover all provisions of Chapter I of Part XI, the words "the foregoing provisions of this Chapter" cover only the provisions preceding that article. And in using these two different expressions in the non-obstante clause of different articls the Constitution-makers cannot be supposed to have had in their minds only article 246 and therefore to substitute the expression "article 246" for these expressions would be contrary to all canons of statutory or constitutional interpretation.

The champions of the existing meaning of article 245 may further assert that, however wide be the non-obstante clauses of 247, 249, 250 and 253, they cover only article 246 because articls 249 and 250 specifically mention that Parliament can make laws on state list which under article 246 is exclusively reserved for state legislatures. But what would they say about articles 247 and 253 ? These articles do not speak of state list at all. Moreover, if this argument is taken to cover only article 246 within the non-obstante clause, then by the same argument article 245 will have to be included because articles 249, 250 and 253 repeat the words "Parliament [may]...make laws for the whole or any part of the territory of India" used in article 245, which again means that notwithstanding anything in article 245 Parliament can, under these articles, make laws for the whole or any part of the territory of India. Thus the non-obstante clause of these articles can, in no way, fail to take account of article 245 so long as power to legislate is read in it.

This will lead to further difficulty. Some of the provisions which are exceptions to the territorial jurisdiction of Parliament, such as articles 364 and 371A and paras 5 and 12 A of the Fifth and the Sixth Schedules respectively, open with the words "Notwithstanding anything in this Constitution". It has been noted above that the opening words of articles 249, 250 and 253, read with the opening words of article 245, also amount to saying "notwithstandiug anything in this Constitution". If Parliament can make laws under these latter articles (249, 250 and 253) notwithstanding anything in this Constitution," then how will they be reconciled with the former articles (364 and 371A) and the paras ? For example, article 371A says that "Notwithstanding anything in this Constitution" no law of Parliament in respect of the matters enumerated in clause (1) (a) "shall apply to the State of Nagaland unless the legislative Assembly of Nagaland by a resolution so decides". With the existing meaning

36. The Constitution of India, art. 276 (1).

assigned to article 245, there is no possible solutiod to resolve the conflict between this provision and articles 249, 250 and 253. This difficulty seems to arise even with the literal meaning of article 245 but as will be explained later that, should not happen in fact. Before explaining that, one more connected illogicality inherent in the prevailing meaning of article 245 may also be mentioned.

A drafting flaw is created in the Constitution by the existing interpretation of article 245. If power is conferred by article 245 subject, among others, to the provisions of articls, 247, 249, 250 and 253, the non-obstante clauses of these articles become superfluous at least to the extent of article 245. A good draftsman would not do that and in any case we should avoid lightly attributing bad draftsmanship to the Constitution-makers.

All these difficulties and absurdities are removed as soon as the literal meaning of article 245 is accepted. According to that meaning, the subject-matter of article 245 is different from the subject-matter of the other articles in Chapter I of Part XI of the Constitution While the subject-matter of the other articles, particularly articles 246 to 250, 252 and 253, is the "power" to make law, the subject-matter of article 245 is only the territorial judisdiction or operation of the laws made in exercise of that power. Since it is so, whatever is said in article 245 does not affect anything said in the other articles and *vice versa*. In other words, since the subject-matter of articles 247, 249, 250 and 253 is power to make law, their non-obstante clauses cover only those articles whose subject-matter is also the power to make law. For example, the subject-matter of article 246 is the power to make law, but articles 251 and 254 deal only with the inconsistency between laws of Parliament and state legislatures and similarly article 255 deals with some procedural matters. Although articles 251, 254 and 255 are as much part of Chapter I of Part XI of the Constitution as article 246, yet the the non-obstante clause, for example, of article 250 does not effect articles 251, 254 and 255, though it certainly affects article 246. On the same reasoning the non-obstante clause of article 250 or of other articles in that chapter will not affect anything in article 245. Thus the territorial jurisdiction of Parliament will remain subject to the limiation imposed by the opening words of article 245, even when it is legislating under the authority of articles 247, 249, 250 and 253 and the words "for the whole or any part of the territory of India" used in articles 249, 250 and 253 should not make any difference because their repetition in these articles is the result of the history behind them and therefore they should be

understood and interpreted in that context.[37] This interpretrtion completely harmonises articles 249, 250 and 253 with provisions like articles 364 and 371A, and paras 5 and 12A of the Fifth and the Sixth Schedules respectively.

Even if the literal meaning of article 245 is accepted the point raised above concerning drafting flaw may also be raised in relation to some of the provisions which are exceptions to the territorial jurisdiction of Parliament and the state legislatures. For example, articles 364, 370 and 371A and para 5 of the Fifth Schedule and Para 12A of the Sixth Schedule open with the words "Notwithstanding in this Constitution." It may be argued that the opening words of these provisions become superfluous, if the territorial operation of the laws of Parliament and the state legislatures is already subject to the provisions of the

37. It has been noted above that articles 245 and 246 are based respectively on sections 99 and 100 of the Government of India Act, 1935. Similarly article 250 is based on section 102 of that Act. (See marginal note to clause 182 of B.N. Rau's Draft of the Constitution in B. Shiva Rao *op. cit. supra* n, 22). Under section 102 the federal legislature could make laws only for a province or any part thereof and could not make laws for federated states which were governed by the provisions of section 101. Since power in section 102 was "Notwithstanding anything in the preceding sections" including, of course section 101, it was to be made clear that nothing in section 102 would affect the position of federated states. The Indian States had not been brought at par with the provinces or other states when Sir B N Rau prepared his draft of the Constitution. Clause 181 of his draft corresponded to section 101 of the Act while clause 182 corresponded section 102. Following the scheme of the Act, Rau's draft made it clear that under clause 182 Parliament could make laws only for provinces and the position of the federated states, as specified in clause 181, could not be affected. When the Drafting Committee considered these clauses, the Indian States still stood in a different category. The Committee, however, decided that clause 181 "should be transferred to the Chapter dealing with special provisions regarding States" and that clause 182 be revised. (See B. Shiva Rao *op. cit. supra* n. 22 at 447). Simultaneously decision was taken to insert, inter alia, two new clauses—181A and 183A (now articles 249 and 253 respectively). (B. Shiva Rao *op. cit. supra* n. 22 447, 449 and 450). Shifting of clause 181 to a separate chapter removed the limitation created by it whose note the original clause 182 had to take in view of its non-obstante clause to make it clear that nothing in the latter clause affected the former. On this change, the members of the Drafting Committee, presumably to emphasise that now the power of Parliament to make law under clause 182 was not confined to the territory of the provinces; expressly repeated the words already used in clause 179 (now article 245) so that no doubts could be entertained in this respect. The same formula was applied to the new clauses 181A and 183A. Since the clause that became article 247 was not added at this stage it does not have those words though it is another matter that those words would have been absent from it because of its distinct character even if it had been inserted alongwith the other clauses.

Constitution by virtue of the opening words of article 245. In this regard, it may be submitted that these provisions are not only exceptions to article 245, but they are also exceptions to other articles of the Constitution such as articles 246, 248, 249, 250 etc., and since these other articles do not express that they are subject to the other provisions of the Contitution, the Constitution-makers expressly clarified the position in the non-obstante clause of the abovementioned articles and paras. A number of other provisions in the Constitititution also have the same opening words or the non-obstante clause, though they have nothing to do with the territorial jurisdiction defined in article 245.[38]

Thus a completely logical and smooth scheme of the Constitution is worked out if the literal interpretation of article 245 is adhered to, whereas intractable problems crop up by pursuing the existing approach to that article. And the problems noticed above are not all; there are a number of others which may also be mentioned. A connected anomaly is that if the subjection of the legislative power to the provisions of the Constitution depends upon the opening words of article 245 and and not otherwise, then what about the legislative powers assigned to and exercised by bodies other than Parliament and state legislatures? For example, under article 240 the President can make regulations for the "peace, progress and good government" of certain union territories; or under para 5(2) of the Fifth Schedule the Governer may make regulations for the "peace and good government" of any scheduled area within the state; or under para 3 of the Sixth Schedule district and regional councils can make laws with respect to the matters mentioned in that para. None of these provisions has anything like opening words of article 245. Should we apply the maxim *expressio unius exclusio alterious* and hold that while the powers of Parliaiament and state legislatures are subject to the provisions of the Constitution, similar powers of the other bodies are not ?[39] It isextremely doubtful whether those who read the power of judicial review in the opening words of article 245 would accept this proposition. But what

38. See, for example, articles 35 and 369.

39. The Supreme Court in *Hari Chand Sarda* v. *Mizo Distt.*, A.I.R. 1967 S.C. 829, has held that a regulation made by a district council under para 10 of the Sixth Schedule is void if it imposes unreasonable restrictions on the right under article 19 (1) (g). It may, however, be noted that the fundamental rights stand on a different footing because of article 13. See also *I. M. Kanniyan* v. *I. T. Officer Pondicherry*, A.I.R. 1968 S.C. 637.

else can they say, unless they give up their stand on article 245 and restore to it its literal meaning ? That is why it was submitted above that to read the power of judicial review in the opening words of article 245 is self-defeating.

Moreover, if article 245 is taken to be the source of all legislative powers of Parliament and the state legislatures, subject to the other provisions of the Constitution, then the entire scheme of distribution of legislative powers laid down in article 246 and other provisions of the Constitution will be upset because in that case the distribution of legislative powers will have to be read subject to all other provisions of the Constitution which refer to law-making by Parliament or state legislatures or both. For example, under clauses (2) to (6) of article 19 reasonable restrictions on specified grounds may be imposed by law on the various rights guranted in clause (1) of that article; or under articles 25 and 26 religious freedom is guaranteed subject to "public order, morality and health".[40] Can it be accepted that under the authority of these provisions laws may be made by Parliament and state legislatures without regard to arti cle 246 because the distribution of legislative powers is subject to the other provisions of the Constitution by virtue of the opening words of article 245 ?

Similarly, should we accept that for the implementation of various directive principles of state policy laws may be made without regard to the distribution of legislative powers in article 246 ? To be specific, can Parliament pass laws under article 40to establish village panchayats in disregard of the fact that "local authorities for the purpose of local self-government or village administration" is a subject in the state list ? Or can it legislate under article 45 to provide compulsory educution upto the age of fourteen years disregarding the fact that primary and secondary education is exclusively a state subject?[42] Opinions have already

40. In *Yulitha Hyde* v. *State*, A.I.R. 1973 Ori. 116, the Orrisa High Court refused to uphold the Orrisa Freedom of Religion Act, under the authority of the opening words of article 25 or the words "public order" in article 19 (2) because they could not be used as legislative heads. But it is doubtful as to what would have been the outcome if the state had argued that all legislative powers of Parliament of were subject to the provisions of the Constitution by virtue of the opening words article 245 and therefore they were subject to the words "public order" in article 19 (2) and to the opening words of article 25.

41. The Constitution of India, Sch. VII, List II, entry 5.

42. *Id*. entry 11. See also *Gujarat University* v. *Shri Krishna*, A.I.R. 1963 S.C. 703, 715. *Cf*. P.K. Tripathi, "Legislative Relations between the Union and the States and Educational Planning" in G.S. Sharma (ed.), *Educational Planning : Its Legal and Constitutional Implications in India*, 10-11 (1967).

been expressed that article 302 grants to Parliament a general power to impose restrictions on the freedom of trade, commerce and intercourse in the public interest.[43] There should be no reason not to read similar with the state legislature under article 304 to impose non-discriminatory taxes on the goods imported from other states if similar goods produced or manufactured in the state are subject to such tax[44] and also to impose reasonable restriction on the freedom of trade, commerce and intercourse in the public interest. Hardly need it be mentioned that the word "interest of the general public" used in some of the clauses of articles 19, "public interest" and "trade, commerce and intercourse" in articles 302 and 304 are words of very wide amplitude which, if utilised for making laws as independent grants of legislative power, will totally destroy the structure so carefully made in Chapter I of Part XI read with the three detailed lists in the Seventh Schedule to the Constitution. But no rule of interpretation can be invoked to avoid such a result, if all legislative powers granted in that chapter are to be read subject to the other provisions of the Constitution by virtue of the opening words of article 245. Moreover, it may be noted that the examples given above are just a fraction from among many scattered all over the Constitution.

Again, in case conferment of law-making power is to be found in article 245 then clause (4) of article 246 becomes superfluous, because even in the absence of that clause Parliament could make laws for the union territories by virtue of its power under article 245. Presence of clause (4) of article 246 clearly establishes that the power to legislate is conferred not by article 245 but by article 246.

Lastly, if power to legislate is derived from article 245 then it will not be possible to reconcile the opening words of that article with exactly the same opening words of some other articles which confer legislative power for specific purpose. For example, "Subject to the provisions of this Constitution" article 327 confers power on Parliament

43. See W.G. Rice, "Division of Power to Control Commerce Between Centre and States", 1 *J.I.L. Inst.* 151, 159-60 [(1958-59); D. D. Basu, *Commentary on the Constitution of India*, v. 5, 95 (5th ed., 1970).

44. See the following observation of Das J. in *Automobile Transport Ltd.* v. *State of Rajasthan* A.I.R. 1962 S.C. 1406, 1418 :

> Thus the States in India have full power of imposing what in American State legislation is called the use tax, gross receipts tax etc. not to speak of the familiar property tax, subject only to the condition that such tax is imposed on all goods of the same kind produced or manufactured in the taxing state...

See also H.M. Seervai, *op. Cit. supra* n. 34 at 999-1000 (1967).

and article 328 confers power on state legislatures to make laws in respect of elections to Parliament or state legislatures as the case may be. If all legislative power is already "subject to the provisions of this Constitution" by virtue of article 245, then why this repetition in articles 327 and 328? The anomly can be resolved by accepting the literal meaning of article 245. In that event the opening words of article 245 become irrelevant for the purpose of articles 327 and 328, (though the rest of article 245 is relevant because the legislature of one state cannot make laws for elections to the legislature of another state), and the opening words of these articles then refer to article 246 which in its clause (1) read with entry 72 of the Union list grants exclusive power to Parliament to legislate with respect to elections to Parliament and state legislatures and in its clause (3) read with entry 37 of the state list grants exclusive power to state legislatures to make laws with respect to the elections to the legislature of the state subject to the provisions of any law made by Parliament.

The foregoing description of complications and difficulties inherent in the prevalent notion of article 245 may not be exhaustive but it is sufficient to establish that the Constitution-makers could never have intended to create such a confusion. As already noted, inference may be drawn from the history of article 245 that they apprehended a misinterpretation of their intention as expressed originally and therefore finally they expressed it so clearly that all chances of reading legislative power or its source in that article were eliminated. However, may be unwittiningly, we have frustrated their effort. We can serve them and solve the intractable problems facing us just by restoring the literal meaning of the words—the primary and the golden rule to ascertain the intention of a legislator or constitution-maker—expressed so clearly and unambiguously in article 245.

III. SOURCES OF LEGISLATIVE POWER

If article 245 is not the source of legislative power, as advocated here, the question arises : Is there any textual source of that power in the Constitution ? Before answering that question it may be mentioned that though Parliament and state legislatures are the main legislative or law-making bodies created by the Constitution, yet they are not the only bodies. In other words, law-making is not the exclusive domain or function of Parliament and state legislatures.[45]

45. *Cf.* V.S. Deshpande, *op. cit. supra* n. 16, at 55. He says :
> The authority to legislate was vested by the Constitution *exclusively* in the Parliament and in the State Legislatures by article 245 (1) of the Constitution. (emphasis added).

There are, as already noted, other bodies or authorities also which derive legislative powers directly from the Constitution and within the field assigned to them their powers are as good as those of Parliament and state legislatures. To project a complete picture of all legislative powers granted by the Constitution, it will be proper to discuss the entire subject in two stages. First we should see the powers of Parliament and state legislatures and then the powers of other authorities. The following discussion is meant only to enumerate the provisions from which power to legislate arises ; it is not intended to lay down their reach which lies much beyond the limited purpose of this paper.

(a) Legistative Powers of Parliament and State Legislatures :

Article 246 read with the three lists[46] in the Seventh Schedule is the main, though not exhaustive, source of legislative powers of Parliament and state legislatures. A number of other constitutional provisions also confer legislative power on Parliament and state legislatures in addition to or in some cases notwithstanding the power conferred by article 246. The number of such provisions conferring power on Parliament is much larger than those conferring power on state legislatures. Actually, the overall number is so large that it requires great stamina and patience to locate all of them in a Constitution consisting of 395 articles and nine schedules. The fact that some of the provisions do not confer any new power but just refer to the power conferred by article 246 (also article 248 in case of Parliament) makes the job more difficult because it requires constant reference to legislative lists to find out if the law referred to in particular article is already covered in any of the items in the three lists. Because of this no claim can be made that the enumeration of such provisions in the following discussion is complete and accurate in all respects. However, it will fully serve the present purpose viz., that not only article 245 is not the source of legislative power of Parliament and state legislatures but also all of their powers are not covered by Chapter I of Part XI of the Constitution. With these remarks provisions conferring legislative power on Parliament and state legislatures may be mentioned.

46. It may be noted that the lists themselves are not the source of power. They simply enumerate the subjects with respect to which legislative power conferred by article 246 may be exercised. See *Harakchand* v. *Union of India*, A. I. R. 1970 S. C. 1453, 1458 and *Union of India* v. *H. S. Dhillon*, A. I. R. 1972 S. C. 1061, 1070.

First, we may refer to the provisions of Chapter I of Part XI (articles 247, 248, 250, 251 and 253). Article 248 confers residuary powers of legislation exclusively on Parliament ; article 252 authorises Parliament to make laws on matters within the competence of state legislatures if two or more states consent and request for such legislation and the rest of the provisions empower Parliament to make laws for the specific purpose and in the manner provided in them, the exclusive powers of state legislatures under article 246 (3) notwithstanding.[47]

The provisions outside Chapter I of Part XI conferring legislative power on Parliament may be classified into several categories. First, there are provisions which confer constituent power (or call it amending power if a distinction has to be drawn between the constituent and amending powers)[48] as a law under them can make incidental changes in the Constitution without following the procedure prescribed by article 368. Articles 2, 3, 4, 169, 239A, 244A, and paras 7 and 21 of the Fifth and Sixth Schedules respectively, are provisions of this nature. Second, there are provisions which confer power on Parliament notwithstanding anything in the Constitution such as articles 16(3), 17, 23, 32 (3), 33, 34, 35,[49] 262 (2) and 369. A law under these provisions will be valid even though it conflicts with the distribution of legislative powers as laid down in article 246 or elsewhere. Third, provisions like articles 22(7), 70, 100(3), 119, 171, 172, 258(2), 261, 262 267(1), 272, 275, 280 (2), 283 (1), 285, 286 (2), 292, 293, 307, 327, 341(2), 342(2) 343(3), and 353(b) may be called instances of specific grant of power to Parliament for specified purpose though they could also be covered by article 248. The justification for these provisions is that though none of the matters specified in them is covered by any of the entries in the three lists in the Seventh Schedule, yet if any of these matters incidenatlly falls in the state or concurrent list, it will be presumed to be excluded from those lists and will be treated within the exclusive domain of Parliament. Fourth, there are provisions which state that "Parliament may by law" do the things mentioned in them; e. g., articles 11, (citizenship), 71(3) (election of President and Vice-President), 80(5) (representation of Union territories in the Council of

47. It has been noted above that inspite of the wide language in the non-obstante clause of articles 247, 249, 250 and 253 its real impact is only on exclusive state powers conferred by article 246 (3).

48. See C. J. Friedrich, *Constitutional Government and Democracy*, 137-138 (4th ed. 1974).

49. The non-obstante clause of article 35 covers articles 16 (3), 32 (3), 33 and 34.

States), 84(c) (qualifications of members of Parliament), 101(1) (vacation of seat by a member in one House of Parliament on being elected to both Houses), 102(e) (disqualifications for members of Parliament), 104 (prohibition to sit or vote as member of Parliament), 173(c) (qualifications of members of state legislatures), 191 (e) (disqualifications for members of state legislatures), 193 (prohibition to sit or vote as member of state legislatures), 231 (establishment of common High Court for two or more states), 241 (constitution of a High Court for a Union territorry) and 321 (Union Public Service Commission). The subject matter of these provisions is covered by one or the other entry in the Union List or in any case by entry 97 of that list and article 248. Lastly, articles 356 (1) (b) and 357 form a separate category in so far as Parliament can make any law with respect to any matter for a state whose legislature has been suspended or dissolved because of constitutional breakdown in the state.

Like Parliament, state legislatures also derive law-making powers from provisions outside Chapter I of Part XI, or more specifically outside article 246 (2) and (3). Articles 209 (regulation of financial business in the legislature), 267(2) (contingency fund of the state), 283 (2) (custody and withdrawal of money from the consolidated and contingent of the state), 293 (borrowing by states), 321 (State Public Service Commission), 328 (election to state legislatures) and 345 (official language of the state) are such provisions. Of them, the subject-matter of articles 321 and 328 is covered respectively by entries 41 and 37 of the state list. Article 328 also begins with the words "Subject to the provisions of this Constitution and in so far as provision in that behalf is not made by Parliament". So there is no difficulty in construing these two provisions in relation to the other related provisions of the Constitution. But there is an apparent difficulty in reconciling the rest of them with article 248 which confers *exclusive* power on Parliament to make laws with respect to any matter not enumerated in the concurrent or the state list. On a careful consideration the difficulty is removed and a solution becomes available in the words of article 248 itself. It grants exclusive power to Parliament with respect to any matter not covered in the concurrent or the state list but it does not say that a specific legislative power conferred on state legislatures by any other provision of the Constitution shall be inoperative. The power so conferred is different from the general power conferred by article 246 (2) and (3) read with the concurrent and state lists and therefore article 248 cannot whittle it down. To put it differently, article 248 is a general provision and the articles mentioned above, i.e., articles 209, 267(2), 283(2), 293 and 345, are specific provisions and if

an irreconciliable conflict between these articles and article 248 exists, then latter should give way to the former on the ground that a speciffic provision must override the general. However, an irreconcilable conflict should not easily be read and where there appears a conflict the solution lies in the rule of harmonious construction which the Supreme Court has applied in a number of cases to resolve conflicts between different provisions of the Constitution.[50] Applying that rule, the scope of article 248 will have to be restricted to give effect to the provisions mentioned above.

In the light of this interpretation of article 248, the general proposition laid down in *Union of India* v. *H. S. Dhillon*[51] calls for modification. In his leading opinion in that case Sikri C.J. observed:[52]

> If a Central Act is challenged, as being beyond the legislative competence of Parliament, it is enough to enquire if it is a law with respect to matters or taxes enumerated in List II. If it is not, no further question arises.

The Court's attention was not drawn to the fact that the distribution of legislative powers was not confined to the three lists read with article 246 and article 248.[53] Had this been brought to the notice of the court perhaps Sikri C.J. would not have made the sweeping observation quoted above. Therefore, it is submitted that when Parliament's competence to enact a law is challenged, then in addition to the inquiry suggested by the learned Chief Justice, it should also be enquired whether the subject-matter of the law is one that has been specifically assigned to state legislatures under some other provision of the Constitution and if it is so, the law of Parliament shall be invalid to the extent it encroaches upon such matter.

Before parting with the discussion of the legislative powers of Parliament and state legislatures a note of clarification may be made. As a cardinal rule of construction no provision of the Constitution can be read to contradict others. Hence, exceptions in specific terms apart (such as articles 35 and 369), no grant of legislative power to Parliament

50. See *S. V. Devaru* v. *State of Mysore* A.I.R. 1958 S. C. 255 ; *M.S.M. Sharma* v. *S.K. Sinha*, A.I.R. 1959 S.C. 395 ; *K. M. Nanavati* v. *State of Bombay*, A.I.R. 1961 S. C. 112 and *S. I. Corpn.* v. *Secretary Board of Revenue*, A. I. R. 1964 S. C. 207.

51. A. I. R. 1972 S C. 1060.

52. *Id.* 1078.

53. It may be noted that in *State of Punjab* v. *Satyapal*, A. I. R. 1969 S. C. 903, 914 the Court had unanimously upheld the states' power to make laws under article 209.

or state legislatures outside Chapter I of Part XI of the Constitution can be read which contradicts any provision in that chapter. It does not mean that the grant of legislative power in that chapter has superiority over any grant outside, but it certainly means that a grant outside also does not have superiority. Therefore, what at first sight may appear as an independent grant of legislative power cannot be so if it negatives, for example, any grant made by article 246 read with the three lists in the Seventh Schedule. To illustrate, no independent grant of legislative power can be read in clauses (2) to (6) of article 19, or in the opening words of article 25 or 26,[54] or in articles 302 or 304. One argument to deny such power may be that these provisions merely lift the limitations imposed on the legislative powers by the relevant provisions. But that apart, a law contemplated by these provisions is covered by one or the other entry in the three lists.[55] If, on the basis of these provisions, Parliament or state legislatures are permitted to legislate with respect to a matter which falls within the exclusive jurisdiction of the other, it will be a clear violation of article 246. However, by adhering to article 246 laws can be made with respect to all matters mentioned in these provisions. The latter approach gives full effect to all the provisions of the Constitution without violence to any. It is this approach which has to be borne in mind while making a search for an independent legislative power outside Chapter I of Part XI or within that Chapter. The various powers of Parliament and state legislatures enumerated in the preceding pages clearly satisfy that test.

(b) Legislative powers of other authorities :

In this section, we do not propose to discuss powers such as the ordinance-making power of the President or the Governors[56] or the power of the executive to issue directions, orders, notifications, etc., as part of their executive functions;[57] or the legislative powers

54. See *supra* n. 40.

55. For example, "friendly relations with foreign states" in clause (2) of article 19 are covered by entry 10 of list I; "public order" in the clause as well as in articles 25 and 26 is covered by entry 1 of list II; "health" in articles 25 and 26 is covered by entry 6 of list II and "morality" in these articles as well as in article 19 (2) and (4) is covered first in entry 1 of list III and then in entry 97 of list I. The expressions "interests of the general public" in article 19 (5) and (6) and "in the public interest" in articles 302 and 304 apply to any law unless it be one which is not in the interests of the general public or in the public interest. But the initial authority to make such a law is to be found in some entry in the relevant list or in some other provisions of the Constitution.

56. The Constitution of India, articles 123 and 213.

57. *Id.* articles 256, 257, 353, 360, 364 etc.

exercisable by any authority so long as Parliament or state legislatures, as the case may be, do not legislate[58]; or the powers which are exercised by the executive as delegate of the legislature[59]; or powers limited to the adaptation or modification of laws.[60] We shall advert only to those legislative powers which are granted by theConstitution to different authorities in the same fashion, though for very limited or specific purpose, as those granted to Parliament or state legislatures. Such powers are not dependent on a law of Parliment or state legislatures nor can they be curtailed by anything short of an amendment of the Constitution—the procedure of amendment differing from case to case.[61]

Among the provisions granting such powers are articles 77(3) and 163(3) which authorise the President and the governors respectively to make rules for the more convenient transaction of the business of the government of India and of the states as the case may be. Next is article 240 which confers powers on the President "to make regulations for the peace, progress and good government" of the union territories mentioned in that article. Similar power is conferred on the governor of Nagaland under article 371(5) (d) to "make regulations for the peace and good government of the Tuensang district". Under para 5(2) of the Fifth Schedule the governor "may make regulations for the peace and good government of any area in a state which for the time being is a Scheduled Area".

The Sixth Schedule has a number of provisions conferring legislative powers on different authorities. Under para 2(6) and (7) initially the governor and later a district or regional council, may make rules for the Constitution, etc., of the district and regional councils. The governor may also make rules for the management, etc., of the district or regional fund under para 7 and under para 19(1)(b) he "may make regulations for the peace and good government of autonomous districts". Power is conferred on the district and regional councils by para 3 to make laws with respect to matters mentioned therein; by para 4(4) to make rules for purposes mentioned therein and by para 8 to levy and collect taxes. Lastly, power to make regulation for the control and regulation of the public services mentioned in para 6 and for the control

58. *Id.* articles 145, 309, etc.
59. *Id.* article 357.
60. *Id.* articles 364, 372, 372A, 373, 392, etc.
61. For example, power conferred by article 240 and various provisions of the Fifth and the Sixth schedules can be amended by Parliament without resort to article 368 while resort to article 368 is essential to affect the powers conferred by articles 77, 166 and 371 A.

of money-lending and trading by non-tribals is conferred on the district councils.[62]

Though the legislative powers conferred on bodies other than Parliament and state legislatures are quite limited, yet important conclusions can be drawn from them. First, they explain why there is no provision in the Constitution "vesting" the legislative power of the Union and the states in Parliament and state legislatiures. Since the Constitution confers that power on other bodies also, such vesting could not be possible. Second, as a corollary of the first, legislation is not exclusively the function of Parliament and state legislatures and therefore the word "exclusive" in articles 246(1) and 248 should have the meaning of excluding only the state legislatures and in clause(2) of article 246 of excluding only Parliament and in neither case of excluding the other bodies on whom powers have been expressly conferred by the Constitution. Third, the conferment of legislative powers on the executive and other bodies negatives the incorporation of the theory of separation of powers in the Constitution.[63] Last, the legislative powers given to the executive in such wide terms as "peace, progress and good government" also indicate that the Constitution-makers were not averse to the idea of permitting the executive to legislate, if that could be the better and more effective instrument for the purpose.[64]

CONCLUSION

In the end it is submitted that, having regard to the elaborate and detailed provisions of the Constitution, it is unsafe to make sweeping generalisations about any of its provisions without thoroughly examining them in the context of all others. As a matter of policy, the Supreme Court should avoid, it is respectfully submitted, expressing any views on matters which are not in issue inasmuch as even its *obiter dictum* may lead to bad law and also restrict future choice. In the field of legislative powers the incidental remarks in *Gopalan* concerning the opening words of article 245 furnish one example of this and the sweeping remarks in *Dhillon* about the legislative competence of Parliament furnish another.

62. The Constitution of India, Sch. VI paras, 6 and 10.
63. *Cf. Ramjawaya* v. *State of Punjab* A.I.R. 1955 S.C. 549.
64. From such wide legislative powers given to the executive, it may also be inferred that the Constitution-makers were not averse to the idea of delegation of widest law-making power by the legislature to the executive if in the judgement of the legislature such delegation could serve the purpose of law better and more effectively. Such inference may help in resolving the existing controversy relating to delegation of legislative power by Parliament and state legislatures.

In the former case, as has been discussed above, what was said by the two judges was neither required nor was shared by the other three judges and if it has been followed in later decisions, that has been done under the impression that it is the law, while in fact this question has never been in issue in any case so far and therefore remains undecided. Similarly, what has been said in the latter case should be confined to the facts and issues before the court in that case. It cannot be cited as an authority to uphold a law of Parliament which does not encroach upon a subject included in the state list encroaches upon a subject assigned exclusively to the state legislatures in some other provision of the Constitution.

THE EQUAL REMUNERATION ACT : A STEP TOWARDS EQUALITY

Though "perfect equality"[1] is still a distant dream, a step further towards this goal was taken through the promulgation of the Equal Remuneration Ordinance during International Women's Year, later replaced by an Act of Parliament.[2] The Act seeks to actualise[3] a cherished desire of the Constitution-makers enshrined in the Constitution[4] and an international obligation undertaken nearly two decades ago.[5] It has been acclaimed as a "measure"[6] towards equality; but will the Act really be able to fulfil the expectations? Can it achieve its vaunted goal and shatter the still persisting shibboleths regarding female inferiority? What more is needed to be done to attain that equality for women which is so basic for social justice and eradication of their economic exploitation? This comment is directed to an exploration of these questions.

1. General Provisions

The Act, which may come into force anytime within three years

1. J. S. Mill, *The subjection of Women* (1869), cited in Ginsberg, "Women and The Law", 25 *Rutgers L. Rev.* 110 (1970).
2. The Ordinance was promulgated on 26 September 1975. It was replaced by the Equal Remuneration Act, 1976 (hereinafter referred to as the Act).
3. See the Statement of Objects and Reasons of the Act.
4. See Art. 39 which provides that : "The State shall in particular, direct its policies towards securing...(*d*) that there is equal pay for equal work for both men and women".
5. Equal Remuneration Convention No. 100 adopted by the I.L.O. in 1951 to put into effect "the principle, of equal remuneration for men and women workers for work of equal value" was ratified by the Government of India in September 1958.
6. See the preamble to the Act.

from the date of its passage,[7] provides for the payment of equal remuneration to men and women workers and prohibits discrimination against women on the ground of sex in matters of employment.[8] It overrides all laws, awards, agreements and contracts of services whether made before or after its commencement[9] except (i) the laws regulating women's employment, (ii) maternity laws, and (iii) the laws regarding terms and conditions relating to retirement, marriage or death.[10] The requirement of equal pay[11] is subject to the power of the appropriate government to declare, on close consideration of circumstances, that discrimination in remuneration is "based on a factor other than sex" and that the differential thus arising shall not be actionable.[12] Similarly, the prohibition of discrimination against women in matters of "recruitment",[13] is subject to "reservations in favour of Scheduled Castes and Scheduled Tribes, ex-service men, retrenched employees, or any other class or category."[14]

7. The provisions of the Equal Remuneration Ordinance, 1975(ERO) and the Act of 1976, which replaced the ordinance, have come into force with respect to the following employment :

   On 15 October 1975 in respect of employment in plantations to which the provisions of the Plantation Labour Act, 1951 apply ; on 1 January 1976 in respect of employments in local authorities; on 27 January 1976 in respect of employment in hospitals, nursing homes and dispensaries, on 8 March 1976 in respect of employment in banks, insurance companies and other financial institutions, on 5 April 1976 in respect of employment in educational, teaching training and research institutions ; on 1 May 1976, in respect of employment of mines, the Employees Provident Fund Organisation, the Coal Mines Provident Fund Organisation and the Employees State Insurance Corporation.

   See the *Gazette of India*, (Extr.) Part II Sec 3 (ii) No. 423 dated Oct. 10, 1975 ; No. 509 Dec. 26, 1975 ; No. 46 dated Jan. 24, 1976 ; No. 111 dated March 6, 1976 ; No. 180 dated April 3, 1976 ; and No. 195 dated April 22, 1976 respectively.
8. See the preamble, section 4 (1) and section 5 (b) of the Act.
9. See sec tion 3.
10. See sections 5 and 15.
11. Section 4 (1) : "No employer shall pay to any worker, employed by him in an establishment or employment, remuneration, whether payable in cash or in kind, at the rates less favourable than those at which remuneration' is paid by him to the workers of the opposite sex in such establishment or employment for performing the same work or work of a similar nature."
12. Section 16.
13. Section 5 : "On and from the commencement of this Act, no employer shall, while making recruitment for the same work or work of a similar nature, make any discrimination against women..."
14. See proviso to section 5.

The Act also provides for effective enforcement measures. Complaints regarding its contravention and the claims for non-payment of equal wages, etc., can be filed by any worker personally or through any legal practitioner, trade union official, or any other person authorised for the purpose, or any inspector on behalf of the worker concerned,[15] before the courts established for the administration of the Act.[16] Section 8 of the Act requires every employer to maintain registers and documents in relation to the workers employed by him.[17] Inspectors having the powers of a public servant are to be appointed to investigate the proper compliance with the Act.[18] Penalities can also be imposed on the violators of the Act[19]. A court[20] cannot take cognizance of an offence committed under the Act without prior sanction of the government or an officer authorised by it in this behalf.[21] The Act also authorises the appropriate government to constitute one or more advisory committees, with at least one half of women members, to advise "for providing increasing employment opportunities for women, including part-time employment", on consideration of the nature of work, hours of work and *suitability of women for employment*.[22]

15. See rules 3 and 4 of the Equal Remuneration Rules (ERR), 1975 framed by the Central Government in exercise of the powers conferred by section 13 of the ERO (Published in the Gazette of India Part II Sec. 3 sub-sec. (i) dated October 18, 1975).
16. It is proposed to entrust the administration of the provisions of the Act in employments, for which the Central Government is the appropriate Government, to the office of the Chief Labour Commissioners (Central) and to appoint the existing Assistant Labour Commissioners, the Regional Labour Commissioners and the Labour Enforcement Officers as Authorities, Appellate Authorities and Inspectors, respectively under the Act. See the Equal Remuneration Bill Financial Memorandum for the powers, procedure and jurisdiction of the Courts. Also see section 7 of the Act.
17. A Form (Form D) is prescribed under rule 6 of ERR 75, for the registers to the maintained by the employer, which has column for the category of workers, brief discription of work, number of men and women employed, rate of remuneration paid, basic wage or salary and other components of remuneration such as dearness allowance, house rent allowance, money value of concessional supply of food grains and other allowances. All these details will certainly help the authorities in tracing the mendacious discriminations.
18. See section 9 and n. 16 *supra*.
19. Section 10 and 11.
20. The concerned court should not be lower than the court of Judicial Magistrate or Metropolitan Magistrate : section 12 (1).
21. Section 12 (2).
22. Section 6.

2. The Scope

Though it is too early to ascertain the effectiveness of the Act, an examination of its major provisions may highlight its potentiality. The Act covers all "workers" employed in any establishment or employment. In the absence of any definition of the words "establishment" and "employment" and in view of the very wide definition of the word "worker"[23] it can be easily inferred that the Act extends its protection to all those persons who are employed in any "establishment" or "employment" irrespective of its size[24] or the nature[25] and is not limited to commercial establishments or business employments.[26] Significantly, the Act binds not only government as direct or indirect employer but also the private employers.[27] Though the state as an employer was already

23. According to section 2 (l) "Worker" means a worker in any establishment or employment in respect of which this Act has come into force.
24. It is significant that the Act does not restrict its jurisdiction to the "establishments" having a minimum number of workers, as is usually done by other Acts whose jurisdiction is restricted to certain establishment having, say at least 10 or 20 workers. While bringing various establishments within the jurisdictions of the Act the Government of India may impose such restrictions. Unless the Government so does, the Act will be applicable even to employments having even two or more employees.
25. See *infra* n. 26.
26. Here it will not be irrelevent to clear a confusion (thouh clarified by the Central Government's declaration reported in *The Hindustan Times* Jan. 25, 1976 p.1) which may arise due to section 2(1) which says that the "words and expressions used in this Act and not defined, but defined in the Industrial Disputes Act 1947, shall have the meanings respectively assigned to them in that Act" and due to the fact that the Government has entrusted the administration of the Act to Labour Commissioner, labour enforcement officers and labour inspectors one might think that the establishments covered by the Act are only those establishments which are covered under the industrial and labour laws and do not include educational and other non-commercial establishments within its scope. The Central Government by its notification has already extended the provisions of the Act not only to the commercial and industrial establishments but to non-commercial establishments like education also. See *supra* n. 7.
27. Section 2(c). "Employer" has the meaning assigned to it in clause (c) of section 2 of the Payment of Gratuity Act, 1972, which is as follows :
    (1) Employer means, in relation to any establishment, factory, mine, oil plantation, port, railway company or shop—(i) belonging to, or under the control of, the Central Government or a State Government, a person or authority appointed by the appropriate Government for the supervision and control of employees, or where no person or authority has been so appointed the head of the Ministry or the Department concerned; (ii) belonging to, or under the control of, any local authority, the person appointed by such authority for the supervision and control of employees

prohibited by the Constitution[28] from making any discrimination on the grounds of sex, unfortunately this important guarantee was made fruitless by protecting the discriminatory treatments.[28a]

In pursuance of the chief aim, which is to secure equal remuneration for similar work to all workers irrespective of their sex, the Act prohibits payment of "remuneration" to "any worker" at rates "less favourable"[29] than those applicable to the workers of the opposite sex, "in such establishment or employment for performing the same work, or work of a similar nature".[30] The equality of wages between males and females is required to be maintained within the same establishment for similar work which may mean that an employer can pay different wages to the workers working in two or more different establishments even if the work performed in those establishments is

or where no person has been so appointed, the Chief Executive Officer of the local authority; (iii) in any other case, the person, who or the authority which, has the ultimate control over the affairs of the establishment, factory, mine, oilfield, plantation, port, railway company or shop, and where the said affairs are entrusted to any other person, whether called managers, managing directors or by any other names, such person.

28. Article 16(2) of the Constitution of India.
28a. See *Raghubans* v. *State*, A. I. R. 1972 P. & H. 117.
29. "No employer shall for the purpose of complying with the provisions of sub-section (i), reduce the rate of remuneration of any worker". Section 4(2). See also section 4(3) for equalising remuneration under the Act. For corresponding provisions in U.S.A. and Britain see Equal Pay Act, 1963 and Equal Pay Act, 1970, respectively.
30. Section 4(1) *Supra* n. 11. Almost similar provision exists in the U.S. Equal Pay Act, 1963. Section 3(d)(1) of the U.S. Act states: "No employer having employees subject to any provisions of this section shall discriminate within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to the employees of the opposite sex in such establishment for equal work or jobs the performance of which requires equal skill, effort and responsibility, and which are performed under the same working condition...
    Provided that an employer who is paying a wage rate differential in violation of this section shall not in order to comply with the provisions of this sub-section reduce the wage rates of any employee". 29 U.S.C. 206 (d) (i) (1964). L. Kanowitz, *Women and the law, The Unfinished Revolution*, 132-33 (1969). The British Act of 1970 also establishes the rights of women to equal treatment in matters of pay and other terms and conditions of the employment when they are employed on the work of the same or broadly similar nature as that of men, or when they are employed on work which, though different has been given an equal value under a job evaluation scheme. See *Equal Pay : First Report on the Implementation of the Equal Pay Act, 1970*, 5-6 (1972).

the "same" or of a "similar nature". Such a provisions would encourage an employer to establish a new establishment separate from the present one, transfer the women employees to the new place and continue the sex-based wage differentials with impunity. As a result, as long as he does not discriminate within the particular establishment, he would presumably not violate the Act. Such an evasion, if possible, may seriously curtail the efficacy of the Act.

3. Same work condition

Any worker can claim remuneration equal to the worker of the opposite sex provided he or she is performing the "same work" or "work of a similar nature". These words, which are the keystone of this guarantee, are defined in section 2(*h*) :

> "Same work or work of a similar nature" means work in respect of which the skill effort and responsibility required are the same when performed under similar working conditions by a man or a woman and the difference, if any, between the skill, effort and responsibility required of a man and those required of a woman are not of practical importance in relation to the terms and conditions of employment.

The guarantee afforded by section 4(i), read with section 2 (*h*) is broader than article 39(d) and the I.L.O. convention,[31] otherwise it would have been very difficult to decide the equal value of work unless lengthy and expensive job evaluation schemes were prepared.[32] It also finds similarity in section 3 of the U.S. Equal Pay Act, 1963.[33]

But certain problems still remain to be resolved. The Act is silent as to the meaning of the words "skill", "responsibility" and "similar working conditions", and the power is entrusted to the authorities concerned to decide the "similarity of work".[34] Serious possibility for the circumventioning of the Act may be afforded by these provisions unless their meaning is ascertained to definite limits. In the United State, the government has very wisely issued detailed guidelines

31. See *Supra* n. 10 and 11.

32. British Act of 1970 uses the words "same" or "broadly similar work" instead of "equal work" or "work of equal nature" to avoid difficulty. see, *supra* n. 30 and also see C.A. Larson, "Equal Pay for Women in U.K.", 103 *Int'l Labour Rev.* 1(1971).

33. See *supra* n. 30.

34. Section 7(3).

for interpretation[35] and the courts have also established the law on this issue with their help. We may profitably use such legal developments in the United States to interpret our Act as the relevant provisions are quite similar.

While measuring the similarity of "skill", experience, training and ability should be accounted for the job performance. But qualifications must be such as are essentially required for the proper performance of the job in question. Additional qualifications not necessarily needed for the performance of the work concerned, cannot be considered to measure the similarity of "skill". Similarly, "skill" cannot include the job efficiency and aptitude though efficiency may be relevant when the wages are to be fixed on the basis of individual output or piece rates.

The amount of exertion, physical or mental, is to be valued while weighing the "effort" similarity. But unless there is difference in the measure of effort required to be expended for the job performance mere variation in the kind of effort cannot justify wage disparity.[36] In *Hodgson* v. *Daizy Mfg. Co.*[37] a U.S. federal court ruled that pay differences are not justifiable where male press operators occasionally are required to exert greater physical effort and female press operators perform all high speed work requiring mental exertion. "Jobs which cause mental fatigue and stress as well as those which alleviate fatigue, all bear on the question of effort measured by the job."[37a] In view of these observations it is clear that dissimilarity of effort justifying dissimilarity of wages must be in quantum and not merely in kind of the effort exerted. Women engaged in a job needing concentration and mental strain should be considered as exerting similar effort and thus

35. "Skill" is the "experience, training, education and ability as they relate to the performanee of a particular job".
"Effort" is defined as "the measurement of the physical or mental exertion needed for the performance of job". "Responsibility" is "the degree of accountability required in performance of the job with emphasis on the importance of job obligation". Regarding the "similar working conditions", the Interpretative Bulletin says that "generally employees performing jobs requiring equal skill, effort and responsiblity are likely to be performing them under similar working conditions", 29 C.F.R. 800, 125-129, 132(1974) cited in J. A. Johnson, "Equal Pay, Act 1963 : A Practical Analysis" 24 *Drake L. Rev.* 570. 585-87 (1975).

36. See E.A. Landau and K.L. Dunahoo, "Sex Discrimsnation in employment : A Survey of State and Federal Remedies," 20 *Drake L. Rev.* 417, 511 (1971).

37. 317 F. Supp. 538 (W.D. Ark. 1970), aff'd in part and reversed in part and remanded in 45 F. 2d. 823 (8th Cir. 1971).

37a. *Id.* Cited in Landau and Dunahoo, *supra* n. 36, 512.

be entitled to pay equal to men who are doing some heavy physical work.

Two inter-connected questions may arise in this context: first, whether the similarity of work to claim equal remuneration must be "exact" or merely substaintial, and second, whether additional physical effort justifies additional pay ? Section 2(*h*) of the Act has an answer to both the questions, namely, that exact similarity need not be established and that additional physical effort does not justify additional wages unless the extra effort exerted is really different and is of practical importance for the performance of job. The words of similar nature are significant here and the definition of these words[38] also clarifies that even if there are some differences in the skill, effort, responsibility and working conditions between the works, low paid workers shall be entitled to claim equal rates provided these differences are not of "practical importance". This provision certainly solves many problems which would have proved great hurdle in the way of equality. Jobs classified as "male" and "female" without any practical or substantial differences in their contents, and artificially created to justify lower wages exploiting the easily available poverty stricken women workers employed in "female" jobs, will be covered under this provision which will enable them to claim equal remuneration. The meaning given to "same work" or "work of a similar nature" suggests that the application of the Act does not depend on the job classification or job title but on actual job requirement and job performances.

In the United States the problem regarding the interpretation of the word "equal" as it applies to equal skill, effort, etc., proved tough because the word "equal"[39] is used by the U.S. Equal Pay Act, 1963 and because no provision similar to the latter part of section 3(*h*) of our Act exists in that Act.[40] Although the legislative history of the U.S. Equal Pay Act was clearly in support that equal means "substantially equal" and not "identical"[41], a controversy continued till *Shultz* v. *Wheatan Glass Co.*,[42] a landmark decision which gave new life to that

38. See section 2(*h*).
39. The word "equal" was substituted for "similar" during the debates on the Act in the U.S. Congress.
40. See *supra* n. 30.
41. "It is not the intent of Senate that jobs must be identical, such a conclusion would obviously be ridiculous". Senator Mc Namara cited in Thomas E. Murphy, "Female Wage Discrimination : A Study of the E.P. Act, 1963-70" 39 *Cincinati L. Rev.* 615, 624 (1970).
42. 421 F. 2d. 259 (3rd Cir. 1970).

Act. In this case the third circuit court finally established that equal means only substantially equal. The most significant point of the decision is that the performance of certain additional physical duties by males does not render jobs unequal unless those additional duties require greater skill, effort and responsibility in order to justify pay differentials. In *Hodgson* v. *Broohkanan General Hospital*[43] the fifth circuit court also held that the "employers may not be permitted to frustrate the purpose of the Act : (1) by calling for extra effort (a) only occasionally or (b) only from one or two male employees; or (2) by paying males substantially more than females for the performance of tasks which command a low rate of pay when performed full time by other personnel in the same establishment."[44] In *Corning Glass Works* v. *Brennen*,[45] another American case, the higher payments to male night workers than the female night workers were held violative of the Equal Pay Act as the employer could not prove the differential in skill, effort, responsibility and the working conditions involved in job performance.[46] In Canada also some courts have decided that the legislative requirement of equal skill, effort and responsibility does not involve identity of tasks.[47]

The judicial trend in the United States and Canada is thus in favour of the interpretation that the requirement of "equality" or "similarity" of tasks does not mean identical equality or similarity. Slight but not substantial difference of skill, responsibility, etc., can not be used to destroy the very roots of such a remedial measure. In India, while administering the Act, constant care must be taken to ensure that the requirement of similar skill, efforts, etc., as the criterion to the claim of equal pay is not abused to thwart the purpose of the Act and any attempts by employers to invoke the trivial differences between the jobs

43. (5th Cir. 1970), reported in *C.C.H. Empl. Practice Guide* 91.8085.
44. *Id.*, Cited in Landau and Dunahoo, *supra* n. 36, 514.
45. 417 U.S. 1488 (1974).
46. See case notes, 52 *J. Urban L.* 816 (1975). The Court approved the second circuit court's rejection of the employer's argument that "night shift work constitutes different 'working conditions' than day and thus not within the Act." R.B. Ginsburg, *Sex Based discrimination and the law : Women and Employment*, 132 (Mimeographed, 1973).
47. The Ontario Court of Appeal found the work of female nurses and male orderlies patently of the same nature or kind and decided that mere lifting of stretchers and transporting patients by male orderlies cannot justify higher pay. see F. Margenskon, "Women Workers and Courts". 15 *Int'l Labour* Rev. 15-20 (1975).

as justifications for not giving equal pay should be strongly condemned.[48]

Another possible danger is that employers may try to evade the equal pay requirement by reclassifying jobs from "men" and "women" into "heavy" and "light"[49] assigning to men "heavy" jobs with higher pay[50] and rapidly segregating women from men's heavy jobs so that the women may have no chance of comparing their pay conditions with male workers. As the Act prohibits discrimination in matters of recruitment against women only, the employers will very easily avoid male employment in these jobs. Moreover, reopening these jobs again to men after some time and employing them on wages paid to women workers which were lower than the wages paid to men workers previously, they may evade that requirement of the Act which probibits reduction of the wages to comply with the provision of equal remuneration.[51]

A difficult obstacle in the way of achieving equal wages is cleared away, since the act nowhere mentions that higher wages may be paid for higher output and section 4(1) and 2(*h*) clarify that the wages are to be fixed on the similarity of job requirement and job performance. It leaves no scope for the often misconceived argument that lower wages to women are justifiable because of their lower productivity[52] and accordingly women as a class cannot be paid lower wages unless by some job evaluations scheme all women are found having less output than all men in a job, which is impossible. Some foreign

48. The lower wages paid to women always have been justified not only by private employers but also by the government on the plea that they are employed in lightwork under the Minimum Wages Act 1948. Some State governments have fixed lower wages for women workers. The Central Government wage Board for Plantation Industries also differentiated the wages on the basis of sex, retained by the subsequent wage agreements between the employers and workers. see *Women in Industry* 81—(Labour Bureau, Ministry of Labour, Government of India, 1975).

Not only that, whenever the objections were raised by the I.L.O Experts Committee asking the Indian Government to rectify such differentials, the Government justified those wage disparities on the plea of less output of women workers than men workers and the light work allotted to the former. See N. Vaidyanathan, *I.L.O. Convention and India*, 49 (1975).

49. The seperation of work into 'light' and 'heavey' categories which has made it possible insidiously to re-establish discrimination without referring to women, is described as the "horizontal" method of discrimination. See Evelyne Sulleret, "Equality of Remuneration for Men and Women in the Member-States of EEC", 112 *Int'l Labour Rev.* 87, 100 (1975).

50. In a recent representation the employers argued that the wage differential were due to difference in job performance and not based on sex. It was because women were not employed in streruous operations and the tasks were so fixed as to give them a lighter job compared with men and the differences in wages largely reflected these differences in the amount of work done and not for the reason of sex. See *Hindustan Times*, January 25, 1975, and also *supra* n. 48.

51. See section 4(2). Similar provisions also exist in U.S. and British equal pay Acts. It will not be irrelevant here to mention an American case in which such attempts to reclassify and reduce the wages were frustrated by the seventh circuit court. The employer transferred all men to the higher paying job out of a job to which only women were restricted, who continued to receive less wages than men formerly working with them. About one year later it was again opened up to males at women's rates at the same time women were for the first time allowed to work at and transferred to the higher paying job. The court held that the employer violated not only equal pay requirement as both the jobs with different rates were found constituting equal work, but also violated the requirement which prohibits reduction of wages for the compliance with the Act. *Hodgson* v. *Miller Bvewing Co.*, U.S. 7 F. 2d 221 (7th cir. 1972). cited in Ginsburg *supra* n. 46, 121.

In another case such efforts to reclassify job and segregation of men and women were condemned by the court. It was decided that an employer violated Equal Pay Act by employing men in higher paying heavy work classification when no classification had formerly been defined, described, evaluated or categorised. Court found that not only the employees were being paid under the classifications "without regard to the work performed" but that "many men and women performed under similar working conditions substantially the same work concurrently and interchangeably". *Wirtz* v. *Vesail Mfg. Inc.* (D. Ind. 1967) cited in Landau and Dunahoo, *supra* n. 36 at 510.

Going further in *Wheaten*'s case the court held that if the heavier task is the justification for higher wages, it must be proved that all of the male workers actually performed these heavier tasks in order to receive higher wages for all males (as a class) than females. It must be established that all males were able and available to exert extra effort while no females were so available. Occasional performance of heavy work which is merely incidental or infrequent cannot justify higher pay. It must be proved that the additional tasks are the essential part of (the males) tasks which they perform without which the jobs could not be performed. *Shultz* v. *Wheaten Glass Co.*, *supra* n. 42, also *supra* n. 46 at 110.

52. Plea of less out-put as justification for less wages is taken by government also. See N. Vaidyanathan, *supra* n. 48 at 49.

courts have also decided that output is a question pertinent to piece rates but not to time rates and that the differences in time rates for men and women can be justified only by differences in the requirements of jobs assigned to them.[53]

The foregoing cases from other legal systems are suggestive of the possibility that the employers in India also may make attempts to evade the Act or try to take advantage of its loopholes so as to destroy its very purpose. Hopefully, the courts and administration will so construe the provisions the Act as to make them truly effective. Besides, as advocated by Kanowitz, while determining the similarity of work and examining the skill, effort and responsibility, special attention must be paid to the circumstances uuder which these jobs were assigned to male and female employees in the first place.[54] Progressive and dynamic interpretation of the Act is necessary to restore the imbalance of past discrimination.

4. **Employment and matters connected therewith**

The preamble to the Act assures prevention of discrimination "in matters of employment and for matters connected therewith and incidental thereto." This fosters a hope that this legislation will be efficacious enough to eliminate all kinds of unequal treatments in employment starting with the recruiment to the terms, conditions and benefits of service up to retirement. But as one goes through the provisions, it is despairingly revealed that the wide scope reflected in the preamble is curtailed by subsitituting the word "recruitment" for "employment". Section 5 prohibits the employer "while making *rec-*

53. See Felice Margenston, *supra* n. 47 at 20, also Evelyne Sulleret, *supra* n. 49 at 88 where it was observed that "When men and women are employed in time-rated work, it is not admissible to pay a reduced wage to women on the grounds of their lower out-put, because remuneration by the hour and week is based not on the result obtained but on the period of time during which the company commands the service of the worker".

54. See L. Kanowitz, *supra* n. 30 at 139 :

> ...women now work at jobs requiring little skill or responsibility of higher paying jobs, not because they are incapable of acquiring or assuming the responsibility of higher paying jobs, but because, in the past they have been denied the opportunity to do so by the discriminatory practices of employers, labour organisations and employment agencies. For the Act to permit wage discrimination on the basis of difference in skill or responsibility without allowing an examination of the reason for the differences may have the effect of destroying much of its effectiveness.

roles".[92] This opinion was reasserted in *Weinberger v. Wiesenfield*,[93] a recent firm rejection of such sex based discrimination. "The *Wiesenfield* opinion suggests the court's readiness to look beneath the surface of 'benign' and 'compensatory' rationalisations and to strike classifications based on the notions that social roles are pre-ordained by sex".[94] The Court held that a deceased female wage-earner's family is also entitled to social security benefits equal to those payable to a deceased male wage earner's family otherwise the social security scheme would denigrate the efforts of wage earning woman by providing her family less protection than it provides to the family of man.[95]

The restrictions imposed upon the employment opportunities of women in view of their marital status[96] on the basis of the assumptions concerning their decreased efficiency due to family responsibility regardless of the rapidly changing notions about the roles of men and women in the contemporary societies, will further aggravate the discriminatory treatments given to them by the employers.[97] Such provisions obstruct woman's way of achieving position of prestige and distinction.[98] These also reduce the demand for women employees, particularly in the highly responsible and competitive jobs. The world-wide prag-

92. See "Supreme Court 1974 Terms", 89 *Harvard L. Rev.* 47, 96 (1975).

93. 43 USLW 4393 (U.S. March 19, 1975) see *ibid.*

94. See R.B. Ginsburg, *supra* n. 70, 14. In this case a Unanimous court declared inconsistent with the equal protection guarantee the social security provisions of a mother's benefit for the care-taker of a deceased wage earner's child, not providing the corresponding father's benefit.

95. *Ibid.*

96. Section 15.

97. As is evident, almost all employers in private as well as public sector believe that married women suffer from certain inevitable dis-advantages arising from their dual role at home and at work.

98. Restrictions regarding marriage exist mainly in Army Service Regulations, Services regulatious of the employees of Air corporations under Air Corporation Act 1953 (Air Hostesses) and in private firms and Companies. In Army Medical Services untill 1972 married women had to leave the nursing service. Revision of the rule in that years has made it possible for them to continue in service at their request, by grant of 2 years extended tenure at a time. Married women are still not recruited to the military nursing service, and if they marry during probation they have to leave the service. I.A.S., I.P.S. and I.F.S. recruitment rules also had a clause imposing restrictions upon the women servants. If they were married or got married subsequently the Central Government could ask them to resign. See *supra* n. 102. But in 1972 the clause was deleted.

matic assessments, including judicial findings, have proved that celibacy clauses or such other restrictions based on marital status of women, due to which they are not eligible for employment or retaining their jobs, are gross generalisations based on no functional descriptions. In U.S.A., France and other countries celibacy clauses binding women in air lines and other establishments have been declared invalid by the courts.[99] The Supreme Court of India has also refuted the arguments made in favour of celibacy clause in *Labour Union* v. *International Franchises P. Ltd.*[100] It was held in this case that there was nothing to show that married women were more likely to be absent or that they were less efficient.[101] It was urged by the respondent in this case that a similar rule existed in certain government services, particularly in Rule 5(3) I.A.S. (Recruitment Rules 1954)[102]. Distinguishing this rule, the Supreme Court observed :

> This rule is not unqualified i. e., only where maintenance of efficiency so requires, while the rule in respondent concern assumes that merely by marriage the efficiency of a woman is impaired and such an assumption in our opinion is not justified.[103]

Though the decision is heartening, yet it impinges the values of equality. Why in case of possible curtailment of efficiency only women are assessed? Instead of *categorising* employees regarding their decreased efficiency on the basis of sex, it would have been better if such laws regulate the inefficiency itself.[104]

99. In France in 1963, the Court of Appeal of Paris held that celibacy rule applied to air-hostesses was invalid, as it could not be demonstrated that marriage affected the satisfactory performance of the functions. In U.S A., Japan, Italy, Israil etc. celibacy clauses binding women in air lines and other establishments are declared invalid on the finding that marriage did not affect every women's ability to perform work efficiently and if it affects the efficiency of women it may affect the efficiency of men too. See Felice Margenston, *supra* n. 41 at 18-19.

100. A.I.R. 1966 S.C. 942.

101. It was held further that the only problem was maternity leave, but the undertaking in question had expressly denied that by using this celibacy clause it was trying to avoid that burden. See *Ibid*, at 944.

102. Rule 5(3) reads : "No married woman shall be entitled as of right to be appointed to the service and where a woman appointed to the service subsequently marries the Central Government may, if the maintenance of efficiency of the service so requires, call upon her to resign".

103. See *supra* n. 100, at 944.

104. Rule 5(3) was deleted from the I.A.S., I.P.S. and I.F.S. (Recruitment) Rules 1954 in 1972 after an assurance given by the then Prime Minister in Parliament because it amounted to discrimination against married women.

The last exception authorises the appropriate government to declare that the difference in remuneration is based "on a factor other than sex", if it is so satisfied on a consideration of all circumstances of the case. An employer's discriminatory pay-rates attributable to that declaration shall not be violative of the Act.[105] Obviously this discretionary power is to be exercised in accordance with the legislative intent and in harmony with other provisions of the Act. While making such declarations the government should be guided by the tests for determining the similarity of work and also by the preamble. It should discard the entrenched stereotyped assumptions regarding the capacities or incapacities of a particular sex as a class. The authorities must also be satisfied that the sex is not the basis for the wage differential otherwise, in view of its very wide language, this exception may prove most problematical.[106] Though higher skill, more efforts, better training and education can be considered as "factors other than sex" justifying wage differentials, it will perpatuate the past discriminatory effects unless the affirmative approach is adopted so as to include only those cases where opportunities equal to men are given to women also to achieve that skill, knowledge or training.[107] Moreover, if factors like less output lighter work,[108] higher cost, or other economic reasons such as employment cost,[109] unemploymeat problems, monetary benefit to the employer, administrative convenience, etc., are accepted as "factors other than sex" to justify wage differentials, then it may prove disastruous and defeat the entire purpose of the Act.

105. See section 16.

106. If the precautions are not taken, this exception may prove as the Indian version of American "sex-plus" doctrine which is much misutilised by the employers in United States to flout the requirements of anti-sex-discriminatory laws arguing that the basis of discrimination is not sex but some other factor (obviously present in one sex only) e.g., pregnancy, mothers with pre-school age children etc. In India also such arguments are given to justify discriminatory treatment, for example government clarified that Rule 5(3) of the I.A.S. (Recruitment) Rules, 1954 is not discriminatory on the basis of sex but it was the factor of marriage and related effeciency, which was the basis of the differential treatment afforded to women.

107. The approach suggested by L. Kanowitz can be most reasonably adopted here. See Kanowitz, *supra* n. 54. See also *Wheaten* case, *supra* n. 42.

108. See *supra* n. 48.

109. Usually employers argue that due to certain additional facilities such as transport, refreshment, and others required by labour-laws, e.g., creches etc., the cost of women employees increases and therefore their wages cannot be equalised with men (See *The Hindustan Times*, 25, Jan. 1976) To avoid such problems the latest move in U.S.A. is to extend these facilities to men employees too.

These exceptions have thus a tendency to subvert the objectives of the Act, unless it is aided with some more drastic weapons. The first and foremost need is to introduce absolutely sex-neutral laws by establishing functional criteria exemplified by the concrete practical instances. Persons whether male or female who cannot fit in should be made subject to different treatment so as to establish, as pointed out long ago by John Stuart Mill, "a principle of *perfect equality*, admitting no power or previlege on the one side, nor disability on the other".[110] The differential treatment irrespective of its motive, always creates a dual system of rights and responsibilities governing the separate groups by seperate set of values. As has been observed "History and experience have taught us that in such a dual system one group is always dominant and the other subordinate. As long as women's place is defined as separate a male-dominated society will define her place as inferior".[111]

6. **Enforcement Structure**

Effective enforcement to discipline the employer behaviour as well as to provide protection and redress to the suffering group, is the main necessity of such legislations. To that end sufficient strength is infused in the Act through its enforcement provisions. Not only direct, individual or class actions but also indirect actions, i.e., by other persons authorised by the authorities concerned for that purpose, are permissible under the Act.[112] Effective compliance is ensured by the Act through its requirements to maintain registers and documents by the employers containing full details of workers, work and remuneration[113] and by providing an inspectorate to investigate[114] that all its directions are adhered to.[115]

The adjudicating authorities appointed under the Act[116] are empowered to hear and decide complaints with regard to contravention of any provision of the Act[117], claims arising out of the non-payment of

110 See *supra n.* 1.

111. See B.A. Brown, E.J. Emerson, G. Folk and A.E. Freedman "Equal Rights Amendment: A Constitutional Basis for Women", 80 *Yale L. J.* 871, 873 (1971).

112. See rules 3 and 4, Equal remuneration Rules, 1975.

113. See Form D, under rule 6 *ibid.*, vide section 8 of the Act.

114. See section 9.

115. For powers of the inspectors, see section 9 (b) of the Act.

116. See section 7(1).

117. Section 7(1) (a).

equal wages[118] and questions as to whether works involved are the same or of a similar nature.[119]

The back pay claims may be awarded[120] and the money due from an emyloyer arising out of the decision of the authority is to be recovered according to the procedure provided in section 33(c)(1) of the Industrial Disputes Act, 1947.[121] To deter the offenders, the Act has also imposed penal liabilities empowering the courts to impose fines.[122] In cases of offences committed by the companies, special precautions are taken by imposing the liability on the person in charge having the responsibility of company's conduct or business as well as upon the director, manager, secretary or any other officer whose consent, connivance or neglect is accountable for the offence, along with the company's separate liability.[123] Subject to the prior sanction of the appropriate government all these offences are cognizable in the court of a judicial magistrate or a metropolitan magistrate.[124]

The most remarkable feature of the Act is the provision for the Advisory Committee[125], in so far as it percieves the need of "affirmative action" involving "forward motion" with "positive measures to correct accumulated consequences"[126] of the past inequalities. This committee, in view of the need for providing increasing employment opportunities for women, including part-time employment, shall tender its advice considering the factors such as the number of employed women, nature of work, hours of work and suitability[127] of women for the employment. Hopefully, the committee shall provide genuine assistance in fulfilling the legislative object of eradicating sex-based discrimination and will suggest the rejection of sex-based demarcations in employment by altering the recruitment patterns and discouraging the practices that limit or deter active participation of women in work-force.

118. Section 7(1) (b).

119. Section 7(3).

120. See section 7(4)(1) which reads: "that payment be made to the workers of the amount by which the wages payable to him exceed the amount actually paid."

121. section 7(8).

122. Section 10.

123. Section 11.

124. Section 12.

125. Sectial 6.

126. See R.B. Ginsburg, *supra* n. 70 at 30.

127. Suitability should not be judged in view of long held assumptions regarding the capacities or incapacities of woman and the stereotyped sex roles. See *Report*, *supra* n 71.

7. Conclusion

Though the Act is designed to eradicate the evils of sex-based discrimination througe vigorous enforcement, certain additional measures would strengthen it further. The main flaw is the absence of any safeguard to the helpless workers against the retaliatory measure taken by the employer who will be in an economically dominant position. Efforts should be made to constrain the employers to obey the law so that the contraventions are minimum. If need arises, anonymous complaints should be allowed to be filed, or the name of the complainant should be kept secret, unless it is unavoidable, as in the case of recovery of money of the wage-differentials. Civil as well as criminal liabilities must be imposed upon the labour organisation or its agent or any other third person, apart from the persons already liable undet the Act,[128] who deliberately exert pressures on the authorities concerned to discriminate in violation of the Act. The Act provides for pecuniary penalties for certain offences, but imprisonment for wilful violations must also be provided.

The Act entrusts power to authorities under section 7(1) to decide the complaints or claims arising under it. There must be maximum time-limit fixed for such adjudications at original and appellate levels. If within that time the aggrieved person remains unredressed, then he or she should be allowed to go to courts for the remedy, so that administrative authorities may not delay the dispute unreasonably.

Most important of all is to see that decision-making power is not left solely to the male officers. Otherwise, the male superiority or prejudice may operate against the objectives of the Act. Women officers should be associated in the decision-making process either directly, if possible, or at least indirectly,[129] because a woman can better understand and appreciate the problems of women-workers and the mental, physical, social and economical impact of the discrimination. Further more, as recommended by the Committee on the Status of Women in India in its report[130], the number of women on the inspectorate of labour department entrusted with the administration

128. See section 10 and 11.

129. If sufficiently qualified or experienced women officers to decide such cases are not available, they can be indirectly helpful, by constituting a committee with at least half of the member represented by women to aid and advise the judicial authorities.

130. See *Report*, *supra* n. 71 at 233 (para. 5.326).

of this Act should be increased as well as provision should be made for women welfare officers wherever women are employed.[131]

The Act should be properly publicised and the workers as well as employers should be informed about their rights and liabilities by a wide circulation and information programme. Not only this, the workers should be educated to claim their rights. It would be more beneficial if women workers are encouraged more and more to actively participate in trade union activities.[132] Labour organisations should also come forward to help in this case by adjusting their activities in accordance with the convenience of the working women to enable them to participate actively.

Legislation by itself is not sufficient to uproot the deep-seated inequalities perpetuated by traditional social attitudes, prejudices and the value systems which have made possible the constant continuation of women's inferiority. A total overhauling of the system of values as well as a profound change of attitudes is absolutely necessary. Women's segregation in education as well as at occupational level must be prevented by discarding the concepts of suitability in terms of femaleness and maleness. Affirmative actions both in the form of "stop order"[133] sach as the termination of discriminatory practices with the help of judicial decrees as well as in the form of positive measures[134] such as affording them more opportunites in job market, improving and upgrading their work and work-conditions by collective agreements, job-evaluation methods etc., are the need of the day. "Pursued with intelligence and good faith, affirmative action should ultimately yield, neither in a pattern of 'reverse discrimination' nor abandonment of the merit principle; on the contrary it should operate to assume more 'rational utilisation' of human resources".[135]

ASHA CHAUHAN*

131. *Ibid.*

132. The Committee on Status of Women has recommended the formation of women's wings in all trade unions, to look after the problems of women workers and to improve womens' participation in trade union activities. *Id.* at 233 (para 5.326).

133. See R.B. Ginsburg, *supra* n. 70 at 30.

134. Constitutionality of positive measures always upheld by the judicial decisions has re-iterated in *State of Kerala* v. *N.M. Thomas* A.I.R., 1976 S.C. 490.

135. Cooper, "Equal Employment Today," 5 *Columbia Human Rights L. Rev.* 262, 278 (1973).

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IS BONUS A MATTER OF RIGHT ?

The basis of payment of bonus to industrial workers in India hss been a subject of controversy and litigation for the last sixty years. Although the workmen have been paid bonus from the beginning of this century, no clear cut basis for such payment was articulated until the Full Bench Formula was evolved by the Labour Appellate Tribunal of Bombay in the year 1952.[1] The Full Bench Formula, which was later on accepted and confirmed by the Supreme Court,[2] basically relied on the principle of profit-sharing as the basis for the payment of bonus to the workmen. However, the Payment of Bonus Act, 1965,[3] while relying on the Formula to a large extent, introduced a new principle of payment of minimum bonus at the rate of 4% of the wages—irrespective of profits or losses. The minimum limit for the payment of bonus was enhanced to 8.33% by the Payment of Bonus (Amendment) Ordinance, 1972 [later replaced by the Payment of Bouns (Amendment)Act 1972]. Now again the Payment of Bonus (Amendment) Act, 1976[4], seeks to reintroduce the basis of profit-sharing for the payment of bonus as evolved by the Full Bench Formula.

The payment of bonus to workmen is not an issue which merely affects the interests of workmen. It also affects the interests of employers, the industry, the shareholders, and the society at large. Hence, the policy on bonus has to be based upon balancing of these conflicting interests. In this regard, the fundamental question is : Is bonus merely a right to share profits or a right to receive certain payments regardless of profits? The answer to this question depends on the

1. For the Full Bench Formnla see *infra*.
2. See *Muir Mills Co. Ltd.* v. *Suti Mills Mazdoor Union*, A.I.R. 1955 S.C. 170.
3. Hereinafter referred to as the Act of 1965.
4. Hereinafter refrered to as the Act of 1976.

concept of bonus in our law. This paper is an attempt to explain the concept of bonus with its historieal background. A critical appraisal of the basic provisions of the Act of 1965 and the Act of 1976 is also made.

1. A Brief History

Historically speaking, the payment of bonus to the industrial workers in India has been made for various reasons. During the First World War a number of textile industries made huge profits because of war conditions and the consequent rise in prices. At that time the payment of bonus to the workmen in those industries was justified on the ground of huge profits.[5] In other words bonus was paid to the workers not as a matter of right but only on the basis of justice equity and good conscience to share profits along with the entrepreneurs. At that time bonus was paid to workmen in other industries by way of gratuitous payment and the workers could not claim it as a matter of right in a court of law. Bonus was considered only as an award and encouragement to the workers.

It was in the year 1942 that for the first time Chagla J. (as he then was) in *General Motors (India) Ltd. Bombay* v. *Their Workmen*[6] recognized the rights of workmen to raise an industrial dispute for bonus as a share in the profits in industry. In the year 1948 the Industrial Court of Bombay gave an award which held that the workmen have the right to share the profits in a concern.[7] In the industrial disputes about bonus for the year 1949 the Labour Appellate Tribunal of Bombay adopted the principle of the Industrial Court of Bombay and gave detailed award by explaining in details the calculation of bonus which has come to be known as the Full Bench Formula. The formula explained that the workmen have the right to have a reasonable share in the profits of the industry and also detailed the prior charges to be deducted out of the gross profits in order to arrive at the surplus for the distribution of bonus.[8] In the year 1955 the Supreme Court accepted that bonus is not a gratuitious payment by the employer to workmen nor a deferred wage but only a share in profits in industry.[9]

5. *Standard Vaccuum Oil Company* v. *Its Employees*, *Labour Gazette*, 107 (1942-43).
6. *Labour Gazette*, June 1942, p. 1030.
7. [1949] Industrial Cas. R. 173.
8. Labour Appellate Tribunal Bombay [Full Bench Formula] [1952] Labour App. Cas. 444.
9. *Muir Mills Co. Ltd.* v. *Suti Mill Mazdoor Union*, *supra* n. 2.

In order to resolve the problems of bonus and to evolve norms the Government of India appointed a Bonus Commission in the year 1960, some of whose major recommendations were implemented in the Payment of Bonus Ordinance, 1965, later replaced by the Payment of Bonus Act, 1965.

The Act of 1965 deviated for the first time partially from the principle of profit-sharing. Although the Act by and large accepted the Full Bench Formula, it made it obligatory for the employers to make minimum 4% of wages as bonus to the workmen irrespective of profits or losses. But, now the Act of 1976 seeks to do away with the compulsory payment of minimum bonus and reintroduces the payment of bonus on the basis of productivity or profits.

2. Concept of Bonus

The dictionary meaning of the word bonus is "something to the good, into the bargain;...gratuity to workmen beyond their wages".[10] It is also explained as an extra-payment made out of profits.[11] It may, therefore, be said that bonus with respect to industrial workers means an extra payment made by the employer to the workmen out of the profits earned by an industry.

(a) A right or privilege?

Is bonus a gratuitous payment or is it a matter of right? According to the theory of production as enunciated by Marshall, production is possible only with the contribution of capital and labour. In other words, production is not possible either with capital alone or with labour alone but it is only possible with the joint contribution of capital and labour. Because labour also contributes to production and profits, it should also have the right to share the profits of the industry. Relying on the above theory Chagla J. in *General Motors (India) Ltd., Bombay* v. *Their Workmen* observed :[12]

> It is almost universally accepted principle now that the profits are made possible by the contribution that both capital and labour make in any particular industry, and I think it is also conceded that labour has a right to share in increased profits that are made in any particular period. But the distribution of increased profits amongst workers is better achieved by the giving of an annual bonus than by a further increase in wages. Wages must be fixed on the basis of normal conditions.

10. *The Concise Oxford Dictionary*, 134 (Indian reprint, 1972).
11. See *Pitman's English and Shorthand Dictionary*, 74.
12. *Supra* n. 6, 1033.

It is, therefore, clear that the payment of bonus to the workmen is not a kind of gratuitous payment or a gift by the employer, but it is a payment in reward for the service already rendered in production by the workmen. Workmen, therefore have a right to share profits as distinct merely from the "privilege" to receive gratuitous payment. In the case of *Mill Owners Association, Bombay* v. *Their Employees*, the court observed :[13]

> That bonus is an ex-gratia payment is true from the standpoint of civil law which can only enforce the terms of a contract between parties, but in the domain of industrial relations between employers and workers, the rights and duties of the parties are not governed merely by a civil law but by collective bargaining in the settlement of disputes arising out of the demands made by one on another for more earnings, better conditions of work and increased production.

The implication of the above observation of the court is that it can be rightly argued that the payment of bonus to the workmen is not always a matter of right in the technical sense of law. In the field of industrial relations the rights and obligations of the parties are not purely determined on the basis of law but are also determined on the basis of collective bargaining.[14] The workmen have the right of collective bargaining to demand increase in wages and improvement in the conditions of labour, and ask for more bonus than permitted under the Act. The workmen are also entitled to raise industrial disputes for different kinds of bonus like *Puja* bonus, festival bonus or customary bonus, etc. Now the payment of the bonus to the workmen to the extent it is allowed under the Act is a matter of right. But to the extent they are entitled to raise industrial disputes for more bonus, not covered under the Act, bonus is a matter of interest or privilege.

However, the payment of bonus to workmen is not a matter of absolute right under all circumstances. It is a right which accrues only

13. [1946-47] Industrial Cas. R. 316.
14. The Trade Union Act, 1926 (Act 16 of 1926) gives the right to the workmen to form trade unions and the right to collective bargaining. It also provides immunities from tortious and civil liabilities. It gives immunity to the workmen from criminal conspiracy which is in furtherance of industrial disputes and genuine trade union activities.
Similarly, the Industrial Disputes Act, 1974 (Act 14 of 1947), s. 2 (J) and (k) gives the raight to workmen to raise indusrtial disputes about conditions of labour and terms of employment.

when the industrial establishment is making reasonable profits. When the profits are thus shared with the workmen in the form of bouns, it does not injure the efficiency of business or the business itself. The basic principle for the payment of bonus is that the workmen have contributed their labour to the earning of the profits made by the industry. The only just and equitable principle, we reiterate, upon which an employer can be asked to pay bonus to the workmen is to consider the amount of profits, and its capacity to bear the additional burden of bonus without injuring the business in any vital matter.

(b) **A Deferred Wage :**

Is bonus a deferred wage ? It is true that bonus is a reward to the workmen out of the profits of an industry for the services they have already rendered during the last accounting year. In this sense it can be said that bonus is an extra remuneration paid to the workmen for the services already rendered. It is also remuneration in the sense that it is not a gratuitous payment. Rather, it is a payment made by the employer not as a gift but in consideration for the services rendered in the production in industry.[15]

However, it may be pointed out that, though payment of bonus is extra remuneration, yet it cannot be considered to be within the concept of wage or deferred wage. If bonus is wage or deferred wage, then for the calculation of profit or loss of a concern bonus will have to be deducted as a prior charge. Wages are always deducted as a prior charge before arriving at the figure of profit or loss. Moreover, if bonus is wage or deferred wage, then it would rank in precedence over dividends and dividends can be given only if there are profits. But wages are to be paid regardless of profit or loss to the concern.[16] In this sense bonus is linked with dividends because both have to be paid out of the profits.[17] As already mentioned, the Supreme Court has also accepted that in fact the payment of bonus amounts to profit-sharing in the industry.[18]

Bonus may be defined, therefore, as an extra payment to the workmen for the services already rendered, to be paid out of the profits of the industry. Thus, it is neither a gratuitious payment nor

15. The *Textile Labour Association Ahmedabad* v. *The Ahmedabad Mill Owners' Association*, [1951] Industrial Cas. 811.
16. *Supra* n. 2, at 173-174.
17. *Id.*, at 174.
18. *State Bank of India* v. *Their Workmen*, A.I.R. 1960 S.C. 12.

a deferred wage. The workmen cannot claim bonus as a matter of right unless there are reasonable profits in industry.

3. **Quantum and Calculation of Bonus**

Payment of bonus to workmen serves as a measure for industrial peace so that there can be development and growth of the industry. However, the quantum of bonus is to be based keeping in view a contented labour force on the one hand and the investing public on the other who would be attracted to invest in industry only if there is steady and reasonable return to the capital which the industry can offer. There cannot be any precise and inflexible formula which can be applicable for all industries and for all times, even though it has to depend basically on the amount of profit which the industry makes.

The Labour Appellate Tribunal, Bombay, while laying down the Full Bench Formula observed :[19]

> Essentially the quantum of bonus must depend upon the relative prosperity of the concern during the year under review and that prosperity is probably best reflected in the amount of residuary surplus.

The Labour Appellate Tribunal further observed that for the distribution of the surplus after deduction of the prior charges, the needs of the employees, the claim of the shareholders and the requirement of industry had to be considered.[20] Hence, the distribution of profits are important not only from the point of view of the workmen, but also from the point of view of the shareholders and the reasonable needs of the industry.

Before the enactment of the Act of 1965, the Supreme Court also accepted the principles laid down by the Full Bench Formula. It was explained by Shah J. in *Jalan Trading Co.* v. *Mill Majdoor Union* as follows[21] :

> The formula, it is clear, was not based on any strict theory of legal rights or obligations: it was intended to make an equitable division of distributable profits after making reasonable allocations for prior charges.

In *Management of Rajendra Mills and Jawahar Mills, Ltd.* v. *Their Workmen*[22] it was held by the Supreme Court that while no inflexible

19. *Supra* n. 8.
20. *Id.*, at 446.
21. [1956] 2. L.L.J. 555.
22. A.I.R. 1960 S.C. 1325.

rule could be laid down as regards the distribution of the available surplus as a workable rule, where the available surplus was not considerable, the distribution should be such as to leave to the employer and the industry on the one hand and the workmen on the other, approximately equal benefits.

Thus according to the Full Bench Formula, which was (with respect) rightly accepted by the Supreme Court, bonus was to be paid as a matter of right to the workmen only when there were profits in industry. Each year was considered as a separate unit for the payment of bonus. If the profits were reasonable, then it was thought that approximately 50% of the profits should be shared by the workmen as bonus. If the profits were considerable then the share of the workmen could be even more than 50% of the available surplus. The payment of bonus to each workman was to be made in proportion to the salary or wage earned by him during the accounting year.

According to the Full Bench Formula[23] the "available surplus" was to be calculated by deducting the following items as prior charges from the gross profits :

(a) Depreciation.
(b) Income-Tax payable for the accounting year, not actual but only notional income tax.
(c) Return on paid-up capital.
(d) Expenditure for rehabilitation which includes, replacement and modernization of plant, machinery and building, but not for expansion of building or additions to the machinery.

When the Act of 1965 was enacted it made a number of changes in the principles for the payment of bonus. Though the Act basically retained the Full Bench Formula for the purposes of calculation of available surplus, as noted earlier, yet, it introduced a new principle of minimum bonus at the rate of 4% of the wages payable to workmen irrespective of profits or losses in the concern.[24] It also introduced the principle of maximum bonus to 20% even though there might be considerable profits in the concern.[25] Further it also provided that

23. Shah J. explained in detail the calculation of available surplus according to the Full Bench Formula in the case of *Jalan Trading Co.* v. *Mill Mazdoor Union*, *supra* n. 21.
24. Section 10 of the Act, 1965.
25. *Id.*, Section 12 (i).

the profits or losses could be carried forward over a cycle of four years with the principle of set-on and set-off respectively.[26] In other words each year is not considered as a separate unit for the payment of bonus as was considered under the Full Bench Formula. Such a principle was introduced with the idea that the workmen should be assured a minimum bonus every year but that they should not get too much bonus in a particular year. But the Act of 1965 provided that if there was any agreement between the management and the workmen about the payment of bonus, then such an agreement could provide for more than 20% of wages as bonus.[27] Section 10 of the Act of 1965 was further amended, as noted earlier, in the year 1972 in order to raise the minimum limit of bonus from 4% to 8.33% of the wages payable irrespective of profits or losses. The allocable surplus under the Act of 1965 is 67% of available surplus in the case of companies and 60% in other cases.[28]

4. Changes Introduced by the Amendment Act of 1976

Faced with the mounting liability to pay bonus both in public and private sectors, the Act of 1976 seeks to link the payment of bonus with profits or production or productivity. The object of the Act is to clarify the concept of bonus as being payable only on the basis of profits or on the basis of production or productivity. In fact this view is not a new one and it is reviving the old concept of bonus as explained by the Full Bench Formula. The following are the significant changes introduced by the Act of 1976.

It amends section 10 of the Act of 1965 by providing that there will be no bonus if there is no surplus. However, the minimum would be payable even if there is a nominal surplus. The minimum limit of the payment of bonus, in case there is a surplus over a cycle of four years, is reduced to 4% instead of 8.33%. The Act of 1976 still maintains the maximum limit of 20% as it was under the Act of 1965. However, the Act of 1976 has deleted section 34(3) of the Act of 1965, whereby the management and workmen could enter into an agreement providing for more than 20% of the wages as bonus. Instead the Act of 1976 provides that notwithstanding any contrary agreement between the management and the workmen, the maximum limit of bonus can be only 20% as provided for by section 11 of the Act of 1965.

26. *Id.*, section 15.
27. See Section 34(3) of the Act, of 1965.
28. For available surplus see sections 2(6) and 5 and for allocable surplus section 2 (4) of the Act of 1965.

5. Critical Appraisal

The basis of the payment of bonus to the workmen is profit-sharing. It cannot be claimed as a matter of right, if there is no profit. If minimum bonus is to be paid even without profits, then bonus would mean that it is a deferred wage and it has to be deducted as a prior charge before arriving at the profits. The shareholders may or may not get dividend, but the workmen will always get bonus. Such a concept of bonus would be definitely against the interests of the shareholders and industry. Bonus should be paid to the workmen only when some reasonable amount of dividend can be paid to the shareholders also.

If bonus is not linked to profits, then it would also be against the interests of the society because the prices of goods produced by the industry would increase. Such a situation would lead to chain reaction and would set inflationary tendencies in the economy. Investors will not invest in losing concerns. If the public does not invest, then ultimately it would be the workmen who will lose because then no new industry will be opened and also the existing industries may have to be closed down because of heavy losses.

On the other hand, if profit is the basis of bonus, then the employers or shareholders would also make some profits, the industry would have scope to grow, the workmen would be happy because they will get bonus, and the interests of society will be served because it would mean that industry can afford to pay bonus at the existing prices of goods for the consumers and the prices of goods produced would not increase because of the bonus factor.

It is, therefore, a welcome step that the Act of 1965 has been amended and workmen would now get bonus only if there are profits. Such a step is in complete conformity with the objective and concep of bonus from the time the Full Bench Formula was evolved.

Since the Act of 1976, also provides productivity or production as the basis of bonus, it would be better if most of the industries evolve some measures to determine productivity of workmen for the payment of bonus. Linking of bonus to production or productivity, is the most ideal thing because then each workman would claim bonus according to his productivity. Such a basis is very useful to give proper incentives to each workman to produce more and the efficiency of workmen would also increase. It would increase overall production ultimately bringing down the price level. However, it is very difficult to measure productivity in all kinds of industries and for different categories of jobs performed by the workmen. As far as possible, the

basis of payment should be productivity but where this is not possible, the second best alternative is the measure of profits.

Furthermore, bonus should be paid only when there is reasonable amount of profit. If the bonus is to be paid simply on the basis of nominal profits, then again the real basis of bonus is defeated because in effect then entrepreneurs or shareholders would not invest for lack of reasonable returns.

Once we accept that the rightful basis of bonus is profit-sharing, then it is equally important that the maximum limit of the payment of bonus to 20% of wages, now prevalent under the law, should also be done away with. If profit-sharing is the basis, then minimum and maximum limits do not go in conformity with such a concept. If a concern really makes huge profits in a particular year, it is basically because of the joint efforts of labour and capital and, therefore, the workmen should be entitled to share the larger gains in the form of greater bonus. If the concern can afford to pay, then it does not cause damage to anyone. Nor will the consumers have reason to complain, if without increasing the prices of goods the workmen can be paid more bonus.

It may be argued by those in favour of the maximum limit that if the workmen are paid more than 20% of their wages as bonus, then too much money would come into their hands which will lead to inflationary tendencies. Such a problem can be solved by many other methods. For example the workmen could be asked that their extra income beyond 20% of wages in the form of bonus shall be deposited either in the provident fund or compulsory deposit scheme which have become equally popular among the employees.

The National Commission on Labour,[29] on the basis of the data collected, has found that the workmen prefer to retain minimum limit of bonus whereas the management prefers to retain the maximum limit of bonus. It shows that the minimum and maximum limits in fact are only subjective issues. The most scientific base is to have neither a minimum limit nor a maximum limit under the Act.

If the minimum limit is abolished by the Bonus Act and the maximum limit is also considered conceptually sound to be abolished, then it logically follows that the principles of set-on and set-off for the purposes of allocable surplus over a cycle of four years should automatically be done away with. And the basis of payment of bonus

29. See *The Report of the National Commission on Labour*, 256 (1969).

ould be the allocable surplus available for each accounting year parately. The one and only relevant year should be the accounting ar for bonus. It will have the advantage of simplifying accounts th for the employers and the employees. Moreover, it would dispel e accounting doubts in the minds of the workmen. In this regard e Full Beanch Formula was right in that it accepted each year as a parate accounting unit.

The only rationale to delete section 34(3) which permitted the anagement and the workmen to enter into any agreement to pay nus at a rate above the maximum limit of 20% is that workmen ould not get more money in their hands in a given accounting year it may cause inflationary pressures. But there appears to be no gical reason to discourage collective bargaining on the issue of bonus. 'e know that collective bargaining should be encouraged if we want have cordial and healthy industrial relations in India. Collective rgaining gives confidence both to the management and the workmen settle their own disputes themselves. The management cannot agree pay more unless the industry can afford and the workmen cannot k for more unless the industry has the capacity to pay. If the indus- y can afford to pay more and it is settled by agreement between the anagement and the workmen, in such cases there should not be any aximum limit for the payment of bonus. Hence, it would be better reintroduce the principle of collective bargaining as was provided rlier by section 34(3) of the Act of 1965.

If the concept of bonus is understood in the light of above iscussion, with the modifications suggested, it would definitely bal- ace the interests of employers, workmen, and the society. Such an nderstanding of the concept of bonus would also encourage collective argaining and ultimately it would result in healthy and cordial indus- ial relations all over India.

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This note was written prior to the promulgation of the payment of Bonus (Amend. ment) Ordinance, 1977 (Ordiance No. 9 of 1977) (Eds.)

SEARCH AND SEIZURE : THE TAXATION LAWS (AMENDMENT) ACT, 1975

Introduction

The power of search and seizure is a potent tool in the hands of fiscal authorities to combat tax evasion[1]. The existence of this weapon in the arsenal of tax administration has a deterrent effect on tax-dodgers and is aimed at foiling an astute tax-evader's attempt to amass unaccounted wealth. Apart from bringing to light unaccounted property or income, this power also reaches to the sale and appropriate the sale proceeds towards any liability existing under section 230-A.[2] The department is also empowered to seize the incriminating documents exposing the erring assessee. Thus the objective is two fold : first, to get evidence which may be used against the person evading taxes and second, to acquire his assets and apply them towards satisfaction of his liability for direct taxes.

The Indian Income-Tax Act, 1922 did not give any specific power of search and seizure to the fiscal authorities. Successive but unsucessful attempts were made in 1938 and 1948 to incorporate this power in the statute. Till then the authorities had the powers normally exercised by the civil courts under the Code of Civil Procedure, 1908, such as power to enforce attendanee of witnesses, power of discovery, inspection. etc[3]. Ultimately, the recommendations of the Taxation Enquiry Commission 1955 found place in the Finance Act, 1956 and the powers of search and seizure were incorporated in the '22 Act[4], which appeared

1. See S. R. Bhargava and N. L. Jain, "Search and Seizure under Income-tax Act—Review of Provisions as Decided by Courts up to the Date," [1975] 2 *Taxation* 1 ; D. Vyas, "Search and Seizure" [1975] 2 Taxation 47 ; S. N. Jain, "Search and Seizure under the Income-tax Law" [1975] 2 Taxation 40 (II) 1.
2. Section 132 B (1).
3. Section 37 of the Income-tax Act, 1922.
4. Sub-section (2) to section 37 was inserted.

as section 132 in the Act of 1961. The relevant provisions were amended again in 1964[5] and 1965[6] to cast the net wider. The Wanchoo Committee[7] recommended that the department should make an increasing use of its powers of search and seizure in appropriate cases[8]. The Committee suggested various measures to make the machinery stronger by plugging various loopholes. All these recommendations have been now incorporated in the 1961 Act by the Taxation Laws (Amendment) Act, 1975[9].

The powers of search and seizure supplement the investigation machinery of the revenue authorities. In fact, this power is given to the tax administrators invariably in all countries. Notable examples are U.S.A.[10], U.K.[11], Germany[12] and Italy[13]. As observed by Justice Roberts[14] :

> ...Taxes are the life blood of government, and their prompt and certain availability an imperious need. Time out of mind, therefore, the sovereign has resorted to more drastic means of collection.... If the amount assessed is not paid when due, administrative officials may seize the debtors property to satisfy the debt.

No doubt, these powers[15] are very irksome and drastic for a tax evader. The exercise of this power may result in a serious invasion

5. Section 30 of the Finance Act, 1964.
6. Section 2 of the Income-tax (Amendment) Act, 1965.
7. *Direct Taxes Enquiry Committee Report (1971).*
8. *Id.* Para 2.39
9. Act No. 41 of 1975. Published in Gaz. of India, 7-8-1975, Part II, S. 1, Ext., p. 271.
10. Sections 6331 to 6344 of the U. S. Internal Revenue Code provide rules governing the seizure and sale of the tax-payers' property. See J. C. Chommie, *Federal Income Taxation*, 660-663 (1968).
11. Section 74 of the Income-Tax Act, 1952.
12. Abgabenordnung (Fiscal Code), A. O. Art. 421 & 433. See Taxation in Federal Republic of Germany, *World Tax Series*, 431 (2nd ed. 1969).
13. See Taxation in Italy, *World Tax Series*, 54-55 (1964).
14. *Bull vs U.S.*, 295 U. S. 247 (1935) ; Under the U. S. Revenue Code, 1954, the Commissioner has the power of distraint over the tax-payer's non-exempt property. The power of seizure can be invoked to compel the payment of a tax debt without the intervention of the judicial process. See also Barnes Douglas L. "Not-so-voluntary Compliance", 43 *Taxes* 821 (1965).
15. As already stated, the powers of search and seizure, in our country, are contained in section 132 of the Income Tax Act, 1961 and their exercise is regulated by Rules 112, 112A, 112B and 112C of the Income Tax Rules, 1962.

into the private affairs of a person and an interference, howsoever temporary, with the citizens' fundamental right to acquire, hold and dispose of property and to practise any profession or to carry on any occupation, trade or business. This led the Wanchoo Committee to recommend that the power should be used with the utmost circumspection.[16]

The Supreme Court had on various occasions to consider whether this intereference infringes the fundamental rights guaranteed to a person under the Constitution. It has been held that this interference does not offend article 19, being a reasonable restriction within the meaning of article 19(5) and (6)[17]. Justice Palekar observed :

> ...Such evasions eat into vitals of the economic life of the community...Therefore, in the interest of the community it is only right that the fiscal authorities should have sufficient powers to prevent tax evasion.

But, at the same time, the Supreme Court sounded a note of caution that the requirements of the section must be strictly complied with and the power can be exercised only for the acts specifically enumerated therein[19].

1. The Scope Of Power

The Director of Inspection or the Commissioner may authorise[20] a departmental officer[21] to exercise the powers of search and seizure.[22] The authorisation can be given in the following three cases, viz. :

(i) when inspite of summons issued under section 131(1) or notice issued under section 142(1) any person has failed to produce the required documents or books of account[23];

16. Paragraph 2.41.
17. *Commissioner of Commercial Taxes* v. *Ram Kishan*, 66 Inc. Tax R. 664 (S. C. 1967) ; *Pooran Mal* v. *Director of Inspection, (Investigation) of Income Tax, New Dehli*, 93 Inc. Tax R. 505 (S. C. 1974) ; *Bhupendra Ratilal Thakkar* and *Another* v. *C.I.T.*, 102 Inc. Tax R. 531 (S. C. 1976).
18. *Pooran Mal's case, supra* n. 17.
19. *Ibid.*
20. Such authorisation must be in Form 45, Income-tax Rules, 1962
21. Only following officers can be authorized : (i) Deputy Director of Inspection (D.D.I.) ; (ii) Inspecting Assistant Commissioner (I.A.C.) ; (iii) Assistant Director of Inspection (A.D.I.) : (iv) Income-Tax Officer. (I.T.O.) ;
22. Section 132 (1).
23. Section 132 (1) (a).

(ii) when the documents or books of account relevant to any proceedings under the Act would not be produced. It is immaterial whether requisition under the aforesaid sections has been made or not[24];

(iii) where any person is in possession of any money, jewellery or other valuable article or thing which, wholly or in part, represents his undisclosed property or income.[25]

Before issuing a search warrant, the authorising officer must satisfy himself that any of the aforesaid three circumstances really exist. He cannot act on mere suspicion or conjecture. To check the abuse of this power, the section provides that the authorising officer should have before-hand "reason to believe" and must act "in consequence of information in his possession". The important pre-requisite is belief and its existence. His belief must be honest and bona fide and it cannot be merely his subjective satisfaction. If arbitrariness is alleged, the court can require the authorising officer to produce the relevant material on which he formed his belief.[26] Thus, where the authorising officer signed blank authorisation forms, the search itself was declared illegal.[27] Similarly, where the search was conducted to enquire as to why a wealthy looking advocate was not paying wealth tax, the Punjab High Court held that the same was null and void.[28] The very genesis of the act of the authorising officer is open to judicial scrutiny and he has to convince the court about the genuineness of his belief. However, if satisfied, the court would not substitute its own judgement for that of the officer.[29] In short, the existence of the belief and the reasons for the belief are justiciable, but not the sufficiency of reasons. Moreover, there must be some reasonable or rational connection between the belief and the information. Furthermore, before issuing authorisation, the officer concerned has to record reasons for doing so.[30]

24. Section 132 (1) (b); *Puran Mal's case*, supra n. 18; *V. K. Jain* v. *Union of India*, 98 Inc. Tax R. 469 (Delhi, 1975).
25. Section 132 (1) (c).
26. *I.T.O., Special Investigation Circle 'B' Meerut* v. *Seth Brothers*, 74 Inc. Tax R. 836 (S.C. 1969). The Court has laid down general principles regarding search and seizure.
27. *Jagmohan Mahajan* v. *C.I.T., Punjab*, 103 Inc. Tax R. 579 (Punj., 1976); *H. L. Sibal* v. *C.I.T.*, 101 Inc. Tax R. 112 (Punj., 1975).
28. *Anand Swaroop* v. *C. I. T., Patiala-I*, 103 Inc. Tax R. 575 (Punj., 1976).
29. *Supra* n. 27.
30. Rule 112 (2).

The authorisation can be given for five specific purposes mentioned in section 132(1). These are: first, to enter and search any building or place where the authorising officer has reasons to suspect that relevant documents or valuables are kept;[31] second, to break open the lock of any safe, almirah etc;[32] third, to seize incriminating documents found in search;[33] fourth, to place identification marks on seized documents;[34] and fifth, to make an inventory.[35]

The search has to be conducted in a reasonable manner. The authorised officer has to call two respectable persons of the locality[36] and the search is conducted in their presence.[37] The occupant of the place searched may also be there.[38] An inventory of the seized articles is prepared by the officer. The same is signed by the witnesses[39] and a copy is given to the person whose premises have been searched.[40] However, if the nature of articles is such that these cannot be seized, the officer may pass an attachment order prohibiting the owner or the person in whose possession or control the articles are, not to remove or deal with them without his approval.[41] The services of police may be requisitioned to conduct the search more effectively.[42] In addition to these safeguards, the provision of the Criminal Procedure Code, 1973, relating to search and seizure, also apply as far as possible.[43]

Let us pause here for a while to discuss the scope of seizure. One major issue is whether the powers of seizure can be exercised over those assets which are in the possession of another authority, say excise or customs. In *Tarsem Kumar* v. *C.I.T.*[44] an amount of Rs. 93,500.00 was seized by the customs authorities under section 110 (2) of the Customs Act. The court decided that the money has to be returned to the assessee. While the amount was in the custody of customs autho-

31. Section 132 (1) (i); Rule 112 (3).
32. Section 132 (1) (ii); Rule 112 (4).
33. Section 132 (1) (iii).
34. Section 132 (1) (iv).
35. Section 132 (1) (v).
36. Rule 112 (6).
37. Rule 112 (7).
38. Rule 112 (8).
39. *supra* n. 37.
40. *supra* n. 38.
41. Section 132 (3); Rule 112 (4 B).
42. Section 132 (2).
43. Sec. 132 (13).
44. 94 Inc. Tax R. 567 (Punj., 1974).

rities, the Income-Tax Officer, acting under section 132, served a notice upon the assessee as well on the customs department and took possession of the cash. The question arose whether the Income Tax Officer was legally justified in doing so. There is a conflict between the views of the various High Courts on this point. The High Courts of Punjab and Haryana,[45] Calcutta,[46] Kerala[47] and Andhra Pradesh[48] have held that the act of the Officer is illegal. On the other hand the High Courts of Madras,[49] Madhya Pradesh,[50] Gujarat,[51] and Allahabad[52] have held to the contrary.

The views differ because the exact connotation and import of the word "seizure" has not been defined in the Act. The Supreme Court has held that "seize" means to take possession contrary to the wishes of the owner of the property. Seizure is a unilateral act of the seizing authority.[53] Thus, the moment the property is seized, the owner is divested of the control over that property. The legal effect of the order of seizure is the transference of legal possession, whether physical or otherwise, to the person effecting the seizure.[54] The power of seizure can be exercised only when the property is in the possession of the person who has committed a default by not disclosing the same to the revenue authorities. The act of seizure is directed against this person, only if he is in the possession of such undisclosed property. If some other authority has already, by an act of seizure, assumed possession or legal control over such property, it is futile to argue that the person has any control over such property. When the property is in the hands of other authorities, issue of an authorisation under section 132 would be

45. *C.I.T.* v. *Ramesh Chunder*, 93 Inc. Tax. R. 450 (Punj. 1974) ; *Tarsem Kumar's case supra* n. 44.
46. *Lakshmipat Charoria* v. *K. K. Ganguli*, 82 Inc. Tax R. 306 (Cal. 1971) ; *K. E. Johnson* v. *Laksmipat Charoria*, 93 Inc. Tax. R. 489 (Cal., 1974).
47. *Bafna Textiles* v. *I.T.O.*, 98 Inc. Tax R. 1 (Kar. 1975) ; *K. Choyi* v. *Syed Abdullah*, 91 Inc. Tax R. 144 (Ker. 1973).
48. *Shajahn* v. *I.T.O.*, (1975) Taxation 41 (3) p. 108.
49. *Gulab and Co.* v. *Supdt. of Central Excise*, 98 Inc. Tax R. 581 (Mad. 1975) ; *Mohammed Kunhi* v. *Mohammed Koya*, 91 Inc. Tax R. 301 (Mad. 1973).
50. *Panna Lal* v. *I.T.O.*, 93 Inc. Tax R. 480 (Madh. Pra. 1974).
51. *Ramjibhai Kalidas* v. *I.G. Desai, I.T.O.*, 80 Inc. Tax R. 721 (Guj. 1971).
52. *Moti Lal* v. *Preventive Intelligence Officer*. 80 Inc. Tax R. 418 (Allah. 1971).
53. *Gyan Chand* v. *State of Punjab*, A.I.R. 1962 S.C. 496.
54. *Durga Parsad* v. *H. R. Gomes* (*Prevention*), *Central Excise, Nagpur*, A.I.R. 1966 S. C. 1209.

contrary to the provision of the Act. As Malimath J. of the Karnataka High Court has correctly observed[55] :

> The power conferred by Section 132 is not an overriding power which can be exercised notwithstanding anything contained to the contrary in any other law... If permitted, it would lead to unwholesome conflict of authority.

The other view is that the expression "reasons to believe" in section 132 (1) has a direct link with the words "any person" in clause (c) of this section. In other words, the authorising officer must have a reasonable belief that the undisclosed property belongs to a particular person and it represents his undisclosed income. Thus, if these twin conditions cumulatively, viz., "bonafide reasonable belief" and "property belonging to persons who have not fully disclosed the same", are fulfilled, the authorising officer is empowered to issue an authorisation under section 132 (1). It is immaterial in whose actual possession or control the property is at the moment of the authorisation or actual seizure. As the Madras High Court observed[56] :

> We do not find any inherent incompatibility in issuing a warrant for seizure when the goods are known to be in the possession of another Government Department.

The Taxation Laws (Amendment) Act, 1975[57] has resolved this judicial controversy. Under the new section 132A, if the Director of Inspection or Commissioner has reasons to believe that the circumstances mentioned in section 132(1) exist, he may authorise competent officials to requisition the relevant documents or assets from the officer or an authority holding them under any law for the time being in force. The holding authority is statutorily bound to hand over the requisitioned assets or documents to the requisitioning officer.[58]

2. Expansion of Seizure Power

The amended Act seeks to enhance the power of search and seizure by the following new provisions :

(*i*) The power of issuing authorisation has been given to Deputy Director of Inspection and Inspecting Assistant Commissioner as well.

55. *Bafna Textiles case, supra* n. 47.
56. *Gulab and Co.'s case, supra* n. 49.
57. Hereinafter referred to as the New Act.
58. Section 132A. See also newly inserted s. 132 (9A) which says that if the authorised officer seizes books of account or other documents from a person over which he has no jurisdiction, these shall be handed over to the Income Tax Officer having jurisdiction within a period of fifteen days of the seizure.

This decentralization has obviously been done to avoid unnecessary delay when the higher officials are not easily available.[59]

(*ii*) Previously the authorised officer could enter and search a building or place. Under the new provisions, he can enter any building, place, vehicle or aircraft.

(*iii*) Section 132 (1) (*c*) allowed authorisation in case where the authorising officer had reasons to believe that the person is in possession of valuables which have not been disclosed. The person, while the search is in progress, could argue that these valuables would be disclosed in the accounting year. To counter this argument, the new Act has inserted the words "or would not be disclosed" (in future).

(*iv*) The new Act has empowered the authorised officer to search any person who has got out of, or is about to get into, or is in, the building, place, etc. Personal search can now be conducted if the authorised officer has reasons to suspect that such person has secreted any paper or valuables about his person.[60] This was serious lacuna in the Act and though the rule[61] did speak about personal search, there was no substantive provision to that effect. Strangely enough, this loophole escaped the notice of the Wanchoo Committee as well.

(*v*) As already said, the power of search under section 132 (1) (*c*) is available against any "person" who is in possession of valuables kept in a building, place, etc. Cases could arise where the building, etc., is in the jurisdiction of any Commissioner but the person is not. In such cases the authorisation could not be of any help to the authorised officer because of lack of jurisdiction. The delay in getting authorisation from the proper Commissioner, i.e., the officer having jurisdiction over the person could frustrate the very aim of search. To overcome such contingencies the new Act provides that the authorisation can be given in such cases by the Commissioner even though he has no jurisdiction over the person.

(*vi*) Sub-section 1A has been newly inserted in section 132. Accordingly to this provision the Commissioner can authorise any officer to proceed under section 132 (1) in respect of any building, place, vehicle or aircraft, even though not mentioned in the previous authorisation. For this wider authorisation the Commissioner should have "reason to suspect" that any book of account or valuables in respect of which the

59. See the recommendations of the Wanchoo Committee.
60. Section 132 (1) (iia).
61. Rule 112 (5).

officer is authorised are kept in any building, place, etc., not stated in the first authorisation.

This insertion has weakened the safeguards against the abuse of authority under the pretext of the exercise of powers of search and seizure. The yardstick of "reason to believe" has been changed to "reason to suspect" and the latter means "mere suspicion". This provision is bound to do more harm than good. True, tax evaders must be dealt with a stern hand, but the existing provision clothes the authorities with enormous powers. Courts do recognize its necessity. A search has never been held illegal on trivial or flimsy grounds. Even if a search is excessive, it has been held as "improper" but not "illegal".[62] It is not necessary that the authorised officer should seize only those documents or assets which are specifically mentioned in the authorisation letter, and even "indiscriminate seizure" has also been upheld.[63] As the exercise of power is regulated by statutory safeguards, it has not been considered as unreasonable or unconstitutional.[64] The most important point is that the material collected in an illegal search, it has been held, can be used in evidence against the person.[65] This is a marked departure from the American practice where such evidence is excluded.[66]

This new power, sometimes said to be of draconian nature,[67] fulfils the aspiration of the tax department which had been clamouring for it since 1956. Raiding houses and business premises on mere suspicion would ruin the reputation of innocent persons. At the same time it may cost the exchequer heavily. Never has any committee, not even the Wanchoo Committee, recommended such vast powers to be given to taxmen.

There is no provision in the Act prescribing any action to be taken against the person concerned if the search proves to be

62. *Puran Mal's case, supra* n. 17.
63. *supra*, n. 27.
64. *Ibid.*; *M. P. Sharma* v. *Union of India*, A.I.R. 1954 S.C. 300.
65. *Puran Mal's case, supra* n. 17.
66. *Mapp.* v. *Ohio* 367 U. S. 643 (1961); T. E. Atkinson, "Admissibility of Evidence Obtained through Unreasonable Searches and Seizures", 25 *Columbia L. Rev.* 11 (1925); Landynski Jacob, "Search and Seizure and the Supreme Court, A study in Constitutional Aspect", *John Hopkin's University Studies in Historical and Political Sciences* (1964).
67. *Select Committee Report on the Taxation Laws (Amendment) Bill, 1973, Minutes of Dissent IV*, para. 31.

"vexatious" or without reasonable ground of suspicion.[68] Such a provision exists in some statutes like the Foreign Exchange Regulation Act, 1973[69] and the Central Excise and Salts Act, 1944.[70] It is suggested that the income-tax legislation should also move along these lines. This would have a deterrent effect on the officer concerned and would necessarily make him more careful.

(vii) Another new provision is that where any books of account or documents or valuables are found in the possession or control of any person; it may be presumed to belong to that person.[71] Furthermore, the documents may be taken to be correct[72] and the handwriting or signaturers on these documents may be presumed to be that of the person in whose custody they were.[73] This would now shift the burden to the person concerned to rebut this presumption. In fact, a person has the maximum knowledge of his private affairs and it is proper to raise a presumption that the documents, books, etc., relate to him. Furthermore this provision would expedite the proceedings for the return of seized assets, because, as we shall discuss, there is a time-limit within which the fate of such assets has to be decided.[74]

The seized assets or documents can be retained by the department to asses the tax liability of the person.[75] This power of retention was given in the year 1965. With a view that the person may not be deprived of his assets for a long time, sub-section (5) of section 132

68. The Wanchoo Committee recommended:
"We would like the Department to ensure that the action of its officers in the matters of searches and seizures do not leave any room for complaint and whenever any officer is found, in his misplaced enthusiasm, to err and overstep the limits of reasonableness, he should be promptly and adequately dealt with" (para 2.41).

69. Section 58 reads :
Any officer of Enforcement exercising powers under this Act or any rule made thereunder who,—
(a) without reasonable ground of suspicion, searches or causes to be searched any place, premises, aircraft, vehicle or vessel, or
(b) vexatiously detains or searches or arrests any person
shall, for every such effence, upon conviction by a court, be punishable with fine which may extend to two thousand rupees.

70. Section 22 is also on the same lines as section 58 of the Foreign Exchange Regulation Act 1973.

71. Section 132 (4A) (i); *Wanchoo Committee Report*, para 2.40 (g).

72. Section 132 (4A) (ii).

73. Section 132 (iii).

74. Section 132 (5) and (8).

75. The application of seized assets is regulated by section 132 B.

provides the procedure and prescribes the time-limit within which the seized assets are to be released. It says that in the case of money, bullion, jewellery, or other valuable[76] article or thing, the Income-Tax Officer is required to make a summary assessment to the best of his judgement which would consequently be followed by regular assessment,[77] or reassessment.[78] This assessment is statutorily regulated by rules of natural justice.[79] The Income-Tax Officer must initiate an enquiry within fifteen days of the seizure. A notice, giving at least fifteen days time, is served upon the person and an opportunity of being heard is afforded to him.[80] Final order of assessment in consequence of this enquiry must be made by the Income-Tax Officer with the previous approval of the Commissioner within ninety days of the seizure.[81] This procedure must be strictly followed.[82]

The order should specify the amount of tax due on the seized assets,[83] any other liability under this Act or other Acts specified in section 230 A(1) (a)[84] and any interest or penalty which may be imposable under the Act[85]. Such assets as would be sufficient towards neutralisation of the person's liability are retained and the remaining assets are to be released to him. The assets, other than money, may be sold and the sale proceeds can be utilised. Such assets are deemed to be under distraint and the sale is effected in the manner laid down in schedule

76. In *Bhagwandas Narayyndas* v. *C.I.T., Ahmedabad*, 98 Inc. Tax R. 194 (Guj. 1975), the Court observed that the valuables should be such as can be readily converted into cash and must possess some intrinsic value in terms of money. It was held that the fixed deposit receipts were neither valuable articles nor 'thing'. These were, "merely the documents of title, which, though possessing much evidentiary value, do not possess any intrinsic market value".

77. Under Section 143 or 144.

78. Under Section 147.

79. Rule 112A.

80. Rule 112A (1).

81. The Wanchoo Committee recommended a period of 180 days ; para 2.40 (c).

82. In *Maneklal Bhagwandas* v. *V. N. Sheth*, I.T.O. Surat, 94 Inc. Tax R. 287 (Guj. 1974) the order was quashed because it was passed in violation of the mandatory requirements of Rule 112A (4) and was also against principles of natural justice because the material relied upon by the Income-tax Officer in passing the order was neither disclosed to the assessee nor was he given an opportunity to disprove it.

83. Section 132 (5) (ii).

84. Section 132 (5) (iii).

85. This is a new provision added by the 1975 Act : section 132 (5) (iia).

III of the Act.[86] Any objection to an order can be raised before the notified authority within a period of thirty days.[87] If on regular assessment the tax liability is less than the retained assets or sale proceeds thereof, then the department is bound to pay back the difference alongwith simple interest at the rate of twelve percent.[88]

As stated above, different provisions apply if any document or books of account are seized. These cannot be retained for a period exceeding 180 days unless the reasons for retaining the same are recorded in writing by the Income-Tax Officer and the approval of Commissioner has been obtained.[89] Any Person legally entitled to these documents can dispute the approval given by Commissioner. He may apply to the Central Board of Direct Taxes for the return of the documents.[90] However, the person from whose custody the books of account or documents are seized may make copies or take extracts from them.[91]

From this brief analysis, it may be concluded that the search and seizure provisions are quite exhaustive and have sufficient teeth to get at unaccounted income. Apart from giving extensive powers to the department, the interests of the person concerned are adequately safeguarded. Its efficient use is the need of the hour. But the power must be exercised in a bonafide manner. Power without check is likely to be abused. Vexatious searches and search without reasonable ground must be discouraged. To this end some effective provisions should be made in the Income-Tax Act.

N.S. Bawa*

86. Section 132 B (1) (iii).
87. Section 132 (11).
88. Section 132B (4) (a) and (b).
89. Section 132 (8).
90. Section 132 (10).
91. Section 132 (9).

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SURAMMA V. GANAPATLU : A CRITIQUE*

The recent decision of the Andhra Pradesh High Court in *Suramma* v. *Ganapatlu*[1] holding that a child-marriage solemnized in contravention of section 5(iii)[2] of the Hindu Marriage Act, 1955,[3] is void ab initio is open to serious criticism for more than one reason. *First*, the reasons advanced by Obul Reddy C.J. on behalf of the court are either in consonance with the actual import of the relevant provisions of the Act nor with the legislative intention. *Second*, in view of the restricted scope of section 16[4] of HMA, which is the only

* This case has since been overruled by a full bench of the High Court in *Venkataramana* v. *State*, A.I.R. 1977 A.P. 43. The case does not, however, minimise the significance of the present comment because the views herein expressed are still relevant and useful for a proper understanding of the import of section 5 (iii) of the Hindu Marriage Act, 1955.

That apart, some of the issues, i.e. the issue of illegitimacy of children born of marriages celebrated in contravention of section 5 (iii) of the Act and the issue of the legislative intent of section (iii) which are discussed in the comment, although found favour with the judges of the full bench, have not been adequately examined in the light of the relevant provisions of the Act. Again, the issue dealing with comparison of relevant provisons of the Special Marriage Act, 1954 with those of the Hindu Marriage Act, 1955 which has been discussed in the comment has not been adverted to in the full bench case.

The case has, however, brought out a few new points which have not been discussed in the comment. For example, it was held that a marriage celebrated in contravention of section 5 (iii) of the Hindu Marriage Act, 1955 would be valid by the operation of the doctrine of factum valet which is not affected by section 4 of the Act.

1. A.I.R. 1975 Andh. Pr. 193.
2. Section 5 (iii) of the Hindu Marriage Act, 1955 (Act 25 of 1955) reads :—"A marriage may be solemnized between two Hindus if the following conditions are fulfilled, namely :—...(iii) the bridegroom has completed the age of eighteen years and the bride the age of fifteen years at the time of the marriage."
3. The Hindu Marriage Act, 1955 (hereafter referred to as HMA).
4. Section 16 states:—"Where a decree of nullity is granted in respect of any marriage under section 11 or section 12, any child begotten or conceived before the decree is made who would have been the legitimate child of the parties to the

provision in the Act dealing with conferment of legitimacy on the children born of void and viodable marriages under certain circumstances specified thereunder, it is not desirable to hold a marriage celebrated in contravention of section 5(iii) of the Act, void ab initio. It may be noted that section 16 seeks to confer legitimacy only on children born of marriages declared void under section 11[5] or viodable under section 12[6]. In the face of section 16 this decision, if accepted, it is submitted, would in effect create and add another category of illegitimate children to the already existing category of illegitimate children: namely, those unfortunate children born of void marriages solemnised under the traditional Hindu law before the commencement of HMA. This is so because section 11[7] of the HMA is expressly made applicable only to marriages solemnized after its commencement.

The facts of the case in brief are: the appellant was given in marriage by her father to the respondent when they were six and eleven years old respectively. Though the marriage was celebrated in 1957, it had not been consummated at the date of the suit. As serious and irreconcilable differences arose between the father of the bride on the one hand and the bridegroom's family members on the other, the bride's father sought to repudiate his daughter's marriage with the respondent. The respondent successfully filed, to thwart his attempt, a petition for restitution of conjugal rights under section 9 of the Act. The learned additional subordinate judge rejected the contention of the appellant that her marriage with the respondent was void as it was violative of section 5(iii) of the HMA. In appeal to the High Court the same arguement was again advanced on behalf of the appellant. The Chief Justice accepted the appellant's argument, advancing in substance the following reasons: (i) the intended purpose of the HMA is "to prevent and eradicate the evil of child marriages;[8] (ii) the object of the HMA is clearly reflected in section 5 (iii) which

marriage if it had been dissolved instead of having been declared null and void or annulled by a decree of nullity shall be deemed to be their legitimate child notwit hstanding the decree of nulliy..."

5. For the text of the provision see *infra*. 7.

6. For the text of the provision see the HMA.

7. Section 11 of the Act reads: "Any marriage solemnized after the commencement of this Act shall be null and void and may on a petition presented by either party thereto, be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (i), (iv) and (v) of section 5".

8. A.I.R. 1975 Andh. Pra. 193, 195.

seeks to prohibit the solemnization of child marriages;[9] and (iii) the scope of sections 11, 12 and 18 does not in any way affect the import of section 5(iii) of the Act.[10]

1. Exegetical Analysis of Section 5

Section 5[11] of the HMA purports only to prescribe certain pre-requisites for the solemnization of any marriage under the Act. This provision obviously has two-fold purpose. One is to enumerate and give a statutory sanction to some of the pre-existing customary norms, such as prohibited degrees and *sapinda* relationship. The other is to disapprove of some of the age-old customary norms in respect of polygamy, age of soundness of mind of the parties to the marriage, etc., by making them pre-requisites for the solemnization of all Hindu marriages under the HMA. Notwithstanding this section 5, it is submitted, does not seek to deal with the issue of validity of marriages celebrated under the HMA. This inference can be drawn from the very language of the opening clause of the provision which is in marked contrast with the language of the opening clause of sections 11 and 12 of the Act. While the opening clause of section 5 states that "A marriage may be solemnized between two Hindus, if the following conditions are fulfilled," the opening clause of section 11 reads that "Any marriage solemnized after the commencement of this Act shall be null and void." In similar vein, the opening clauses of section 12 declares that "Any marriage solemnized, whether before or after the commencement of this Act, shall be voidable". It may be noted again that the HMA classified marriages into three exhaustive categories, namely,

9. *Id.*

10. *Ibid.*

11. Section 5 of the HMA declares:—

A marriage may be solemnized between two Hindus, if the following conditions are fulfilled:—

(i) neither party has a spouse living at the time of the marriage.
(ii) neither party is an idiot or a lunatic at the time of the marriage;
(iii) the bridegroom has completed the age of eighteen years and the bride the age of fifteen years at the time the marriage;
(iv) the parties are not within the decrees of prohibited relationship unless the custom or usage governing each of them permits of a marriage between the two;
(v) the parties are not *sapindas* of each other, unless the custom or usage governing each of them permits a marriage between the two;
(vi) where the bride has not completed the age of eighteen years, the consent of her guardian, in marriage, if any, has been obtained for the marriage.

valid, void and voidable. Every marriage celebrated under the Act will have to fall into any one of these three categories. The main question, therefore, is: under what category does a child marriage solemnized in breach of section 5(iii)[12] fall? If a marriage does not fall under the category of either void or voidable marriages, it would be presumed to be a valid marriage because the Act does not recognise any invalid marriage not covered by the category of either void[13] or voidable marriages.

As is evident from the text of sections 11 and 12, the former renders void any marriage celebrated in contravention of "clauses(i), (iv) and (v) of section 5", while the latter renders voidable any marriage solemnized in breach of, inter alia, clauses (ii) and (vi) of section 5. The above scheme of the provisions would indicate that any marriage solemnized in breach of clause (iii) of section 5 is valid notwithstanding such contravention, for that clause does not find a place either in section 11 or in section 12 of the Act.

Further, it may also be noted that section 5 does not deal with void marriages. This fact is clear from the language of section 11. If the import of section 5 with regard to child-marriages is taken to render them void, logic demands the extention of the same import to all marriages solemnized in contravention of any of the conditions laid down in that provision, for there is nothing in the provision to justify any discrimination between the several conditions. Such an import of the provision, it is submitted, would obviously be not only inconsistent with the import of section 11, but also render the section superfluous even with regard to clauses (i), (iv) and (v) of section 5 which it expressly seeks to deal with.

Faced with such an insurmountable difficulty the learned Chief Justice sought to distinguish a void marriage under section 5 from a void marriage under section 11. According to him, while a marriage solemnized in contravention of section 5(iii) would be "void ab initio", a marriage celebrated in breach of clauses (i), (iv) and (v) of that section "does not automatically become null and void unless a petition is presented by either party to the marriage for declaration of their marriage as null and void on the ground of contravention of any one of the conditions specified in clauses (i), (iv) and (v)."[13] The above view cannot be justified in the face of the categorical import of the

12. See *supra* n. 11.
13. A.I.R. 1975 Andh. Pra. 193, 195.

opening clause of section 11. As its language indicates, the invalidity of any marriage contravening any of the clauses mentioned thereunder stems directly from section 11 and does not stem either from section 5 or from a court's decree of nullity. It is left to the parties concerned to approach the court for obtaining a decree of nullity which cannot alter the status of the parties to the already void marriage, but would have only a declaratory value. If the parties fail to obtain the decree of nullity, such a failure would not validate the void marriage because the decree of nullity envisaged under section 11 is not relevant for deciding the issue of validity of the marriage, which is separate from the issue of obtaining the decree of nullity. Failure on the part of the parties to a void marriage to obtain a decree of nullity would, however, be fatal to the interests of the children born of that marriage as they would be condemned to the status of illegitimacy with no protection under section 16[14]. All the considerations mentioned above would also be applicable to section 12 which deals with voidable marriages. However, failure to obtain a decree of nullity under section 12 would not adversely affect the interests of the children born of a voidable marriage as the marriage in such a case will be treated as valid for all purposes.

The above discussion leads to the conclusion that a marriage solemnized in contravention of section 5(iii) is neither void under section 11 nor voidable under section 12 since what is not expressly included in those provisions should be presumed to have been excluded. And as stated earlier, what is not either void or voidable is valid.

Support for this view can also be derived from sections 4, 24 and 25 of the Special Marriage Act, 1954[15] which are in *pari materia* with sections 5, 11 and 12 of the HMA respectively. A well-recognised rule of construction is that the provisions of a statute should be construed with reference to the provisions of another statute, though enacted earlier, provided they are in *pari materia* with one another[16]. Therefore, it is necessary to examine the relevant provisions of the Special Marriage Act, 1954. Section 4 of the Act, like section 5 of the HMA, prescribes several pre-requisites for the solemnisation of marriage under the Act. Section 4(c) of the Special Marriage Act, 1954, like section 5(iii) of the HMA, prescribes age of the parties to the marriage. However, this provision does not purport to deal with

14. See *supra* n. 4.
15. Act 43 of 1954.
16. See *Maxwell on the Interpretation of Statutes*, 64-66 (12th ed., 1969).

the issue of the validity of a marriage contravening any of its sub-sections including sub-section (c), as this issue is dealt with under section 24,[17] which renders child marriages void. The same logic can be extended by analogy to section 5 of the HMA to argue that it does not deal with the issue of the validity of any marriage contravening any of its sub-sections.

Moreover, the fact that section 5 of the Act does not deal with the issue of validity of the child marriage is evident from the provisions of the Child Marriage Restraint Act, 1929[18] (the Sarda Act) which continues to be in operation even after the passing of the HMA. If the view that non-conformity with section 5(iii) of the HMA is intended to render child marriages void is accepted, then it would be logical to conclude that some of the provisions of the Sarda Act would stand repealed by the force of section 4(2) of the former which states that "any other law in force immediately before the commencement of this Act shall cease to have effect in so far as it is inconsistent with any of the provisions contained in this Act." But it may be noted that none of the provisions of the Sarda Act is considered to have been repealed. On the contrary the HMA is complementary to the Sarda Act. Therefore, the inevitable conclusion is that it is not the purpose of the HMA" to prevent and eradicate the evil of child marriages" as stated by Reddy C. J. Its only purpose is to discourage solemnization of child marriages by imposing penal sanctions under section 18 of the HMA. A child marriage under the HMA can be prevented before it is solemnized by an injunction obtained under section 12 of the Sarda Act. But once a child marriage is solemnized

17. Section 24 (I) of The Special Marriage Act, 1954 states:—

> Any marriage solemnized under the Act shall be null and void and may be so declared by a decree of nullity if—(i) any of the conditions specified in clauses (*a*), (*b*), (*c*) and (*d*) of section 4 has not been fulfilled, or...

The same considerations would apply in the context of section 25 of the Special Marriage Act, 1954.

18. This Act (Act 19 of 1929) is popularly known as the Sarda Act. It seeks to discourage solemnization of child marriages by visiting the bridegroom, the persons conducting the marriage and the concerned parents or guardians of the parties to the marriage with penal sanctions of imprisonment or fine. Section 2(a) of the Act defines the word "child" as "a person who, if a male, is under eighteen years of age, and if a female, is under fifteen years of age." Sections 3, 4 and 5 prescribe different punishments to different persons. Section 12 provides for the issuance of an injunction preventing the celebration of any marriage in contravention of the provisions of the Act.

under the Act, it is valid[19] notwithstanding the entailment of penal sanctions under section 18 of the HMA, as well as under sections 3, 4 and 5 of the Sarda Act. Again, even if it is accepted that the Sarda Act stands repealed by the HMA, child marriages under the latter, as already submitted, are not void.

2. Legislative Intent

A perusal of the Lok Sabha debates also reveals that Parliament did not intend to make child marriages either void or voidable. At the clause by clause discussion of the Hindu Marriage Bill in the House several members[20] moved amendments to clauses 11 and 12 (now sections 11 and 12 of the Act) which sought to insert sub-clause (iii) of clause 5 (now section 5 of the Act) in clause 11. Had these amendments been accepted child marriages would not have become valid under the Act. But these amendments were rejected when clause 11 was voted upon for its final adoption[21]. In view of the above legislative history of section 5(iii) of the MHA, the observation of the learned judge that "it cannot therefore be said that Parliament intended to make marriage between two minors only punishable and not render them null and void under clause (iii) of section 5"[22] is not convincing. This view now stands confirmed by the new changes effected recently to some of the existing provisions of the HMA. The Marriage Laws (Amendment) Act, 1976[23] seeks to bring about radical changes in some of the matrimonial laws in the country. One of the changes brought about is to enable a Hindu wife to obtain divorce under section 13 of the HMA on the ground that her marriage was solemnized before she attained the age of fifteen years and she has repudiated the marriage after the age of eighteen years.[24] This provi-

19. See *Siramandy* v. *Bhagavathyamma*, A.I.R. 1962 Mad. 400; *Mahari* v. *Director of Consolidation*, 1969. Allah, L.J. 63; *Naumi* v. *Norotham*, A.I.R. 1963 Him. Pra 15; and *Ram Saran* v. *Sital*, A.I.R, 1939 Allah. 340. The last case was decided under the Sarda Act.

20. See 4 *Lok Sabha Debates*, Part 2, (April-May) 1955. N.C. Chatterjee (p. 7597 and 7611), Bogawat (p. 7906 and 7614) and M.S. Gurupadaswamy (p. 7619) moved amendments to clause 11 of the Hindu Marriage Bill.

21. Id. 7686.

22. A.I.R. 1975 Andh. Pra. 193,195.

23. The Act received the assent of the President on 27 may 1976.

24. See clause 7 (c) (iv) of the Marriage Laws (Amendment) Act, 1976. This provision accepts and embodies the recommendation of the Committee on the Status of Women in India which said; "As immediate measures to deter child marriages and to alleviate their consequences we suggest the following :—(a) to

sion clearly shows the intention of Parliament on the validity of child marriages under the HMA. The Law Commission has also expressed that "the general understanding is that the marriage remains valid, though criminal panalities may be attracted by reason of violation of the requirements as to minimum age"[25].

Another far-reaching consequence of this decision, if accepted, will be that it would create serious hardship to the children of marriages solemnized in contravention of section 5(iii) of the Act. Section 16[26] which purports to confer legitimacy on the children born of void and viodable marriages requires the obtaining of a decree of nullity under sections 11 and 12 respectively as a condition precedent for such conferment. Since section 5(iii) has not been mentioned either in section 11 or section 12 no decree of nullity can be obtained under these provisions. Consequently, section 16 cannot be invoked[27] for the conferment of legitimacy on the children born of marriages celebrated in contravention of section (iii) of the HMA, if they are held to be void marriages solemnized before the commencement of the Hindu Marriages Act, because section 11 expressly confines its scope to the marriages celebrated after the commencement of the Act[28].

provide the girl the right to repudiate the marriage on attaining majority on the lines similar to the 'option of puberty' under Muslim Law." See *The Report of the Committee on the Status of women in India*, 113 (1975).

25. *The Law Commission of India, Fifty Ninth Report*, 50 (1974)

26. For the text of the provision see *supra* n. 4.

27. It may be noted that the Marriage Laws (Amendment) Act, 1976 (Section 11) seeks to dispense with the requirement of obtaining a decree of nullity either under section 11 or section 12 of the Act, as a condition precedent for the invocation of section 16 of the Act. The relevant portion of clause 11 of the Act reads:—

"For section 16 of the Hindu Marriage Act, the following section shall be substituted namely :—

16. (1) Notwithstanding that a marriage is null and void under section 11, any child of such marriage who would have been legitimate if the marriage has been valid shall be legitimate whether such child is born before or after the commencement of the Marriage Laws (amendment) Act, 1976 and whether or not a decree of nullity is granted in respect of that marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act."

As is evident from its language, ths proposed new section 16 will be applicable only to void marriages covered by section 11 of the HMA.

28. For the text of the provision see *supra* n. 7.

It is noteworthy that even the Marriages Laws (Amendment) Act, 1976, does not improve the lot of the Children born of void marriages solemnized before the commencement of the Act.[29] This is really unfortunate.[30]

B. ERRABBIXX

29. See *supra* n. 27.

30. It is suggested that the present section 11 of the HMA may be amended so as to extend its scope even to void marriages solemnized before the commencement of the HMA.

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THE CIVIL RELIEF *VIS-A-VIS* THE STATUTORY REMEDY IN INDUSTRIAL ADJUDICATION

Specialia Generalibus Derogant/Generalia Specialibus Non Derogant ?

I

Premier Automobiles v. K. S. Wadke[1] is a decision of considerable importance, though the vital legal issuse on the jurisdictional question would appear to be simple. The appellant company had executed an agreement on December 31, 1966, relating to an incentive scheme of payment for production increase with its union, called the Engineering Mazdoor Sabha,[2] which was at that time a registered and recognised trade union of the appellant's production department. Subsequently, a rival union called the Association of Engineering Workers[3] came into existence in the same department. The appellant, after derecognising the Sabha Union, entered into an agreement with the Association Union regarding the payment under the incentive scheme. This agreement was sought to be brought into force with effect from January 1, 1971. The new agreement purported to alter the norms of the incentive scheme and the payments under it[4].

1. 1975 Lab. I. Cas. 1651 = A.I.R. 1975 S.C. 2238 (Alagiriswamy, Goswami, and Untwalia JJ.). The page citation hereinafter correspond to the pages in the Labour and Industrial Cases. Untwalia J. delivered the judgement of the Court).
2. Hereinafter called the Sabha Union.
3. Hereinafter called the Association Union. It was also registered and recognised for purpose of collective bargaining.
4. Under the old agreement with the Sabha Union, the employees were to get an extra payment at the rate of 3.5% for every block of 25 units after a target of 950 units, till the limit of 1250 units, and above the 1250 unit target it was 4% extra payment. The formula would work out for a total increase of 91% in wages if the production target reached above the 1250 units in a month of 25 working days. Under the new agreement with the Association Union, the floor level was raised and the slab level target was changed to 975 and 1325 for the same percentage of extra payment. This materially affected the total emoluments of the workers and demanded considerable increase in production from the effective date of the new agreement.

Upon this the Sabha Union lodged its protest with the appellants. The appellants took the stand that the alteration in the agreement with the Association Union was necessitated under the changed conditions of having taken in 27 apprentices as regular employees in the production department on account of which the production had increased. Aggrieved under the circumstances, the respondent and another workman instituted a suit in the city civil court, Bombay, against the appellant and the Association Union in a representative capacity on behalf of the Sabha Union and the non-unionised workers of the production department. It is relevant to note that though the appellant derecognised the Sabha Union before entering into the new agreement with the Association Union, it did not take any step to terminate the agreement with the Sabha Union by the Industrial Disputes Act, 1947.[5]

In the civil suit the plaintiff-respondent based his claim on the December 1966 agreement to which he was a party and claimed his relief under the provisions of the Specific Relief Act, 1963. He prayed for a declaratory decree that the subsequent agreement with the Association Union was not binding on him and other workmen who were not members of the Association Union and for a prohibitory order restraining the appellant from enforcing the said agreement. Before the trial judge, the appellant, besides opposing the suit on merits,

5. It is to be noted under section 2(p) "settlement" means "a settlement arrived at in the course of conciliation proceedings and includes a written agreement between the employer and workmen arrived at otherwise than in the course of conciliation proceedings". Where such agreement has been signed by the parties thereto. Under sec. 18, a settlement arrived at by agreement between the employer and workman otherwise than in the course of conciliation proceedings shall be bindings on the parties to the agreement. By virtue of this section settlements and awards receive parity in their legal sanctity and enforceability. Section 19, which provides for the operation of settlement and awards, under sub-section (3) provides "An award shall, subject to the provision of this section, remain in operation for a period of one year". It also provides : "Notwithstanding the expiry of the period of operation under sub-section (3), the award shall continue to be binding on the parties until a period of two months has elapsed from the date on which notice is given by any party bound by the award to the other party or parties intimating its intention to terminate the award" (sub-sec. 6). Under sub-sec. (7) no notice given under sub-sec. (2) or sub-sec. (6) shall have effect, unless it is given by a party representing the majority of persons bound by the settlement or award, as the case may be. Thus, it is evident that since the law under the statute treats settlements and awards alike, in order to effect a termination of the agreement, notice must be given, and when it is not terminated, it does not cease to be operative even when the statutory period of its operation expires.

challenged the jurisdiction of the civil court to entertain matters of industrial dispute and questioned its power to issue any order or decree against the parties. The argument was that as the dispute was one between an employer and the workmen in respect of an agreement between them, it was an industrial dispute for which the forum provided under the Industrial Disputes Act, 1947 has exclusive jurisdiction and consequently the civil courts have no jurisdiction to entertain the suit. The respondent, on the other hand, contended that the rights arising out of the agreement to which he was party had become an implied term of the conditions of his service, and that consequently certain rights of a contractual nature had accrued to him the breach of which entitled him to an appropriate remedy in the ordinary courts. The trial judge, holding that the suit was of a "civil nature for enforcement of rights of common and general law", granted an injunction of a conditional nature, and refused the declaratory relief.[6]

On appeal, a single judge of the Bombay High Court, while declining to interfere on merits, sustained the jurisdiction of the civil court in the matter. An appeal to the division bench also failed. The matter was brought up before the Supreme Court by special leave. The appellant urged that the right claimed by the respondent under the agreement could be enforced through the statutory remedy available under section 33-C of the Industrial Disputes Act.[7] The

6. The opinion of the trial judge was that since the suit was of a civil nature, there was no question of the reliefs being claimed under the Industrial Disputes Act. The injunction order was in terms of restraining the appellant from enforcing the agreement of January 1971 with the Association Union, subject to two conditions (1) the injunction was not to operate on those workmen who were prepared to accept the terms of the new agreement after the appellant took steps to make the agreement binding on the workmen who were not members of the Association Union; (2) the injunction was to cease to operate on the expiry of three months after the expiry of twenty one days notice under section 9A of the Industrial Disputes Act.

7. Section 33-C provides that when money is due from an employer under a settlement or an award or under the provision of Chapter V-A to a workman, the workman himself, or an authorised person or assignee, through an application move the appropriate Government for recovery, within an year from the date on which the money is due, [sub-section (1)]. So also, if the workman is entitled to receive from the employer any benefit which is capable of being computed in terms of money, and if question arises as to the amount due, such question could be decided by the labour court, so specified by the appropriate Government [Sub-section (2)]. And further, the workmen employed under the same employer and entitled to receive from him any money or any benefit capable of being computed in terms of money. A single application for the recovery of the amount due could be made on behalf of such workmen [Sub-section (5)]. All these provisions were to operate subject to the rules that would be made in that behalf.

respondent on the other hand pleaded that the remedy said to be available under the statute is a misnomer, since a reference to labour court or industrial tribunal was dependent on the exercise of the powers of reference vested in the government under section 10(1) of the Act, which it may or may not exercise. Consequently, it did not confer any right on the respondent. Further, it was argued that even if the suit did not lie in a civil court for enforcement of the right created under the Act, the courts in India could make an order or decree for injunction to prevent the threatened injury or breach of right, as the remedy of injunction was not barred. The Supreme Court was not persuaded by the argument of the respondent. Nevertheless, it was of the opinion that on the facts and circumstances of the case the provision of section 33-C of the Industrial Disputes Act was not the appropriate remedy.[8] Further, it was not also open to the workmen concerned to approach the labour court or the tribunal directly for adjudication of the dispute. The Government could refuse to make a reference of the dispute, even on grounds of expediency.[9] If the refusal of the Government to refer was not sustainable, the claimant would have to invoke the jurisdiction of the High Court under Article 226 of the Constitution for an appropriate relief. However, the court also felt that as the power of reference exercised by the Government was so common, it was difficult to call the remedy a misnomer or insufficient or inadequate for the purpose of enforcement of a right or liability created under the Act.[10] The handicap which the remedy suffered from was well compensated on making the reference. The handicap leads only to the conclusion that for adjudication of an industrial dispute in connection with a right or obligation under the general or common law and not created under the Act, the ramedy is not exclusive but alternative. For, enforcement of a right or an obligation under the Act the remedy provided *uno flatu* in it is exclusive[11]. According to the court, the remedy available under the statute is confined to rights arising out of it and does not extend to the enforcement of a right or obligation arising under the general law or common law.

8. 1975 Lab. I. Cas. 1651, 1569.
9. *Ibid.*
10. *Ibid.*
11. *Ibid.*

As regards the remedy under the Specific Relief Act, 1963, to the respondent in matters of industrial dispute the Supreme Court was of the opinion that "the jurisdiction of the Civil Court in India is limited to cases in which there is right at law, that is to say right to be pursued in such Court."[12] And in India it is not permissible, as in England, for the courts to exercise any original jurisdiction, independently of such right at law, to prevent what it considers as wrong.[13] After examining the precedents, and the principles applicable to the jurisdiction of the civil courts in relation to an industrial dispute,[14] the court pointed out that there would be hardly any dispute that could be said to arise only out of a right or liability under the general law and not under the Industrial Disputes Act within the meaning of section 2 (k) and that industrial disputes invariably were disputes that relate to the enforcement of a right or an obligation created under the Act, for which the only remedy was under the Act.[15]

12. *Id.*, 1660. The Court found that as in England, there were no two systems such as common law and equity in India, to seek equitable remedies. But under s. 9 of the Civil, Procedure Code the civil courts have jurisdiction to try suits of civil nature except the suits which were expressely or impliedly barred.
13. *Id.*, 1161.
14. (i) If the dispute is not an industrial dispute, nor does it relate to enforcement of any other right under the Act the remedy lies only in the civil court.
    (ii) If the dispute is an industrial dispute arising out of a right or liability under the general or common law and not under the Act the jurisdiction of the civil court is alternative, leaving it to the election of the suitor concerned to choose his remedy for the relief which is competent to be granted in a particular remedy.
    (iii) If the industrial dispute relates to the enforcement of a right or an obligation created under the Act, then the only remedy available to the suitor is to get an adjudication under the Act.
    (iv) If the right which is sought to be enforced is a right created under the Act such as Chapter VA then the remedy for it is either section 33-C or the raising of an industrial dispute as the case may be.

    The court accordingly found that the source of the right claimed by the respondent was the agreement of a binding nature under section 18(1) of the Industrial Disputes Act, and that such collective agreements created a right under the Act and not under the general law of contract. Hence, as a threatened breach of their right which flowed from an agreement arising under the Act and a suit for a degree of permanent injunction was not maintainable in the court "as it had no jurisdiction to grant the relief or even a temporary relief". (at 1665).
15. 1975 Lab. I. Cas. 1651 at p. 1664. The Court noted the divergence of views expressed by High Courts in India in the matter of the availability of civil remedy in industrial disputes. For example, in *M/S Austin Distributors Pvt. Ltd.* v. *Nikhil Kumar Das* [(1970 Lab. I. *Cas.* 323 (Cal.)]. The Cal. High Court had held that a suit for recovery of damages in cases of wrongful dismissal would be in a civil court even though a special remedy is provided in the Act in respect of that matter. "This would be so on the footing that the dismissal was in violation of the contract of service recognized under the general law" (at 1664-65). The Supreme Court seems to agree with this decision.

The Supreme Court stressed that the consequence of the order of the trial court was one of creating an impossibility in the sense that under that order it becomes imperative for the employer to operate simultaneously two agreements with regard to the incentive payment.[16] On this ground also, the Supreme Court ruled that the trial court decree was unsustainable.[17] Again, on the character of the remedy sought by the respondent, the Supreme Court found that section 37 of the Specific Relief Act, 1963, read with sections 38 (1) & (2), 41 (a) and 14 (1) (c), would show that the law is that an injunction cannot be granted to prevent the breach of a contract of which specific performance cannot be had.[18] And since the impugned agreement is a variable one under section 9-A of the Industrial Disputes Act,[19] it is not specifically enforceable and as such the remedy of injunction cannot be granted to prevent its breach.[20]

16. *Id.*, 1666.
17. *Ibid.*
18. See *infra* fn. 38.
19. Sec.9-A : No employer, who proposes to effect any change in the conditions of service applicable to any workman in respect of any matter specified in the Fourth Schedule, shall effect such change,—
    (a) Without giving to the workmen likely to be effected by such change a notice in the prescribed manner of the nature of the change proposed to be effected; or
    (b) Within twenty-one days of giving such notice;
    Provided that no notice shall be required for effecting any such change —
    (i) where the change is effected in pursuance of any settlement, award or decision of the Appellate Tribunal constituted under the Industrial Disputes (Appellate Tribunal) Act, 1950; or
    (ii) where the workmen likely to be affected by the change are persons to whom the Fundamental and Supplementary Rules, Civil Services (Classification, Control and Appeal) Rules apply.
20. It is to be noted that the decision of the Supreme Court in this case disposes of another appeal as well which also arose out of similar facts and on the same point. In that case under section 33(2) of the Industrial Disputes Act, the appellant sought, from the industrial tribunal, the approval of a dismissal order of some 46 workmen. While the approval application was pending under an agreement the matter was submitted to Arbitration under section 10A of the Industrial Disputes Act. Subsequently, the appellant sought to terminate the agreement and

The decision of the Supreme Court merits careful consideration on more than one count. It deserves approbation for clearly laying down the law governing matters of jurisdictional questions relating to industrial relations disputes. Nonetheless some of the following aspects of this decision warrant critical appraisal :

(i) the trial court order was not sustainable because the civil courts have no jnrisdiction to deal with the matter ;

(ii) the remedy of injunction does not lie in cases of contractual obligation which in their very nature are not specifically enforceable by virtue of the provisions of the Specific Relief Act ; in the instant case the agreements were not specifically enforceable in their nature and therefore the remedy of injunction was not available, even if the trial court were to have jurisdiction ;

(iii) the relief granted by the trial court was not maintainable on account of its being operationally impossible and impracticable.

II

A. Legal Study

The Court took the view on the first aspect that the Industrial Disputes Act, by providing reliefs under sections 33-C and 10 with regard to industrial disputes as defined in section 2 (*k*) of the Act, excludes civil court remedies in this regard. Since the Act provides statutory remedies for rights that arises out of the statute, the remedy must be found within the statute. On this view of the matter certain pertinent issues call for consideration, namely,

i. what is the concept of a legal remedy and relief ?;

ii. do section 10 and 10-A of the Industrial Disputes Act provide for legal remedies or reliefs? ;

iii. if "reference" under the Act is a legal remedy or relief, to what extent is it available or sufficient as a relief? ;

accordingly under section 19(2) of the Industrial Disputes Act notice was served on the Union terminating the said agreement. Challenging this action of the appellant, the respondents as plaintiffs sought an injunction order restraining the appellant from committing a breach of the agreement. Upon the preliminary objection on jurisdictional issue the trial court found against the appellant and issued the injunction in favour of the plaintiff-respondents. Thereupon the matter was brought in appeal before the Supreme Court.

iv. if a "reference" is refused, what alternative is left to the aggrieved ?;

v. is the remedy under section 33C of the Industrial Disputes Act of general nature available in all cases of industrial disputes? ;

vi. does the availability of "reference" under the Industrial Disputes Act exclude the general remedies available under the Specific Relief Act ?; and

vii. if a "reference" is refused, will mandamus lie under Articles 226 and 227 of the Constitution ?

A consideration of these and other related issues would show the adequacy or otherwise of the law, besides highlighting the need and relevance of a positive judicial policy in matters of industrial disputes.

It is submitted that a legal remedy is the relief available at law to an aggrieved person whose legal right has been infringed under the particular circumstances of the case.[21] Let us now consider the nature of the relief available under the Industrial Disputes Act. Under section 10 of the Act, one can seek to raise an industrial dispute and have it referred. Under section 10-A, as an alternative to the provisions of section 10, the parties can make out a dispute and under written agreement submit it to arbitration.[22] Whether it is the former, or the latter it

21. See *Black's Dictionary of Law*, as also *Osbern Concise Law Dictionary* and *Stroud Judicial Dictionary*.

22. Section 10 provides :

For where the appropriate Government is of opinion that any industrial dispute exists or is apprehended, it may at any time, by order in writing,

(a) .....

(b) .....

(c) refer the dispute or any matter appearing to be connected with, or relevant to, the dispute, if it relates to any matter specified in the Second Schedule, to a Labour Court for adjudication; or

(d) refer the dispute or any matter appearing to be connected with or relevant to, the dispute where it relates to any matter specified in the Second Schedule or the Third Schedule, to a tribunal for adjudication.

Sub-sec. (2)/

Sec. 10-A provides, when any dispute exists or is apprehended and the employer and workmen agree to refer the dispute to arbitration, they may ∴ by a written agreement, refer the dispute to arbitration and the reference shall be to such person or persons as an arbitrator or arbitrators as may be specified in the arbitration agreement. sub-section 3(b) (3-A).

is subject to the intervention of the Government.[3] But it is evident that both provisions contemplate a legal method and machinery for the resolution of conflicts which could properly be called industrial disputes under section 2 (k) of the Act, with the difference that in the former course the Government is seized of the matter at the very first instance while in the latter it comes in at a later stage. In either case, the final decisions as to whether the dispute should be referred rests with the Government in its discretion.[24] In such circumstances it cannot be conceded that there existed any legal right for the party, that could be pursued under the law for the relief contemplated. In fact, a "reference" by the Government for adjudication is no relief at all. A reference for adjudication or even arbitration is a way of settlement of the dispute, a process through which the machinery contemplated by the Act could be activised in any particular case through the agency of the government. The provision of a machinery, or for that matter a *modus operandi*, could not be taken as a legal remedy, much less as an adequate legal remedy. For, the element of executive discreation vested in exercising the option of reference negatives the very concept of legal right and corresponding legal remedy.

Furthermore, it is not that in every case "reference" is made as a matter of course. Therefore, it is wrong to conclude that seaction 10 or section 10-A provide a legal remedy in cases of disputes, for when there is no legal right to a reference there is no legal remedy available ; and the statute does not contemplate granting a legal right to every disputant to get the matter referred to adjudication as a matter of course. As far as the workmen are concerned the relevant provisions would only be an enabling provision to raise a dispute. Hence, it would be fallacious to view the provisions as legal remedies. It is not disputed that the government can refuse to refer a dispute. In such an event, it is admitted that the relief available is to resort to article 226 or 227 of the Constitution involving the jurisdiction of the High Court to issue a writ of mandamus or any other appropriate writ. Here it is sufficient to state that seldom can a worker avail himself of such a remedy on account of factors which are often beyond his control.[25]

23. See sections 10(2), 10-A (3) and S. 10-A (3-A).
24. *Ibid.*
25. The High Courts have very seldom issued the writ of mandamus in such cases. The expenditure involved, the time factor and the risk element are factors which work as a great deterrant for the worker to ordinarily choose the course of action contemplated under the provision of the Constitution.

The Court through Untwalia J. did concede that it is not easy for the aggrieved workman to get his matter referred for adjudication in all circumstances and that it was legitimate to take the view that the jurisdiction of the civil court was not completely ousted by the passing of the Industrial Disputes Act.[26]

True, section 33-C of the Act entitles a workman to approach the statutory machinery to seek the enforcement of a right based on pecuniary claims against the employer in the special situation of a dispute pending before the concerned authority, the labour court or the tribunal as the case may be. But, section 33-C remedy is available only under specific circumstances and for limited purpose of recovering money due, it cannot be regarded as affording a sufficient remedy.

We must conduct that the Industrial Disputes Act neither provides any legal remedy in the proper sense of that expression, nor any adequate relief for the infringement of the right of a worker.

B. Exclusion of Civil Jurisdiction

On the question whether the Industrial Disputes Act in effect excludes the general remedy available in the ordinary courts of law, it

26. A very extensive machinery has been provided for settlement and adjudication of industrial disputes, but since an individual aggrieved cannot approach the tribunal or the labour court directly for the redress of his grievance without the intervention of the Government, it is legitimate to take the view that the remedy provided under the Act is not such as to completely oust the jurisdiction of the civil court for industrial disputes.
"If the dispute is not an industrial dispute within the meaning of Section 2(k) or within the meaning of Section 2-A of the Act, it is obvious that there is no provision for the adjudication of such disputes under the Act. Civil Courts will be the proper forum. But where the industrial dispute is for the purpose of enforcing any right, obligation or liability, under the general law, or the the common law and not a right, obligation or liability created under the Act, then alternative forums are there giving an election to the suitor to choose his remedy of either moving the machinery under the Act or to approach the civil court. It is plain that he cannot have both. He has to choose the one or the other".
Having thus formulated opinion of the Court on the issue generally, the Court proceeded : "that the civil court will have no jurisdiction to try and adjudicate upon an industrial dispute if it concerned enforcement certain rights or liability created only under the Act. In that event civil court will have no jurisdiction even to grant a decree of injunction to prevent the threatened injury or on account of the alleged breach of contract if the contract is one which is enforceable under the Act alone". (*1975 Lab. I. C. as 1651 Para 6 & 9 at pp. 1655 and 1657 respectively*).

becomes relevant to consider two maxims namely, *specialia generalibus derogant* and *generalia specialibus non-derogant*. The former means that when a special provision is made it overrides an earlier general provision on the subject. The latter means that when a general provision is made, it does not destroy, prejudice or annual an earlier special provision.

In the field of statutory application, the maxims deal with the fact of inconsisteney. *Specialia generalibus derogant*, as applied in construing statutes, means that the special statute would override or abrogate the general one. But this doctrine becomes applicable only under limited circumstances. It would do so when the special statute provides so or when there appears an apparent conflict between the provisions of the two sets of statutes standing together governing the same matter.[27]

The maxim *generalia specialibus non-derogant* is founded on the reason that the legislature does not intend to override or abrogote the provisions of a special Act in passing a subsequent general statute.[28] An intention to repeal or abrogate can, however, be gathered under circumstances of inconvenience or incongruity of keeping the two enactments in force, or in the repugnancy of the special Act to the general course of subsequent legislation.[29] The law is clear on the proposition that unless there is conflict between the two statutes standing together, or unless the subsequent statute expressly provides so, the provisions of both the statutes will remain unaffected by each other.[30]

27. N.S. Bindra, *Interpretation of Statutes*, 122-124 (1970).

28. "In passing the special Act, the legislature had their attention direct to the special case which the Act was meant to meet, and considered and provided for all the circumstances of that special case, and, having so done, they are not to be considered by a general enactment passed subsequently, making no mention of any such intention, to have intended to derogate from that which by their own special Act, they had carefully supervised and regulated. When the legislature has given its attention to a separate subject, and made provision for it, the presumption is that subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly". But where there is a conflict between a special Act and a general Act, the provision of the special Act would prevail. (Bindra, *op. cit. supra* n. 27 at 122-124). Thus the presumption is that when there is no conflict and if both the statutes can co-exist they should be al owed to be operative in their respective areas simultaneously.

29. See *Maxwell on the Interpretation of Statutes*, 161-162 (1962).

The remedy, even if it can be so called, available under the provisions of sectioys 10 and 33-C of the Industrial Disputes Act affords no reason to deny the remedy available under the general statutes. The court was clearly wrong in arriving at the conclusion that the jurisdiction of civil court stands ousted in such matters on the basis of "relief" available in the Industrial Disputes Act. There is nothing in that which expressly or impliedly abrogates the provisions of the Specific Relief Act which is a general law. Further, the Industrial Disputes Act provides exclusive reliefs only in so far as it is a matter of industrial dispute. Whether the right of the respondent arose under the general law or statute law is a matter of opinion. And in the strict sense of the terms, as emphasised earlier, the provisions of section 10 could not be construed as a matter of legal right for the respondent.

Even before the passing of the Industrial Dispute Act, employment contracts were made and agreements of the nature in question predetermining the terms of employer-employee relationship as adjuncts of subsisting employment contracts were executed by the parties. Moreover, it is only when a "reference" is made that the matter comes within the purview of the Industrial Disputes Act as an industrial dispute. Therefore, simply because that Act was passed, one cannot assume that the rights available at common law were altogether taken away by necessary implication. Indeed, the Industrial Disputes Act does nowhere indicate that the rights available at common law were abrogated by it. Further, in the instant case, apparently there was no conflict between the two statutes. Therefore, though the Industrial Disputes Act could be regarded as a particular statute of exclusive application for industrial disputes, it does not necessarily exclude the other remedies available at law.

30. "If the legislature makes a special Act, dealing with a particular case and later makes a general Act, which by its terms would include the subject of the special Act and is in conflict with the special Act, nevertheless unless it is clear that in making the general Act the legislature has had the special Act in its mind and has intended to abrogate it, the provisions of the general Act do not override the special Act. If the special Act is made after the general Act, the position is even simpler. Having made the general Act, if the legislature afterwards makes a special Act, in conflict with it, we must assume that the legislature had in mind its own general Act when it made the special Act which is in conflict with the general Act, as an exception to the general Act." (Bindra, *op. cit. supra* n. 27 at 124). Also see *Sila Singh* v. *Sunder Singh*, A.I.R. 1921 Lah, 281 and see *Maxwell op. cit. supra* no. 29 at 166 and 169-70).

Again, since there was no conflict between the general Act and the Act, it was to be presumed that the latter[31] was not framed with the legislative intent to exclude the remedy of injunction available under the Specific Relief Act. Moreover, the respondents made their option to seek the relief available under the general statute for the enforcement of a right which was primarily contractual in nature. And the trial court in its wisdom found itself competent to grant the relief prayed for. The matter should have ended there.

We might also stress the common ground that the agreements were in the nature of collective agreements. The court took the view that since the collective agreements were to be deemed as binding on the parties under the provisions of the Industrial Disputes Act.[33] the right of the parties arose under that statute. The law relating to collective agreements in India is not in a very happy state. Collective agreements can be of the "legislative type" or the "executive type". In either case, the legal sanction for enforcement is only the raising of a dispute under the statute for adjudication. Even in the latter type of agreement, unless an obligation is cast on the parties within the agreement, and a clause for recompense is provided for its breach, there is no remedy and for purposes of enforceability it remains merely a "gentleman's agreement". The legal character of the agreement is the same as an unenforceable contract. Nonetheless, though the agreements such as the one in the instant case were recognised as collective, be cause they stipulate benefits that accrue to a worker they were treated as falling within the sphere of contractual obligation under the employment contract.[33] This was the case even prior to the enactment of the Industrial Disputes Act, and such contracts were sought to be enforced in the ordinary courts.

Thus, a right arising out of an agreement in the area of collective contract, if anything, is a legal right enforceable at common law. In the instant case, the finding of the court that the right founded on an agreement is a statutory right, is itself open to doubt. For, a right based on an agreement of a collective nature forming part of employment contract is a contractual right enforceable at law by a remedy

31. The Industrial Disputes Act, 1947.
32. 1975 Lab. I. Cas. 1651 at 1666.
33. Clauses that form part of a collective agre ement, so far as it relates individual employees must be assigned the sanction of his individual contract with the employer. (For details see Teller, 1 *Labour Disputes and Collective Bargaining* section 86). See also O.K. Freund, *Labour Relations and the Law* 24-31.

available in the general law. And on that ground alone to conclude that, as the right claimed is statutory right, the remedy has to be found within the statute, and that the other remedies av a ilable under the legal system stand ousted would be untenable on the face of it.

In this regard, it is submitted that it is the ordinary legal right of every citizen to seek the prevention of an apprehended harm that would arise out of the breach of a contract, or even otherwise, for which remedies are available at law. And the general remedy of injunction to prevent an anticipated harm which results from an act legally not justifiable, is an accepted form of relief founded on well-established principles of law and justice in the jurisprudence of this country. This remedy is available to all citizens in general under the law, where the right or cause emanates from a contractual obligation.[34] The Supreme Court now denies the general relief available to all citizen to one who happens to be a worker, simply because his cause could be agitated in an alternative forum as an industrial dispute even though often enough such alternative remedy is inadequate or even illusory.

III

The law relating to injunctions is another aspect which the court has considered. The court held (we recall) that no injunction could be granted to prevent the breach of a contractual right of which specific performance cannot be had under the Specific Relief Act. An injunction, temporary or perpeatual, whether mandatory or prohibitory, is an equitable relief. Injunction may be granted either with the object of maintaining the status-quo till the determination of the rights of the parties in the cause or matter pending in a suit, or with the object of giving effect to and/or protecting the right alleged, which are likely to be infringed or violated. In the former case, it would be a temporary injunction, since it would operate only till the decision of the suit and would get either vacated or confirmed as perpetual on the decision of the suit. In the latter case, it would be perpetual, since what was sought to be enforced by the preventive order was the protection of an existing right pre-decided as available in favour of the plaintiff as against the defendant. Further, injunction relief is discretionary.

Where the plaintiff claims the relief on the basis of an obligation which arises from contract, the court should be guided by the rules

34. The Specific Relief Act, read with the relevant orders of the Civil Procedure Code, confers jurisdiction on civil courts to grant relief on injunctio n and the citizen is entitled to approach the court as a matter of right to see k the relief.

and provisions relating to specific performance of contract.[35] Under the law, "a contract which is in its nature determinable is not enforceable specifically.[36] Further, an injunction cannot be granted "to prevent the breach of a contract the performance of which would not be specifically enforced.[37]

A contract which is determinable in nature, in the sense that it is a revocable and voidable contract and a contract which can be terminated at the option of a party cannot be specifically enforced.[38]. Under the law an injunction cannot be granted to prevent the breach of a contract the performance of which would not be specifically enforced.[39] The theory is that as a matter of policy and expediency "no court can be called upon to do a vain thing."[40] The *raison d'etre* of refusal of relief of injunction in relation to contractual obligation is that the decree, if made would be rendered nugatory by the act of parties and thus undo what the court had done. In order to facilitate the exercise of discretion vested in the court to refuse the relief, the particular situations are specified under section 14 of the Act.[41] But where the specific performance of the agreement is possible (depending on the terms of the agreement, the capacity of the defendant, the power of the court, the circumstance in which what has been promised by the defendant could be carried into execution), the court would normally exercise the discretion in favour of granting the remedy of injunction.[42]

The court held that the agreement in questions was not specifically enforceable because of its being determinable under section 19(2) of the Industrial Disputes Act and also variable following the procedure given in section 9A of the said Act.[43] Therefore, under section 41 (e) of the Specific Relief Act, the injunction cannot be granted.

35. Section 14 of the Specific Relief Act, 1963.
36. Section 14(c) of the Specific Relief Act, 1963.
37. Section 38 of the Specific Relief Act, 1963 read with section 14 of the Act.
38. Section 14 enumerates : "The following contracts can not be specifically enforced, namely, (a)...(b)...(c) a contract which is in its nature determinable".
39. Section 41 of the Specific Relief Act, 1963.
40. *Rust* v *Connard* 87 Michigan 449 cited in O.P. Aggarwala, *The Law of Specific Relief Act in India*, 456(1970).
41. *Supra* n. 38.
42. For section 14 of the Specific Relief Act forbids the enforceability of a contract specifically performable only under the Particular set of circumstances. See *supra* nn. 35 and 38.
43. 1975 *Lab.I. Cas.* 1651, 1666.

Even accepting the view of the Court it would stand to reason to hold that if an injunction would not lie to prevent a breach of right arising out of an agreement, which amounts to settlement under the Industrial Disputes Act it would be so in the case of the earlier agreement of 1966, of which the plaintiff/respondents were a party, and not merely for the latter agreement of 1971 which the employer sought to operate and against which the action was brought. For, the planitiff / respondents in this case were seeking the status quo under the earlier agreement by preventing operation of the latter agreement. If the tiral court cannot prevent the breach of the former by issuing in injunction, it cannot also prevent the operation of the latter by a prohibitory order. That would mean the two agreements co-exist validly as if in operation. The reason advanced for setting aside the order of the trial judge was that his order amounts to "keeping two swords in the same sheath"[44] an impossibility which the Supreme Court apparently wishes to avoid and in effect does. It is submitted however, that the trial court order was a more satisfactory relief, in the sense that it does not seek too much except the compliance of the law in the statute by both parties. The operative part of the order of the trial court was only that the appellant should issue the notice terminating the earlier agreement and bring the latter agreement in force according to law. Therefore, in the instant case, in exercising its discretion in favour of granting the relief, which to its best judgement appeared to be just and proper, the trial court had done what was strictly within its powers to do, in appreciation of the facts and circumstances of the case. Had the Supreme Court held that the agreement was binding on the parties under the statute and as such had to the complied with, unless it was terminated or varied in accordance with the law, that would have been fair and proper, which in effect was the trial court's order.

IV

In dealing with the point that the trial court order was not sustainable because of impracticability, it is relevant to note that the Supreme Court was pre-judging the results of the said order or its aftermath. The reason it states is that to permit the simultaneous operation of the two agreements would amount to "an attemp to put two swords in one sheath."[45] The question arises : if the employer could execute an agreements of one type with one set of employees and an agreement of a different type with another set of empleeoys

44. *Id.*, 1665.
45. *Ibid.*

concerning some payments, what is the precise difficulty in operating the two agreements in relation to the respective employees who signed them and others who opt for either of the two ? Certainly, there may be some administrative inconvenience for the employer in keeping the accounts and the resultant effect on the "balance sheet" of the employer. Furthermore, it is important to point out that the order of the trial court only prevented the enforcement of the latter agreement dated Jaunary 9, 1971, till the prerequisites of law for the enforcement of the impugned agreement were met with. Hence there as no question of keeping "two swords in the same sheath" and that was not what the trial court order purported to do.

It is evident on a proper reading of the trial court order that it is a conditional injunction which in its nature and character has the effect of a temporary injunction only. As and when the appellant fulfills the conditions in the order (which conditions were perfrectly justifiable and legal in the circumstances), it would cease to operate. Second, for all practical purposes the nature and pattern of the established employer-employee relationship is that the conditions of service of the concerned employees are governed by the agreement they execute indeed to a point that the stipulations of the agreement would be part of the contract of employment till it is altered or abrogated. It was on record that neither for abrogation nor for alteration any notice was given by either party to the agreement. The trial court decreed that the employer be prohibited from operating and enforcing the new agreement (which agreement the employer chose to execute with the Association Union) as regards the employees of the Sabha Union till such time that section 9A of the Industrial Disputes Act, (which requires a notice of temination on the part of the parties who desire the termination or alteration of the agreement), is complied with; and with regard to those who do not opt out of the old agreement and thus choose to be governed by the new agreement.[46] Thus, apparently nothing appears to be unfair on the facts and circumstances of the case, or which was perverse or repugnant to the established principle of law, whether statutory law or common law. Further, the respondents did not claim their rights under the Industrial Disputes Act.[47] In this context, had the Supreme Court held that the agreements in question were a matter of contractual relationship within the contract of service in relation to the respective

46. *Id.*, 1655.
47. *Id.*, 1658.

group of workmen, it would not have been repugnant either to law or justice. Looked in its perspective the parties worked under the agreement of 1966 as though binding on them. The agreement at the relevant time was valid and effective and had matured as an implied and necessary condition of service. Subsequently, the employer also chose to recognise a rival union, (dercecognising the Sabha Union), the Association Union, to enter into a fresh agreement which materially affected the benefits which the members of the Sabha Union under the former agreement used to derive. Presumably, the employer had obvious and plausible reasons to do so. But the members of the Sabha Union who worked under the agreement they executed were not consutted; nor was the agreement with them terminated legally, as required under the law. Thus, the action of the employer, besides being a breach of contract, was a violation of the law under the Industrial Disputes Act. The order of the trial court, would thus amount to setting right what the employer omitted to do in complying with the law. If law were meant to administer justice, the trial court decree in favour of the plaintiff-respondents granting a temporary conditional injunction, viewed in the context of the facts and circumstances of the case was nothing but fairness.

In the event, the relief granted by the trial court was of no material benefit to the respondents except by way of preventing an anticipated breach of an agreement. For, the trial court had ordered that (i) the injunction would not operate on those workmen who would accept and opt for the new agreement; (ii) the injunction would not operate after the appellant takes steps to make the new agreement binding on the parties; and (iii) the injunction would cease to be operative after the expiry of there months from the expiry of the twenty one day's notice under section 9A of the Industrial Disputes Act.[48]

The original suit in the trial court was instituted on April 8, 1971. From the trial court order, appeal was preferred to the single judge of the Bombay High Court. Both the single judge and subsequently the division bench of the High Court sustained the order of the trial judge, after which the Supreme Court entertained the appeal by special leave petition and allowed the same. Special leave appeal before the Supreme Court was filed in 1973 and the decision

48. *Id.*, 1655.

of the court was given on August 8, 1975. Four years and four months of prolonged litigation lapsed in between. Had the appellant chosen to comply with the order of the trial court, hardly three months and twenty one days might have taken to comply with the law, and the order of the trial court. The compliance of the law would have saved the appellant's position too. Instead, the appellant chose to establish a victory at law and preferred the appeal. Had the Supreme Court disallowed the appeal and ordered compliance with the law to rectify the appellant's inital mistake of not terminating the agreement by notice, would there have been any reversal or denial of justice to the appellant? Further, the Supreme Court could have dismissed the appeal on policy grounds; (a) that it would not ordinarily entertain an appeal which had been dismissed by both, the single judge and the division bench of the High Court, for want of substance; and (b) that the issue involved is merely a technical point of procedural law and inorder to discourage prolonged litigation and avoid delay in such matters the Supreme Court ordinarily would be disinclined to entertain such an appeal. Assuming, however, that the interference of the Supreme Court in appeal proceedings could be considered an exercise in judicial functioning, equity and fair play demands that it should have disallowed the appeal and confirmed the trial court order.

V

One has to conclude that sociologically the decision neither served the ends of justice nor fostered any healthy development of the law. Even granted that there was room for the application of the maxims of common law, it was incorrectly applied because there was no conflict between the two statutes requiring the court to decide the question of jurisdiction in a matter that falls in the twilight area. Also, insofar as injunctions were a more efficacious remedy to prevent an apprehended injury, and the civil courts had been endowed with the jurisdiction to give the relief in appropriate cases, the Supreme Court should ordinarily discourage special leave appeals, where the High Court has not granted the certificate of appeal.

Above all, the effacement of the civil court jurisdiction in matters of employment contract on the ground that the matter could be made out as an industrial dispute, is tantamount to a denial of legal right which every citizen in India enjoys. More particularly, such a policy harms the working classes.

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THE SHAKING OF FOUNDATIONS : SOME THOUGHTS ON JEROME HALL'S *FOUNDATIONS OF JURISPRUDENCE**

Those of us who studied jurisprudence as students, before the mid-sixties when the so-called 'modernization' of legal education began, would still recall with admiration Jerome Hall's *Readings in Jurisprudence*,[1] which used to be a prescribed reading for postgraduate legal studies in all leading Indian universities. Some of the Indian jurisprudents may have, since then, lost contact with many of the invigorating subsequent writings of Professor Hall. For them, as for others, it is essential to return to his recent work, which represents a quintessence of a whole lifetime's dedication to jurisprudence.

Jerome Hall invites us to a common search for an "adequate" and an "integrative" jurisprudence. A legal philosophy is "adequate" if it meets at least four criteria : it should be "relevant" to "current socio-legal problems and intellectual interests"; it should clarify legal concepts; it should be "internally self consistent" and, finally, it should "comprehend" the variety of [legal] experience within the limits of one scheme of ideas".[2] Jurisprudence can be "integrative" only when the "basic importance" of the *structure*, *fact* and *value* of law is fully and sensitively grasped and assembled under a general perspective of law.

Legal positivism offers one building block for an "adequate" and "integrative" jurisprudence ; but the trouble arises when we

* *Foundations of Jurisprudence* (1973 : Bobbs Merril Company Inc). This book will be hereafter referred to simply as *Jurisprudence*.

I derive this title from Paul Tillich's deeply stirring book published in 1949. In many ways, Hall writes with the same fervor which characterizes Tillich.

1. This book of readings was published in 1938 and still serves as a primary source-book in jurisprudence. See also J. Hall, *Comparative Law and Social Theory* (1963).
2. *Jurisprudence*, 19.

regard the building block as a whole edifice. Positivism, particularly as in hands of Bentham, Austin and Kelsen, has developed a "logic of the law" and made important contributions to the structural analysis of legal concepts".[3] But, Hall cautions us, one should resist the dominant tendency which would appropriate either analytical method or the "logic of the law" wholly to legal positivism as this raises a "serious barrier to the progress of jurisprudence".[4] Hall reminds us that natural lawyers have also made equally important contributions to a structural understanding of the law. He sharpens this point by adding : "indeed, what we now think of as an analytical jurisprudence was the product of Roman law interpreted by glossators and post-glassators of the seventeenth and eighteenth century"[5].

This is by now trite learning; it is generally conceded that analytical method neither arose with, nor is a monopoly of, legal positivism, which is a much more recent development in the history of human thought than the idea of law and legal systems.

What is distinctive in Hall's analysis is his further claim that, not unlike natural law theories, legal positivism is also based on subjective valuations. Positivism has its own "metaphysical" and "moral" tenents and the "neutrality" claimed by, or on behalf of, Bentham, Austin and Kelsen is a misleading myth. Just as there is no value-free sociology there is no value-free jurisprudence. This point is certainly not novel in social sciences or philosophy; it may however, be new for jurisprudents. It is worthwhile to follow Jerome Hall in some detail on this aspect.

> it is true, generally speaking, to say that in legal positivism
>
> It is plain that what is involved is not simply logical analysis viewed only as a method; the claim is not merely that the method is neutral but, also, that the product of that method, the significance of the results, is neutral...[6].

In what precise respects is legal positivism non-neutral or to what values is it necessarily committed ? *First*, Hall doubts whether

3. *Id.*, 51.
4. *Id.*, 38.
5. *Ibid.*
6. *Id.*, 64-65.

positivist conceptions of the law are at all free of ethical or value commitments. Hall flatly states : "There is no such thing as a neutral definition of law."[7] Definitions of law (like Austin's) in "purely factual (i.e power) terms" can never be neutral.[8] Even Kelsen's professedly pure descriptive theory of law is not free of commitment to *legal* justice. Hall quotes Kelsen : "justice" means "the maintenance of a positive order by a conscientious application of it".[9] This is clearly an admission of "minimum ethical standard" in the very notion of law. And Hart's admission of minimal natural law as an "essential constituent of positive law" is to Hall "tantamount to a surrender" since it implies that "an 'essential' element of positive law is an ethically normative one."[10]

In addition, analysis of legal concepts itself presupposes a "legal theory". Hall contends that analytical jurisprudence is itself subservient to a "positivist" legal theory: it includes "substantive statements whose meanings reflect a positivist theory of law".[11]

Second, the very conception of neutrality in conception of laws itself imports certain value-preferences. "In Pure theory, a negative valuation of all valuations", avers Hall, is the "dominant ideology".[12] Kelsen's ethical non-cognitivism is itself an *ethical* attitude. Valuation is thus ineluctable; even negation of values is a value. Hall describes Kelsenian positivism as "subjectivist legal positivism".

Third, Hall asks : "is subjectivist legal positivism neutral when it dismisses nautral law theories as 'myths' or 'ideologies'?". Hall stresses that Bentham and Austin "made little effort to restrict their writing (jurisprudence?) to neutral 'analysis' "[13] The same observation applies to Kelsen and realists (whether or not the latter can be lumped together with 'positivists'). Hall is clearly using 'neutrality' here to mean that the "analyst must not prefer any normative ethics or express any value judgements".[14]

Jerome Hall thus joins the ranks of very few jurisprudential thinkers who have endeavoured to expose positivist pretensions of

7. *Id.*, 67.
8. *Id.*, 68.
9. *Id.*, 69.
10. *Id.*, 51.
11. *Id.*, 70.
12. *Ibid.*
13. *Id.*, 67.
14. *Ibid.*

neutrality. If he had just stopped with this critique, he would have only demonstrated the backwardness of the state of art in jurisprudence. Such pretensions were unmasked in the thirties and forties in relation to social theory, history, economics, epistemology, pure natural sciences and even theology.[15] Belated exposures of purported value-free jurisprudence in Anglo-American legal thought can only be relegated to an exercise in overcoming a "cultural lag".

Fortunately, the unmasking of value-free legal positivism is not an end in itself for Hall's analysis, though some rather surprisingly careless statements suggest precisely that.[16] In substance and spirit, Hall's analysis is a powerful prod to transcend the deadening dichotomies between "positivism" and "natural law" theories. A move towards a more "adequate" jurisprudence which takes account of the structure of the law, social facts and values is certainly facilitated by candid recognition of the fact that valuation is "expressed in all the theories and analyses" of law, whether "deliberately in some, inconsistently or by implication in others".[17] The difference between natural law theories and legal positivism is a difference not thus of *kind* but merely of *degree*.

Another major component in Hall's critique of positivism is that it is almost exclusively concerned with the structural understanding and analysis of law. Structural analysis of law is undoubtedly important but preoccupation with it may obscure the socio ethical content and nature of law. Positivists' insistence that law may have *any* content and that the law is a "formal vehicle", is, for Hall, contrary to the plain fact. That plain fact is that "there is not and never has been a positive law that is or was only a formal vehicle : every positive law has content, much more content than legal positivists deal with"[18]. Hall reiterates throughout the book : "one may *say* that positive laws are vehicles or hypothetical judgments or commands; but saying that does not alter the actual character of these laws".[19]

15. See, e.g., P. Bridgman, *The Way Things Are* (1959); M. Polanyi, *Personal Knowledge* (1956); G. Myrdal, *Value in Social Theory* (1958); A.S. Miller and R.F. Howell, "The Myth of Neutrality in Constitutional Adjudication", 27 *U. of Chicago L. Rev.* 6611 (1960).
16. In regard to positivists' work, Hall says that his criticism does not mean "that analytical jurists were not or are not neutral...or that such neutrality is impossible." *Jurisprudence*, 67. This statement does not find any elaboration.
17. *Jurisprudence*, 70.
18. *Id.*, 51.
19. *Ibid.*

Hall stresses that mere structural analysis of law does little to clarify our understanding of law as human social process. For example, the problem of validity of law in legal positivism is merely one of identifying whether a norm conforms to a higher norm or a problem merely of identification of a norm as part of a legal system. The criteria of validity for a legal positivist are purely logical or formal (exercise of legal power following prescribed procedure is law.)

But discussion on the validity of norms presupposes the idea of a legal system. The *grundnorm* makes sense only when it is presupposed that it is "by and large efficacious". Austinian sovereign similarly must (in order to be such) receive habitual obedience by the *bulk* and *generality* of people. Acceptance of certain rules of recognition by "people" is essential to Hart's conception of law as a union of primary and secondary rules. A legal norm may be valid, in the sense that it satisfies criteria of validity as a matter of logical operation, irrespective of its efficacy. But the legal order—as an order of norms-and its criteria of validity do contain ineluctable reference to the social facts of 'efficacy'. Hall is right thus when he observes that subjectivist legal positivists "discuss the efficacy of a legal system as a 'condition' of its being law" but they do not "scrutinize the conditions of that efficacy".[20] Hall urges that validity of law cannot simply be reduced to a problen of "factual attitudes" : social "reality' is also "partly normative"[21]. Hall concludes : "if the treatment of the validity of law is taken as an important test of the adequacy of a philosophy of law..., legal positivism is not a likely candidate".[22]

Jerome Hall further exposes the core of limitations of the positivist analyses in a remarkably insightful chapter on "sanctions and concepts of law"[23]. Positivists, confronted with the need to distinguish positive law from other laws 'improperly so-called' or from other normative orders rely on coercive sanctions as a distinctive feature of positive law. Austin incorporates sanction as an essential property of positive law; so does Kelsen. Both Kelsen and Austin (the latter more specifically) do *not* include positive sanctions (e.g. rewards, incentives) in their notion of sanctions of law. This leaves them only with negative sanctions, that is the notion of "coercion" or "physical force".

20. *Id.*, 74.
21. *Id.*, 75.
22. *Id.*, 62. Hall makes this remark in his discussion of Ross' 'psychological' positivism but it applies in his analysis to all kinds of legal positivism.
23. *Jurisprudence*, 101-41.

Hall has no difficulty in demonstrating that "not all legal sanctions are measures of force"[24] and that the positivistic notion of legal sanction is inadequate. What is more interesting is his conclusion that sanctions, as defined by Austin and Kelsen, cannot really help us in distinguishing normative legal order from other normative orders. He points out, following Ehrlich, that every group or association has its own normative orders; and these orders, like the law, are backed by both positive and negative sanctions. The internal "law" of the various organised groups in society includes sanctions which are measures of force, and these bear a striking affinity with the state law.[25] All that could be said is that : "some legal sanctions are measures of physical force, others are not and both statements are true of the sanctions of the norms of various sub-groups".[26]

How then can we distinguish legal norms from other social norms? Fredrick Harrison, whom H.L.A. Hart very substantially follows, observed in his critique of Austin that it is necessary to define law in a way that would "combine the two aspects of *command* and *rule* ... without losing sight of the *obligation* and *sanction*..."[27]. Hart endeavoured to offer precisely this combination in his *Concept of Law* by elucidating the notion of law as a combination of primary rules of obligation and secondary rules of recognition, change and adjudication. Hall, on a closer analyses of Hart's notion of obligation, maintains that it is really difficult to extricate it from "moral obligation".[28]

Hall proceeds to demonstrate the implausibility of any clear distinction between rules of obligation and other rules by maintaining that each of the three principal features of the rules of obligation can,

24. *Id.*, 109. For some examples of this inadequacy sanctions such as 'discharge', 'dismissal', adverse 'publicity', suspension from benefits of membership of associations etc. clearly do not involve sanction conceptualized as a "measure of physical force".
25. *Jurisprudence*, 110-111. See also, E. Ehrlich, *Fundamental Principles of the Sociology of Law* 62 *et. seq.* (1936). For the development of the idea of non-state legal systems see U. Baxi, "People's Law, Development and Justice" (being a paper presented to Law and Society Seminar, Culture Learning Institute, East-West Centre, Hawaii); U. Baxi, "From Takrar to Karar: The Lok Adalat at Rangpur", 10 *Jl. of Constitutional and Parliamentary Studies*, 52, at 93-95(1976).
26. *Jurisprudence*, 111.
27. F. Harrison, *On Jurisprudence and Conflict of Laws* (1919); *Jurisprudence*, 120-21.
28. *Id.*, 133.

without inconsistency, be extended to other rules.[29] Whatever be the merits of Hall's criticism of Hart, the real question he raises merits closest attention: can we construct a wholly positivistic theory of "obligation"? Or must any theory of 'obligation' entail some specific features of morality?[30]

This critique of positivism bears out, in large part, Hall's indictment that positivistic jurisprudence, with all its many wothwhile contributions to thinking about law, is both particularistic and inadequate. An 'adequate' jurisprudence, according to Hall, must grasp and explain law not just as normative structure, but also comprehend law's relation to social facts and moral values. It must be stressed here that Hall himself does not, in saying all this, espouse any extreme natural law position; he is equally conscious of the major limitations of *iusnaturalist* thinking, an aspect which we are not taking here into full account.[31]

Hall thus arrives at the notion of "integrative" jurisprudence which focuses not so much on the key conception of 'norm', 'rules' or 'sanction' but rather on action. The central idea in 'integrative' jurisprudence' is "law-as-action", which includes "decision-making...viewed as rational and free to a significant degree".[32] 'Action', as described by Hall, includes the 'ideational. factual and valuational aspects"; indeed, 'action' is a 'vital unity' of all the three aspects.[33] Law as action, of course, recognizes the importance of law viewed as rules. But legal rules and practices are "ancillary" to law-as-action which is "paramount".[34] Law-as-action includes actions of "legislators, judges, enforcement officers", who being authorities of the state orientate their action to legal rules.[35] But legal rules are important in Hall's analysis only in so far as they relate to legal action.

29. *Id.*, 133.
30. *Id.*, 132. A recent analysis by J. Raz also sidesteps this question of "how to present a unified account of both moral and non-moral obligations" by saying that this raises a "general question of the nature of morality", J. Raz, "Promises and Obligations" in P.M.S. Hacker and J. Raz (eds), *Law, Morality and Society: Essays in Honour of H.L.A. Hart*, 210, 225 (1977).
31. See, for Hall's critique of *iusnaturalist* thought, *Jurisprudence* 21-53. and of Fuller's notion that the "law is the enterprise of subjecting human conduct to the governance of rules" at pp. 116-118.
32. *Jurisprudence*, 158.
33. *Ibid.*
34. *Jurisprudence*, 157.
35. *Id.*, 159.

Hall would also include in the notion of law as action the "*interactions* of officials and laymen".[37] Hall points out that, in a way, positivistic conceptions of law always recognised, with varying degrees of explicitness, such interaction in their conceptions of law (e.g. "habits of obedience", conformity, experience of sanction, or "effectiveness"). But there are important sociological reasons for including lay action into the notion of "law-as-action".

One such reason is provided simply by the fact that action "by very large numbers of lay persons has considerable effect on legal action"—whether it is in terms of civil disobedience, lobbying, outright organized evasion of the law, conformity, obedience, or compliance.[37] Hall recalls Bentley who said :[38]

> The law at bottom can only be what the mass of people actually does and tends to some extent to make other people do by means of governmental agencies...

Karl Lewellyn, similarly, looked upon rules of law as being important "in so far as they give us a guide to what the officials will do or how we can get them to do something."[39] Lewellyn too regarded lay person's behaviour as "a part of law", as falling within the "field of law".[40] A second reason for including lay action in the notion of law-as-action is the fact that lay action can generate 'potential' law through custom.[41]

A third reason for concentrating on law as "action" rather than merely as "rules" is that it enables one to better perceive the dynamism of law as a social process. "Subjectivist" legal positivism "bars the construction of a dynamic theory" since its model is "first rules, then conduct".[42] Hall dismisses Kelsen's attempt at formulating a dynamic

36. *Ibid.* (emphasis in original). Hall has some difficulties in classifying the actions of lawyers. He says "the work of lawyers does not comprise an essential component of law-as-action", it is "obviously necessary" for "correction or better conduct" of lay persons and officials. *Jurisprudence*, 161. The inability, or disinclination, to conceptualize lawyers, action as an ingredient of "law-as-action" is, in the present opinion, a serious limitation in Hall's analysis.
37. *Jurisprudence*, 159.
38. F. Bentley, *The Process of Government*; 277 (1908); *Jurisprudence*, 144.
39. K. Lewellyn, *The Bramble Bush* (1930); *Jurisprudence*, 147.
40. *Ibid.*
41. *Jurisprudence*, 160. Hall classifies lay action as : (i) action which "constitutes custom that are *potentially* law" and (ii) law-as action, that is law action "which conforms or obeys or complies with the law".
42. *Jurisprudence*, 162.

theory of law as a purely formal attempt, of no fundamental relevance, since it bases the "dynamism" of law "only on the consistency of legal rules with higher norms".[43] However, dynamism of law as social action "involves duration, sequence, causation and change as basic categories".[44] In the model of law-as-action, the traditional model gets reversed : What comes first is "action", then the "rule". This clearly applies to "custom", judicial process and, to some extent legislation.[45]

Hall has made a bold and important beginning in his insistence that 'action' rather than "rule' be explored as a unifying conceptual focus for new jurisprudence. His call for inclusion of lay action in the very notion of law-as-action is sociologically sound as well as jurisprudentially legitimate. He certainly adds to our understanding of legal positivism by emphasizing that it included lay action as a specific definitional component of law.

Since the notion of law-as-action is so important it needs close examination both at analytical and ideological levels. Analytically, even when we accept the stipulative definition of action (as "purposive", 'useful and inherently valuable', 'goal-directed', "environment-bound"), we may ask whether the notion of law-as-action is clear and self-consistent. Hall would include action of law persons as well as lay persons in his conception of 'law-as-action'. Is all lay behaviour comprehended by that action? Hall feels that if that were the case this conception would be "too vague for fruitful use".[46] Accordingly, he proposed a "guiding line" for inclusion of lay conduct which is "the relevance of law". "Confirmity" and "violation" are two types of lay conduct which have relevance to law; therefore, these types of lay action would fall within the notion of law-as-action.[47] Hall distinguishes between "merely fortuitous conformity" from "conformity that results from the effect of internalized norms that are *moral* as well as legal"; violations of law may be similarly distinguished as "inadvertent" and "conscious".[48]

43. *Id.* 164.
44. *Id.*, 165.
45. *Id.*, 167-68
46. *Id.*, 160.
47. In this discussion, Hall overlooks lay action as constitutive of custom or "potential law" see *supra* note 41.
48. *Jurisprudence*, 159 emphasis added). Hall operationalizes the relevant notions thus : "There is 'conformity' where there is no awareness of relevant rules of conduct; 'obedience' where there is awareness; and 'compliance' where there is not only such awareness but also approval of the rules".

All this does not really contribute to any clear understanding of the scope of inclusion of lay action in the notion of "law-as-action". Is "fortuitous conformity" (which Hall defines as conformity without any awareness of the relevant rules of law) to be entirely excluded from the idea of "law-as-action"? If we exclude it (even John Austin so clearly relied on "habitual obedience" as a basic aspect of the definition of the "sovereign"), would it then be at all possible for us to provide an "adequate" social account of law? How do we distinguish "genuine" conformity from merely fortuitous one? This question becomes all the more acute in view of Hall's insistence that the former is not merely a function of "internalized" legal rules but also of "internalized" *moral* rules. Is a person conforming to what he considers to be totally unjust law on the ethical ground that the law ought to be obeyed genuinely conforming to the law? The point is that it is simply not open to the jurisprudent—especially of the "integrative" kind – to simultaneously seek to include lay action in terms of "conformity" and "violation" into the very notion of law and to seek to take only selective aspects of the lay action. If inclusion of all lay action (of these two types) makes the concept of "law-as-action" "too vague for fruitful use" then we need to look for other unifying concepts which would be more adequate for the purpose.[49]

The real difficulty here is that once we go beyond state law (official, positive, national, formal law) and proceed to include 'lay' action, it is not possible to adhere to any idea of a 'monistic' legal system. Indeed, one has then to reckon with the pervasive reality of the plurality and multiplicity of legal systems in each society. All societies are multi-legal. The state is only one of the many social groupings, howsoever imperious and dominating it may be. If the state needs for its operations, social control and institutionalisation of conflict—namely, the law—so do other non-state groups. To refuse to conceptualize their regulatory systems as law (in any significant usage of the term) is to do inadequate and particularistic jurisprudence—jurisprudence of state law. Jerome Hall, and those who believe in fundamental reorientation of jurisprudential thought (regardless of the label "integrative") need to move beyond state law as determinative of inclusion of lay action into the notion of "law-as-action" Lay action not merely "conforms" or "violates" state law. It also creates and

49. Indeed, a more adequate conception than "law-as-action" is necessary if we are to be able to take better account of custom and lawyers' practices. See *supra* nn. 36, 41, 47.

sustains autonomous legal systems which may complement or conflict with the positive law of the state.[50]

How does the law-as-action notion help us solve some analytical puzzles which positivistic jurisprudence, according to Hall, can do only inadequately? Let us take Hall's analysis of the problem of validity as one example. If "rules are viewed as proposed solutions of practical problems", Hall argues, it would simply not be possible to confine the idea of validity of a law simply to a mere logical derivation from, or conformity to, a higher norm.[51] When rules are viewed thus, we move from the mere question of their validity to the questions of "usefulness" or "fittingness" of the actions based upon these rules. A "correct, right or useful solution expresses sound values and contributes to the solution of a practical problem"; it "also establishes and maintains decent relations".[52] Hall further maintains:[53]

> The correctness or utility of certain actions is closely and rationally connected with their effectiveness. That certain actions are right or useful is necessary but not sufficient to make them part of law-as-action; they must also be done with "sufficient" frequency and be supported by a sufficiently large number of persons, lay and official, to distinguish them from the actions of a martyr or a saint. Instead of separating pure rules from paralleling behaviour, and the consequently necessary treatment of efficacy as a "condition" of law, we deal with equally important characteristics of law-as-action its correctness or utility and its effectiveness.

How is this formulation to be understood? Are the positivistic criteria of validity of law to be altogether abandoned and replaced wholly by the ones proposed? If this is so, then even if legal action is itself infirm (being void *ab initio*, or *ultra vires*, or unconstitutional) it will still be valid if it is "right" or "useful" and followed by "sufficiently larger number of persons lay and official".[54] A legally invalid action may thus form an aspect of "law-as-action" if the above stated criteria are fulfilled.

This last formulation makes perfect sociological sense because it concedes that the norm regarded as invalid (and the action regarded as

50. See U. Baxi, *op. cit. supra* n. 25.
51. *Jurisprudence*, 173-74.
52. *Id.*, 174.
53. *Ibid.*
54. *Ibid.*

illegal) by the criteria of state law may still well be valid and legal by the criteria of validity of a non-state legal system, (*e.g.* untouchability, dowry, prohibition). But, of course, this is not Jerome Hall's viewpoint, since he accepts the state legal system as the exclusive concern of "integrative" jurisprudence.[55]

Hall's difficulties, therefore, are numerous, and even formidable. How can an action that is illegal and a norm which is invalid be ever subsumed under the category "law-as-action"? Or does Hall mean that such action and norm can, by definition, neither be "correct" nor "right" nor still "useful"? There is a related question: if a rule is correct, right and useful and yet "sufficiently large number" of lay persons do not follow it, would it be "law-as-action"? What would be the situation if there is divergence between "sufficiently large number" of lay and official persons as regards the 'validity' of a norm and action based upon it? It may be considered as a part of "law-as-action" but would it be "valid" for that reason? Or is it simply to be assumed that whatever is correct or right or useful will *necessarily* be followed by a large number of people? Or that it would *necessarily* establish and maintain "decent" relations?

All this raises questions concerning the ethical components or ideology of integrative jurisprudence. One wishes Jerome Hall had as frankly addressed himself to this question as he has in his critique of 'subjective' legal positivism. It is clear that "integrative" jurisprudence, like most Anglo-American jurisprudence, celebrates the ideology of liberal legalism, the main tenets of which are open to serious sociological and philosophical questionings.[56] Hall's "integrative" jurisprudence thus turns out to be both "particularistic" and 'inadequate" in its present stage of formulation.

55. Hall has an incipient awarenesss of the notion of plurality and mulitiplicity of law (as his analyses of sanctions and effectiveness of law demonstrate). It is puzzling that, despite this, he adopts the hegemonial state law model in the construction of an "integrative" and 'adequate" jurisprudence. The "law-as-action" should thus mean many more types of interaction than Hall's analysis accommodates. Some of these are: (i) interaction between state law persons and laypersons; (ii) interactions between state law persons and non-state lawpersons; (iii) interaction between non-state lawpersons and laypeople; (iv) interaction between and among laypersons in relation to both state and non-state law.

56. See, *e.g.*, D.M. Trubek & M. Galanter "Scholars in Self-Estrangement: Some Reflections on the Crisis of Law and Development Studies in the United States." *Wisconsin L. Rev.* 1062 (1974)

Indeed, one may sharpen the point by asking: how can a book called *Foundations of Jurisprudence*, providing a vision of "integrative" jurisprudence, altogether ignore the competing paradigm of law provided by Marxist thinkers? Can integrative jurisprudence be truly integrative if it does not take account of power, conflict, and radical change? One may also ask, in the same mood, whether jurisprudence can be "adequate", let alone "integrative", if it overlooks the complexities of interaction between state and non-state legal systems, present everywhere but pointedly illustrated by the Afro-Asian legal and social experience?

These, and related questions, indicate salient items on the agendum of "integrative" jurisprudence. Jerome Hall has pioneered a new path and helped remove the cumulated jurisprudential debris. The laying of foundations still awaits the patient, and near-Herculean, labours of gifted and dedicated jurisprudents like Jerome Hall.

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LEGAL SERVICES CLINIC : DIRECTOR'S REPORT, 1975-76*

During 1975-76 the clinic rendered legal assistance and aid to more than forty people, involved an increasingly large number of students in this unique experiment in clinical legal education, conducted preliminary researches on Law and Poverty, and opened up potential channels for constructive use of students' energy and idealism. Several newspaper reports and individual appreciations indicate the reception the experiment received among the public and the legal educators in this country. It is a matter of great satisfaction that the Krishna Iyer Committee on Legal Aid, appointed by the Government of India, and the All India Law Teachers' Association made appreciative references to this pioneering effort of Delhi Law Faculty and recommended its adoption in every centre of legal education in the country. Already the Delhi Clinic has helped in establishing similar clinics in a number of Universities in India.

During this year, all the activities of the Clinic referred to in the report for the academic year 1974-75 were carried on with full vigour. A seminar on "Clinical Legal Education and National Legal Aid Scheme" was held on the 28th of September, 1975. It was inaugurated by the Hon'ble Mr. Justice V.R. Krishna Iyer of the Supreme Court of India. In the Director's working paper for the seminar it was submitted that in order to make legal education socially relevant, law students must be made aware of the problems of the society and should be involved in the process of helping the poor in their legal problems right at their student stage. Clinical legal education means associating law students with "live cases" at every stage of the legal journey of the case, namely, interviewing the client, preparing a brief of the facts, drafting the legal documents for the client, filing that case in the court and associating with the case in the court at all stages. In order to interest law teachers in legal aid work, it was necessary that full-time law teachers should be given the right to practise

*This report has been prepared by Dr. P.S. Sangal, Director of the Clinic for 1975-76.

in all legal aid cases and to some limited extent in other cases also. The Advocates Act, 1961, should be amended to provide that the Bar Council of India and the State Bar Councils should ensure and support the setting up of legal aid clinics in all law schools, should make attendance at the legal aid clinics compulsory for all the finai year students for at least one semester and should provide for marks to be awarded for performance in the work of the clinic.

Professor R.C. Mehrotra, Vice-Chancellor of the University of Delhi, in his presidential address to the seminar expressed his happiness at the new experiment going on in the Law Faculty of imparting socially relevant education through the medium of the Students Legal Services Clinic. He thought that law teachers should be enabled to keep in touch with the practical law in the courts but not at the cost of their main functions of teaching and research in law. He stressed that this movement of clinical legal education and legal aid should give rise to some ceiling on the lawyers' fee which he thought was at present so exorbitant that an ordinary man cannot afford to get legal advice and aid from them. He felt the fees of lawyers should be brought down by the legal profession itself or, if necessary, by imposition from above.

Mr. Justice V.R. Krishna Iyer in his inaugural address said that clinical legal education should be made a necessary component of any meaningful scheme of legal education. He thought that the success of any programme of legal aid would largely depend on the efforts and active participation of law students. Legal aid clinics, he said, should be started as part of the curriculum in law schools. Mr. Justice S. Rangarajan of Delhi High Court said that legal aid programme, besides being socially significant, would provide a base for the much-needed movement for legal reforms in this country. Poverty law and legal aid services should be made essential parts of legal education. Dr. L.M. Singhvi, the then Advocate-General of Rajasthan, expressed himself whole heartedly in favour of introducing clinical legal education in law schools through the medium of legal aid clinics. Dr Singhvi further said that law students and teachers should conduct a social audit of law in order to study the social impact of the provisions of law and the inadequacies of the legislation both on its provisions and application, Public interest litigation, he thought, was a sphere of law that remained largely undeveloped in India.

Professor Upendra Baxi, Dean, Faculty of Law, while welcoming the guests, emphasised the need of taking legal aid work seriously.

Other colleagues who actively participated in the Seminar included Mr. R.V. Kelkar, Dr. M.P. Singh, Mr. B.B. Pande, Dr. A.K. Koul, Dr. K. Ponnuswami and Miss Veena Bakshi. From among the student members of the clinic, Mr. B.R. Mittal, Mr. Sushil Kumar Jain, Miss Abha Kulshreshtha and Mr. Rajiv Mehra made strong pleas in favour of clinical legal education.

It is a matter of gratification for us that the national Press carried the message of this seminar to even the remote corners of the country.[1] It is also a matter of great satisfaction for us that what we stressed here in this seminar was echoed in the National Seminar on Legal Aid and Advice, held on 3 and 4 October 1975.[2]

We visited village Chhatera in the State of Haryana on the 21st of March, 1976. The group included Dr. S. Jaffer Hussain and Dr. Hoti Prasad, my colleagues, and 25 student-members of the clinic. Dr. Maha Singh, a social worker of village Chhatera, had announced about our programme in the village before hand and when we reached there a number of villagers who had legal problems of one kind or other came to us with their problems. We gave them advice and in cases where they had not brought the relevant papers, we asked them to visit the office of the clinic at any time convenient to them. Our visit and the advice we gave there were very much appreciated by the villagers and we told them that they could always come to us with their legal problems. We acquainted the villagers with their legal rights in regard to various matters.

During the year, we kept in touch with the Ministry of Law, Government of India, as also the Indian Council of Legal Aid and Advice. Mr. V.V. Vaze, Joint Secretary and Legal Adviser, Government of India in the Ministry of Law, Justice and Company Affairs,

1. See the important national dailies, like the *Times of India*, the *Hindustan Times*, the *National Herald*, the *Statesman* and the *Patriot* of 29 September, 1975.

2. The then Prime Minister Indira Gandhi while inaugurating the Indian Council of Legal Aid and Advice on October 1975, expressed hereself in favour of starting legal aid clinics in law schools and associating law students and law teachers with legal aid work. At the conclusion of that seminar, a Resolution moved by Dr. L.M. Singhvi was unanimously adopted. The Resolution, *inter alia*, "ADVISES the Universities and the Bar Council of India to take steps to introduce the study of Poverty Law and the participation of law students in Legal Aid Clinics as an integral and compulsory part of the curriculum for the LL.B. courses and to enable the utilisation of law teachers and law students to contribute to the national task of providing legal aid advice to the indigent and the disadvantaged."

who was looking after the proposed legal aid scheme to be instituted through law by the Government of India spoke to the members of the clinic on "Legal Aid and Law School" on the 13 March 1976.

We kept ourselves in close touch with the Indian Council of Legal Aid and Advice and in recognition of the necessity for close contact between them and our Clinic, among other things, the Indian Council of Legal Aid and Advice (Delhi Branch) nominated Dr. P.S. Sangal on their excutive commitiee.

Among the Advocates who assisted the clinic during this year must be mentioned the names of Mr. Sushil Kumar, Mr. R.P. Gupta and Mr. R.K. Kapoor and we are very grateful to them. Special mention should be made of Professor Lotika Sarkar, Professor D.K. Singh, Dr. B. Sivaramayya and Mr. S.P. Singh who were always helpful to the clinic during the year. It needs hardly to be added that without Dean Baxi's active support, successful working of the clinic would have been impossible. The great co-operation received from the student office-bearers of the clinic deserves special mention. Mr. B.R. Mittal, Secretary, Arun Kumar Sinha, Miss Abha Kulshreshtha and Mr. R.K. Kalia, Joint Secretaries, Mr. Shiv Kumar Sharma and Mr. Narinder Singh, Assistant Secretaries, extended their fullest help in all the activities of the Clinic. The valuable service rendered to the clinic by the office assistant, Mr. N.K. Mishra, must also be acknowledged here.

Financial support on a continuing basis has been made available by the University Grants Commission and with this assured financial support, we propose in the next academic session to further extend our activities to (1) the provision of legal services : (2) the promotion of law reforms ; (3) the promotion of legal literacy ; and (4) public utilitity litigation in areas of environmental pollution, consumer protection, and professional malpractices.

BOOK REVIEWS

Jurisprudence and Legal Theory by G. C. Venkata Subbarao (Eastern Book Co., Lucknow, 8th ed., 1975 pp. xii+340 : Rs. 14.00)

If the number of editions is some indication of the success and popularity of a book, the book under review has fully earned both. In the course of journey from its first to the eighth appearence the book has undergone many changes affecting both its form and content. The lastest edition covers 340 pages divided into 32 chapters. It also contains a list of selected readings. Thus the edition under review is a well-established work by an eminent jurist.

The book, primarily meant for the LL.B. course, is designed to give comprehensive basic information about jurisprudence. The vast and intricate subject is contained in a manageable text-book form in the traditional manner.[2] The book presents the subject under six major topics : *viz.*, province of jurisprudence, theory of the state, theory of law, sources of the law, jural analysis, and theory of justice. This book is no mere complilation, like most other Indian books on the subject. Rather, it offers critical examination of the main jurisprudential issues in the light of the views of many notable thinkers. However, the book does suffer in certain respects, probably due to limitations of space.

The first three chapters of the book are devoted to a discussion of the nature and scope of jurisprudence, schools of jurisprudence and the latest trends in jurisprudence. Discussion of the schools of jurisprudence has become conventional for any text-book. But any attempt to group juristic thought emerging in diverse times, places and ideological contexts into "school" over-simplifies, and often confuses, the issues. The book identifies, the analytical school on the basis of the following criterion : "The jurists of the Analytical School consider

1. G.C. Venkata Subbarao, *Jurisprudence and Legal Theory* (8th ed., 1975) (hereinafter referred to as *Subbarao*).
2. Like the book, the review follows the conventional chapterwise comment scheme.

that the most important aspect of law is its relation to the State."[3] However, the jurists of analytical or positive school are more commonly known, at least for bringing out the distinction between analytical, sociological and natural school thoughts by their emphasis on "is-ness" or positive feature of law, which does not necessarily imply an analysis of law in terms of the State. The book points to the fact of dominance of analytical school in England and philosopeical school on the Continent. But the explanation provided for such a development is far from convincing.[4] However, it is worth pondering as to how far the English analytical school has influenced other common law countries. Does the mix-up of local or traditional attitudes with the common law attitude not lead to a queer amalgam?

Chapter III entitled "Latest Trends in Jurisprudence" does not do full justice to the subject. Restructuring the chapter, in terms of diverse strains of contemporary approach, e.g., Hart, Fuller, Stone, Radbruch and others, would have been more desirable.

The discussion of the concepts of state and sovereignty in Chapters IV and V is of special value for the proper understanding of the positivist standpoint. However, Bentham's contribution to the idea of sovereignty should have found a place in this chapter,[5] particularly the notable differences between Bentham and Austin.[6]

Part III relating to "Theory of Law" has discussed very vital issues rather briefly. Examining the concept of law in the light of Austin, Kelsen and Salmond only puts a sort of artificial limitation on the free flow of the discussion, which should have also moved towards thinkers who treat law as a system of rules. Furthermore, the utility of devoting five small chapters to various kinds of laws is, to say the least, doubtful, particularly in view of the fact that a fairly intimate acquintance with the diverse kinds of laws is ordinarily assumed in case of every person before his exposure to the jurisprudence course.[7]

3. *Subbarao*, at 10.
4. *Id.* at 15-16.
5. J. Bentham, *Of Laws in General* (1970).
6. See for a useful general discussion of Sovereignty, J.D. Finch, *Introduction to Legal Theory*, 72-86 (2nd ed. 1974).
7. This is on account of jurisprudence being a final year subject in most of the LL,B. curriculums. A similar argument can be raised against the inclusion of Chapters XXV and XXVI and the discussion relating to interpretation of statutes at pp. 145-153, which could be more appropriately covered elsewhere.

The discussion on rights and duties lucidly explains an intricate topic in the light of the views of Austin, Salmond, Gray and Holland. However, an analysis of Hohfeld's schema of jural opposites and correlatives would have introduced the readers to a more rigorous, and also practically useful, framework relating to rights and duties.

A detailed discussion of ownership, possession and allied topics in Chapters XX to XXII is useful for understanding the juridical concept underlying various kinds of property in modern societies. The author has displayed his sound judgment about vital significance of property issues by devoting over fourteen pages to a unconventional discussion of the concept of property and ownership in the concluding part of the book.[8] In doing so, he has well identified the significant jurisprudential-controversy areas.

Chapter XXVII relating to legal sanctions is rather sketchily presented. Describing various kinds of sanction in a general way without reference to any particular legal system or country makes the discussion very vague.[9] Similarly, the initiation of the discussion on capital punishment with the period of George III when 220 offences were of capital nature explains little about the concept of the sanction as such.[10] The list of countries where capital punishment is abolished omits mention of England[11] which took the abolitionist step after a fairly loud debate.[12] A general discussion of the philosophical and ideological shifts underlying various forms of sanction would have

8. *Subbarao*, 314-327.
9. Mention of deportation and corporal punishment as forms of sanctions is misleading as they have become obsolete in a majority of legal systems. In India, Act 26 of 1955 dropped transportation as a form of sanction. Similarly, with the repeal of the Whipping Act in 1955 the only form of corporal punishment is abolished in India. The latest development in the field of sanction is reflected in the *Joint Select Committee Report on the India Penal Code (Amendment) Bill of 1972*, which lists out the following nine kinds of sanctions: (i) death; (ii) imprisonment for life which shall be rigorous, that is, with hard labour; (iii) imprisonment for a term, which may be (a) rigorous, that is, with hard labour; (b) simple, that is, with l ght labour, (iv) community service; (v) disqualification from holding office; (vi) order for payment of compensation; (vii) forfeiture of property; (viii) fine; (ix) public censure.
10. *Subbarao*, 271.
11. *Id.*
12. Capital punishment was abolished in England in 1965 after considerable debate and parliamentary wordly duel following the *Report of the Royal Commission on Capital Punishment*, 1949-53, H.M.S.O. Cmnd. 8932.

been more useful for understanding why a particular sanction is good or bad.

Part VI of the book devoted to theory of justice contains discussion on topics like the concept of justice, civil and criminal justice, standards of justice and current developments in India. This part is a useful epilogue to this short book. The relevance of justice and other values for law is likely to be under-recognised in legal systems following the authoritarian model of law, but such values assume vital significance for all those who care for a wider concept of law and aspire to refurbish the image of law. It is true that one source of Indian societal values is the Constitution, but the question of values for a society undergoing fundamental social change cannot be meaningfully resolved in terms of static constitutional framework alone.[13] Is it merely a coincidence that the book concludes with a discussion on legal aid, which as an aspect of equal-justice value could be identified as the weakest point of the Indian state legal system? How long will jurisprudence go on according a peripheral place to such central discussion? Greater justice could have been done to the legal aid issue in this book, if more effort had been made to expound the philosophy of legal aid. The need for legal aid is an indicator of a common malaise of all the modern legal systems, which are required, at least theoretically, to perform an even legal journey in an uneven terrain, or to administer equal justice among unequals. Thus, the legal aid idea is the beginning of a new jurisprudence, or at least a new approach to *the concept of law* and its functioning in the society.

We must, finally, note the bold and candid observation in the preface of the book concerning its objectives and scope.[14] The auther is inspired on the one hand by the unabated vigour of the jurists concerned with the highest enquiries about law, and on the other he is equally guided by the imperative realities of the market place. To keep a balance between these two, often opposing poles, is a hard task which is well-performed by the present author. However, the present work does not altogether break through the barrier of unintelligibility arising out of the general terseness with which the subject of jurisprudence is generally associated. The usual approach to

13. It is a happy augury that in view of the demands of social change the Constitution has been amended from time to time.

14. *Subbarao*, iii-iv.

jurisprudence as a subject is partly responsible for the present state of affairs. Jurisprudence continues to maintain purely theoritical or conceptual form, depending more on theoretical constructs and argumentations relating to the concepts of law. This form may be characterised as *nirakar* (formless, abstract) jurisprudence.[15] In contrast with the above model, one can easily imagine of a *sakar* (real, concrete) jurisprudence which would be more concerned with the actual social facts that might appear in the form of judicial or legislative decisions. Such a *sakar* jurisprudence would be concerned about things that are observable. The present work cannot be said to have trodden the *sakar* path and therefore, it would have limited utility for a large section of readers who fail in their capacity and desire to concentrate and imagine about *nirakar* legal concepts. However, the trends in law teaching involving shift to case-method of teaching and greater emphasis on critical analysis of legislative measures and judicial decisions and the thrust of sociology of law are indicators that jurisprudence will acquire more and more *sakar* character in the years to come.

B.B. Pande *

15. Edinburgh University students have similar views about jurisprudence course. Neil Mac-Cormick summarises their views, expressed in the course of a research study conducted by Peter Sheldrake, in the following words :

> It appears that many members of the class feel that too much attention is paid in the course to somewhat fine and abstract points of 'high theory', too much to debating what law is, and too little to considering the philosophical and sociological implications of various more concrete aspects of law as it is or arguably is.

Neil Mac-Cormick, "Jurisprudence in the Law course—A foot note", 13. *J. of the Socity of Public Teachers of Law* 361 (1975).

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Indian Company Law by Avtar Singh [Eastern Book Co., 4th Ed. 1974, pp. 558, Rs. 25.00, Paperback Rs. 22.00]

In his preface to the first edition of *Indian Company Law*, (1966) the author described it "an humble attempt" of a novice in legal writing "to present the complicated subject of company law in the shape of basic and elementary principles." Since then, this work has undergone almost a complete transformation through its three subsequent editions, growing both in bulk and in wisdom. The author, reputed for conspicuous ability as a teacher of the subject for about two decades, is no more a "bignner". Little wonder that the book explicates the principles of a highly technical subject with brevity and precision and is admirably geared to the needs of law students.

As the Indian company law is largely patterned on English law, comprehension of the corresponding provisions in English legal system is essential. Though this work mainly deals with the Indian law, it refers to the law prevailing in countries like U.S.A.[1] and Canada[2].

In the first chapter the author describes the nature, advantages and disadvantages of incorporation together with the lifting of corporate veil in a simple manner with apt illustrations based on decided cases. The author, however, has not thought it necessary, unlike most textbook-writers, to examine elaborately the history of company law, perhaps because of the lack of students' interest in historical discussion. But this, in our view, is an unjustifiable omission. As Gower rightly says, of all the branches of law the company law is perhaps the one least readily understood except in relation to its historical development.[3] The author has partially made up the deficiency by referring to some works at footnote 17 on page 3 which could be consulted by serious readers.

1. For example, at p. 239 reference is made to rule 10b.5 of the Securities and and Exchange Commission Rules.
2. See p. 52 where reference is made to a Canadian case.
3. L.C.B. Gower *The Principles of Modern Company Law*, 22 (3rd ed. 1969)

The chapters dealing with memorandum and articles are excellent though the discussion about doctrine of ultra vires with reference to the position obtaining in India is inadequate.[4] There is no reference to the recommendations of the Bhabha Committee[5] and the Daphtari-Sastri Committee.[6] Further, though it has been mentioned that in consequence of the Amendment Act of 1965, the main object and the other objects have to be stated separately, no reference has been made to the amendment of section 149. The amendment of section 149 which by inserting a new sub-section (2A) requires that before a company commences a new business it should seek approval of the shareholders by special resolution in general meeting is inextricably interwoven with the amendment of section 13. The combined effect of both the sections is to mitigate the rigours of the doctrine of ultra vires with regard to shareholders by affording them an opportunity to get prior information about the new business to be embarked up on by the company. Both these sections were amended to give effect to the recommendations of the Vivian Bose Commission which were fully endorsed by the Daphtari-Sastri Committee.

The section dealing with the procedure for alteration of memorandum is a little incongrous. The author says first that alteration does not take effect until it is confirmed by court on petition[7]; towards the end of the discussion he says that by the Companies (Amendment) Act, 1974, this power has been transferred to the Company Law Board.[8] The better course would have been to state the current law first and then to refer to the old law. Perhaps, the new edition of the book had already gone to the press when the amendment was put into effect as seems clear from the fact that a few pages embodying the amended law are printed in light-blue shade.

4. Discussing the effects of ultra vires transactions the author quotes the following from a judgement :

   "An ultra vires contract being void abinitio cannot become intra vires by reason of estoppel, lapse of time, ratification, acquiescence or delay."

   The reference given at footnote 8 on page 52 is, however, wrong. This observation was made not by Lord Cairns, L.C. in *Ash bury Rly. Co.* v. *Riche*, [1875] 44 L.J. Exch. 115, but by Russel J. in *York Corpn* v. *Henry Leetham & Sons, Ltd.*, [1924] Ch 557, 573.
5. *Report of Company Law Committee* (1952)
6. *Report of the Companies Act Amendment Committee* (1957).
7. *Avtar Singh*, 59.
8. *Id.*, 60.

The chapter on "Prospectus", though fairly detailed, fails to take account of the newly inserted sections 58A and 58B relating to restrictions on the acceptance of public deposits by companies. These crucial provisions demanded the author's attention.

The chapters dealing with promoters, shares, shareholders share capital and debentures have been comprehensively dealt with. The relevant statutory provisions and judicial decisions have been carefully analysed. Greater attention was, however, to be expected from the distinguished author on controversial topics such as : no-par value shares prevalent in some of the states in U.S.A. and are being hotly debated in England, and the position of preference share-holders vis-a-vis the position of debenture holders with whom the former appear to be more closely approximated as cautious investors. Though preference shares have the characteristics of ordinary shares as well as of debentures, their dual character tends to become highly anomalous. After a balanced analysis of the roles played by the ordinary share-holders, preference shareholders and debentureholders, Gower concludes that "suspended midway between the true creditors and true members, they (preference shareholders) get the worst of both the worlds".[9] Some discussion of this aspect, even if not detailed, would have been helpful.

Chapter X on "Directors" is perhaps the most remarkable chapter, fully suggestive of the author's extensive research. The discussion on the fiduciary duties of directors, particularly those relating to "breach of trust" and "trading in corporate control", is specially noteworthy. This is substantiated by an elucidation of the principles laid down in the leading decisions including such latest cases as *Industrial Development Consultants and Colley*,[10] *Bamford v. Bamford*,[11] *Peso Silver Mines, Ltd. v. Cropper*,[12] *Re Duomatic, Ltd.*[13] *and Securities and Exchange Commission v. Texas Gulf Sulphur Co.*[14]. An important decision, subsequent to the publication of the book, concerning the fiduciary position of directors decided recently by the Privy Council is *Howard Smith, Ltd. v. Ampol Petroleum, Ltd.*,[15].

9. Gower, *op, cit. supra* n. 4, at 364.
10. [1972] 1 W.L.R. 443.
11. [1968] 3 W.L.R. 317.
12. 58 Dominion L.R. (2d) 18 (1966).
13. [1969] 1 All E.R. 161.
14. 401 F. 2d 833 (1968).
15. [1974] 1 All E.R. 1126 (P.C.).

In view of the increasing proliferation of regulatory provisions adding to the armoury of administrative controls on companies operating in several directions, the development of a separate subject of study to be known either as "economic administrative law" or "corporate administrative law" is imminent. The provisions in the Companies Act relating to "oppression and mismanagement" and "investigations" are significant, as they involve the exercise of substantial regulatory powers by the government. The decision of the Supreme Court in *Barium Chemicals, Ltd.* v. *The Company Law Board*,[16] which the author discusses in some detail, explains the power of the Central Government to order investigation into the affairs of a company.

A very significant provision, quite in tune with the socialistic ideals of the government, is its power to convert its debentures or loan account in a company into capital.[17] This may look like "back-door nationalisation" or "creeping socialism". In fact this should not sound strange in view of the fact that the government had declared twenty years ago in its Industrial Policy Resolution of 30th April 1956 that "Industrial Undertakings in the private sector have necessarily to fit into the framework of the social and economic policy of the state and will be subject to control and regulation in terms of the Industries (Development and Regulation) Act and other relevant legislation". The 1974 Amendment also brought about some changes of a far-reaching character, specially those relating to transfer of power of conforming alteration from the court to the Company Law Board sector, restriction an purchase or transfer of shares (Sections 108A to 108H) and power of the government to appoint directors in the exercise of its powers to prevent oppression and mismanagement (section 408). The author has discussed all these provisions with clarity and lucidity.

The chapters on winding-up are equally fascinating, but one wonders as to why the author has not referred to the recent and a highly relevant decision of *The Aluminium Corporation of India* v. *Lakshmi Rattan Cotton Mills Ltd.*[18]

One significant feature of the book is its unusually large number of bibiliographic references which should be of use to the advanced

16. [1966] 2 Comp. L.J. 151.
17. Sections 81 (4) and 94 A.
18. A.I.R. 1970 Allah. 452.

students. The book is likely to be equally useful to the students of law who are receiving their instructions through the case-method, in view of its close attention to the leading cases.

The author gives at the end of the book an appendix containing a brief study of the major amendments introduced by the Companies (Amendment) Act, 1974. This enhances the utility of the book for the readers.

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Constitutional Law of India by H.M. Seervai [Bombay : N.M. Tripathi, P. Ltd., 2nd ed., Vol. I(1975) and Vol. 2(1976), pp. 1509 : Rs. 125.00]

The book under review first appeared in one volume in 1967. The rapid and sweeping constitutional developments which have occurred during the Emergency, so soon after the publication of this work, have rendered it somewhat out of date. Of course for this the author cannot be blamed. He, however, has reproduced in a special schedule the important sections of the thirty-eighth and the thirty-ninth amendments to the Constitution.[1] Understandably he does not treat at length a large amount of important material such as the fortieth, forty-first and the forty-second amendments to the Constitution and, the emergency constitutional jurisprudence developed by the Supreme Court in *Smt. Indira Nehru Gandhi* v. *Raj Narain*[2] and *A.D.M. Jabbalpur* v. *Shivakant Shukla*.[3] The *Indira Gandhi case* is, in fact touched upon at the end in the last two chapters written obviously after completion of the original manuscript. But the intrinsic merit of the work, as an athortative source of information and knowledge of the law till immediately preceding the June emergency of 1975 remains unaffected.

In writing this book the distinguished author successfully emulates Dr. Wynes' *magnum opus* on the Australian Constitution.[4] The book is a rare and rich contribution to the literature on the constitutional law in our country.

Volume I of the book contains a detailed exposition of the

1. See H.M. Seervai, 2 *Constitutional Law of India*, AA-7 and AA-8 (2d ed. 1976). (Hereinafter cited as *Seervai*).
2. A.I.R. 1975 S.C. 2299.
3. A.I.R. 1976 S.C. 1207.
4. W.A. Wynes, *Legislative, Executive and Judicial Powers in Australia* (3rd ed. 1962).

developments immediately following *Golak Nath* v. *State of Punjab*.[5] That decision marked the end of a long spell of judicial restraint practised prudently by the Supreme Court. Very appropriately, the author had in the first editior advocated the advisability of that decision being overruled at the earliest possible apportunity. He must have every reason to feel rewarded, because, the criticism offered by him on *Golak Nath* in some measure found acceptance in the *Kesavananda Bharati* v. *State of Kerala*.[3]

The Chapter on "Amendment of the Constitution" is exceedingly well written. The author treats the most controversial issues of our constitutional system with rare understanding and confidence. In view of the far-reaching post *Golak Nath* developments the chapter is redesigned and redone in the perspectives of the *Kesavananda case* and the *Indira Gandhi case*.

The author does not accept totally the constitutional jurisprudence of *Kesevananda*. Nevertheless, he regards this case as one like of which, it is to be hoped, will not be heard in our Supreme Court again.[7] He opines that the summary signed by nine of the thirteen judges "*has no legal effect at all*"[8]. He sāys that no deep analysis of the constituent power took place in the *Kesevanada* pronouncements. It is "a primary power", although it is a "derivative power", and certain restrictive limitations are inherent and implied in the nature, character and contents of the infra-structure of the power established by article 368.[9] Six of the seven judges, who constituted the majority, held that such limitations existed. Khanna. J. did not, according to the author, subscribe to the inherent and implied limitations doctrine ; nonetheless, he held that the amending power did not cover an alteration of "the basic structure or framework of the Constitution".[10] The author observes that the *Kesevananda* ruling did not resolve all issues concerning the amendatory power. He clearly maintains that the constituent power contents in amending a

5. A.I.R. 1967 S.C. 1643.
6. A.I.R. 1973 S.C. 1461.
7. *Seervai*, 1512.
8. *Id*, 1516.
9. *Id.*, 1522.
10. A.I.R. 1973 S.C, 1461, 1903.

written rigid constitution cannot be four squares the full-scale constitutent power used for framing a constitution.[11] Very pertinently he observes that the judgement in the *Indira Gandhi case* breaks new ground on the conceptual contents and scope of the amending power. He points of the ecological setting of the *Indira Gandhi case*, particularly, raising the issues of the contents and constituents of amending power *ab extra* property right postulates and the inarticulated social control and welfare jurisprudence of the directive principles of states policy implementation measures.[12] The separation of power doctrine based challenge to an amendment cannot be termed utterly irrelevant or ineffective.[13] The case powerfully establishes that the amendatory power is not, after all without its inherent limitations, and if an amendment is passed in contravention of the limitations, it is *ultra vires* the power. When construed with this gloss, we get to an extent a correct interpretation of article 368.[14] He says that "though many objections can be raised against the doctrine, there is no other interpretation which is not open to graver objections."[15]

The author subscribes to the view that judicial review is "concomitant" of a written constitution ; and is neither a new principle in India, nor a new feature of our Constitution[16]. In the precedential conceptualism evolved since the days of *Marbury* v. *Madison* in the U.S.A. and many a case in India, he does not find the review power of the Supreme Court and the High Courts as flowing from any particular provision of the Constitution including articles 32 and 226. In principle it is; according to him, an inalienable constituent of judicial power of a constitutional court. Very correctly he regards it as an incident of the established constitutional limitations including the curbs imposed by the fundamental rights and the implications of essential features of Constitution. Conformably to the axioms of constitutional jurisprudence and conceptions of constitutionalism, he does not contemplate any possibility of curtailment or constriction of judicial review by means of constitutional amendment.

11. *Seervai*, 1523-24.
12. *Id.*, 1522 and 1960.
13. *Id.*, 1574.
14. *Id.* 1576.
15. *Id.*, 1572.
16. *Id.*, 1200.

It is natural that the lawyer-author should have written a long chapter on "Right to Judicial Remedies." The treatment of the several writs is both upto-date and exhaustive. In a measure the author succeeds in attempting a correct and precise description of the existence, nature and restrictions of the writ issuing power of the High Courts under article 226, and the Supreme Court under article 32. As is expected from him, the references to judicial dicta are well digested, accurate and deep. His attempt to equate four squares the High Court jurisdiction under article 226 and the power of the Supreme Court under article 32; and his straight unimaginative observation that it is not a proper exercise of discretion to refuse a writ, if an alternative remedy exists, expresses the position known till immediately preceding the forty-second amendment. The judicial review and *ultra vires* jurisdiction as an incident of writ issuing power seem to be inextricably inter-connected. The question whether a High Court can exercise *ultra vires* jurisdiction incidental to its writ issuing power is prohetical even though cursorily, raised and unimaginatively disposed of.[18] The author seems to maintain that the High Court can always issue a writ, if an administrative action is authorised by an *ultra vires* law.[19] Imperceptibly, nay, impliedly he maintains that a *vires* contention in respect of an impunged law can be taken, passed and decided in writ proceedings.

The author attempts a fuller discussion, than he gave earlier in the first edition of his book, on the directive principles of state policy. He holds on to the articulated view that in case of conflict between the fundamental rights and the directive principles, the latter should conform to the former. He feels that it would be an inaccurate rewriting of constitutional history to say that the framers gave primacy to directive principles over fundamental rights.[20] Nevertheless, he accepts the assumptions and logics and implications of the primacy and precedence given to the directives in article 39 (b) and (c) by article 31 C.[21] He does not hesitate to note that the reach of the article falls short of the suggestion made by Shri B.N. Rau in,

17. I Cranch, 137(1801).
18. *Seervai*, 837.
19. *Ibid.*
20. *Id.*, 1032.
21. *Id.*, 1034.

and its rejection by, the Constituent Assembly, in as much as the article relates only to "property in its widest sense."[22] He feels that by upholding the substantive part of the article, the Supreme Court removes an irritant, and lets it be known that it may uphold social welfare legislation enacted by Parliament. The author concedes the logical consequences of the historico-political supposition, and thereby, accepts the possibility that a constitutional amendment may remove any conflict that may arise between any two of the fundamental and essential feature provisions *albeit* parts III and IV of the Constitution.[23] This clearly envisages the expanded area coverage by article 31 C. This is what comes true following the forty-second amendment.

The inter-relationship between the President and the Prime Minister in the Council of Ministers and, along with it the position of a state Governor *vis-a-vis* the State Council of Ministers is discussed at length.[24] Specifically he refers to the *Samsher Singh's case*[25], and submits that it finally makes the President constitutional head of the Union in respect of the executive power vested *lex litera* in him.[26] He is obliged to act on the aid and advice of his Council of Ministers. The conferment of certain discretionary powers on the Governor under article 163(2), and absence of a similar clause in article 74 negatives all contentions for any general discretionary power on the President. Nevertheless, the author does not discount rare remote situations in which the President may act a *discretion*.[27] Not commonly, there is some small circumstances under which the President may act in his discretion. For instance, when in a general election the party in power is defeated, and no clear majority is returned to the House of the People, he has a real discretion to ascertain for himself, first which party or combination of parties can from a stable government; and, secondly, which of the persons contending for leadership is accepted by such party or parties as their leader. Atop this the President

22. *Id.*, 1035.
23. *Ibid.*
24. *Id.*, 1057 *ff.*
25. *Samsher Singh* v. *State of Punjab*, A.I.R. 1974 S. C. 2192.
26. *Seervai*, 1059.
27. *Id.*, 1068.

does have, the discretion to reject the ministerial advice, and if necessary, to dismiss a council of ministers, if it continues to offer advice contrary to the Constitution. The author's analytical argument in this respect should engage the attention of all those who would deny the President all discretion at all times and in all situations, though it is another matter, that the forty-second amendment has closed all doors for such discretion.

The author chooses to treat critically yet one more topic. This is the continually unclear topic of parliamentary privileges. He draws the reader's attention to the infirmities of the *President's Reference* No. I of 1964[28]; and feels that the *Reference* should not be taken to give a correct statement of the law and practice in the area[29]. Having discussed the majority opinion delivered by Gajendragadkar J. and the dissent of Sarkar J., the author says that the latter is clearly correct.[30] In consequence, he feels that *M.S.M. Sharma* v. *Shri Krishna Sinha*[31] was rightly decided.[32] In accordance with the rule of harmonious construction the general provisions of the fundamental rights should give way to the special provisions for privileges of the legislature, its bodies and members. Very rightly he warns against any tendency against an independent investigation in the matter of doubt and disputes in respect of existence or scope of a privilege or its use, methodology, and any undue reliance on any book, for that matter, May's *Parliamentary Practice*. Agreeing with the dissenting judge in the *Reference*, he maintains that the privilege of a House to comitt a person including a High Court judge for its contempt, by a general warrant is an established privilege without being founded merely in comity between the House and the Court.[33]

The author's treatment of emergency provisions of the constitution is not only weak, it is also inexcusably casual, cursory and wholly inadequate. Strangely enough there is no separate chapter on this very important topic in view of long spells of emergency even before the emergency beginning on June 25, 1975, which he totally, even if, understandably ignores altogether. The

28. A.I.R. 1965 S.C. 745.
29. *Seervai*, 1178 *ff.*
30. *Id.*, 1179 and 1181.
31. (1959) Sup. 1 SCR, 806.
32. Constitutional Law of India, Vol. II pp. 1172-1174.
33. *Ibid.* pp. 1166-7,

constructional analysis of articles 352, 358 and 359 is not only sketchy, but it is also shaky. The author conveniently avoids mentioning amendatory changes introduced by the thirty eight amendment, although in view of his mention of the *Indira Gandhi case* it cannot be said that he was wholly unaware of its having been passed. He restates the operational effects of unamended articles 358 and 359.[34] The former suspends article 19, and as ruled in *Makhan Singh* v. *State of Punjab*[35] and *State of M.P.* v. *Bharat Singh*,[36] the validity of the emergency legislative and executive acts cannot, therefore, be challenged either during the continuance of emergency or even thereafter.

It goes without saying that the book under review possesses certain special features. Written by an active practising lawyer of repute, the book appears to be based on many written briefs which the author himself should have prepared. The case-law treatment of the subject is really unique and leaves nothing to be desired. It is correct and coherent, without any pretentions of academic bias in the treatment of the subject. The lawyer in him has made the work more analytical than critical and jurisprudential. Much as the present reviewer would like it to be, the author cannot be credited with having contributed much conceptually or academically. The deficiency is, however, more than made up by the author's sterling qualities of intellectual honesty, courage and credibility brought to bear in preparation of the book. Undoubtedly the book is thus one of the most comprehensive and near complete books on the subject.

M.C.Jain Kagzi*

34. Constitutional Law of India p. 93.
35. AIR 1964 SC 38.
36. AIR 1967-1170.

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Commentaries on Companies Act, 1976 by Jagdish Swarup, (Lucknow : Eastern Book Company, 1976, pp. XXVIII+2076; Rs. 140.00 2 vols.

The Companies Act 1956 as amended is probably the biggest and also the most complicated among the Indian statutes. The volume as well as complexities are increasing with the frequent amendments to the parent Act. The high frequency of amendments could be understood only in the light of the desire of Indian Parliament to use company law not only as a device for the formation and governance of companies but also as an instrument for attaining the socio-economic goals as enshrined in the Directive Principles of State Policy of the Indian Constitution. A company, in the Indian context, is considered to be a national institution owing duties to, besides its shareholders, its workers, the consumers of its products and the community at large. A company is not to govern itself merely for private profit but also in a manner so as to serve the public or national interests, so much so that if a company acts in a manner which is against public interest, its directors could be removed from office and far-reaching action under section 398 (and many other sections) of the Act could ensue. Due to these reasons the company law has become a fascinating and at the same time a complex subject for study. In the circumstances, a book designed to project the proper perspective for the study of this subject is a very difficult job. Happily the learned author has fulfilled this task commendably.

The book offers section-wise commentary, 34 appendices dealing with different but useful matters relating to companies like the Capital Issues (Control) Act, 1947, Companies (Public Trustee) Rules, 1973, Cost Audit (Qualification) Rules, 1970, Cost Audit (Report) Rules, 1968; Companies (Appointment of Sole Agengts) Rules, 1975; Companies (Secretary's Qualifications) Rules, 1975; Application of Section 159 to Foreign Companies Rules, 1975; Indian Companies (Foreign Interests) Act, 1918; and Company Law Board (Bench) Rules, 1975.

The approach of the author in this second edition has been (as in the first) critical but constructive. It is refreshing to note that critical remarks made by the present reviewer[1] and the learned author in the first edition of this book[2], concerning the Orissa High Court Judgements in *Orient Paper Mills, Ltd.* v. *State*[3] and in *In Re Orissa Chemicals and Distilleries, Ltd*[4]., have exercised a healthy influence which is evident in the latter decisions like *Rank film Distributors* v. *Registrar of Companies*[5].

The author's critical approach is very evident when he discusses the very important, but much ignored *Life Insurance Corporation* v. *Mundhra*[6]. In this case, the appellant, a member of the British India Corporation, complained about the mismanagement of the affairs of the B.I.C. and wanted the court not to confine its probe strictly to the affairs of the B.I.C. but also to scrutinise the interfused affairs of

1. See P.S. Singal and K. Ponnuswami, "Inter-State Change of Registered Office of a Company", [1964] 2 *Lamp. L.C.* 104. These comments were as follows:—
"It is submitted, in conclusion, that the contentions of the State of Orissa, the solitary objector to the petitions in these two cases, are illusory and unfounded. Section 17 of the Companies Act, 1956, unlike the English law, gives the right to any company formed under the Act to move its registered office from one State to another by complying with the requirements laid down in that section. There is nothing in the Indian Constitution to discourage any such movement. Judicial recognition of irrelevant and unfounded considerations will make section 17 of the Companies Act nugatory indeed. That section does not require notice of the petition to be served on the State Governmant. Nor does it require the Court to have regard to regional interests. To read them into the section will indeed be far-fetched, for if that were the intention of Parliament, there could be no reason why Parliament should have left it to be implied instead of expressly laying it down in the section. These two Orissa decisions raise a novel question for the first time. It is to be hoped that they will not find favour with the other High Courts and the Orissa High Court will, when an opportunity arises, reconsider them".

2. See J. Swarup, I Commentaries on Companies Act, 1956, 57-58 (*Ist ed. 1974*), pp. *57-58, 1964*. The remarks were as follows:—
"It is submitted that these are wholly extraneous matters not germane to the enquiry. If the shareholders have trken a *bonafide* decision that the change of the registered office from one State to another would be conductive to the better and efficient running of the business of the company, the court wouln not go into the question whether the decision of the shareholders was right or wrong".

3. A.I.R. 1957 Ori. 232.

4. A.I.R. 1951 Ori. 62.

5. A.I.R. 1969 Cal. 32.

6. [1963] 1 Allah. 447.

the Corporation and its hundred per cent subsidiary, Messrs. Begg, Sutherland and Co., (Private) Ltd. For the respondent, it was contended that the affairs of the subsidiary could not be investigated at the instance of a member of the holding company, particularly when the respondent was not a director of the subsidiary. Dwivedi J. of the Allahabad High Court (as he then was), dealing with this controversy, said : "Having regard to the history of the holding company, its inherent dangers, precedents, text-books and the enterprise unit context of Section 398, I am led to think that the court may investigate, on the application of the appellant, the affairs of the subsidiary which had become a mere department of the Corporation. The object of the section is to liquidate mismanagement in the affairs of a company. The affairs of the British India Corporation would include also the affairs of its departments or branches"[7].

It is heartening that Mr. Jagadish Swarup has examined this, probably the only Indian decision, on the aspect of the power of the member of a holdiug companay to have the affairs of the subsidiary company scrutinised under section 398 of the Companies Act, 1956.

This decision of the Allahabad High Court is very refreshing as evidencing that at least some Indian courts do not decide cases by strict legalism but are quite willing to tread the long and thorny paths of judging the merits of cases on the basis of business realities. If even after this decision, a "double derivative suit" of the type mentioned by Justice Dwived[7] is not permitted in this country, it is strongly urged that it should be made possible by enacting an express provision to this effect in section 398. This, it is submitted, is necessary if mismanagement is desired to be liquidated also in the subsidiery companies, more particularly, in wholly-owned subsidiaries like the one involved io this case[8]. The learned author has done great service by bringing out the full implications of this very important decision.

Mr. Jagadish Swarup has brought to bear on the writing of this monumental book his vast learning and experience as a lawyer of great repute with a vast company law practice. However, from a man of his experience and understanding we also expect some

7. *Id.*, 470-471.

8. See P.S. Sangal, "Mismanagement in a Company", 10 *Jaipur L.J.*, 38, 71(1970).

greater contribution by way of expounding the new emerging philosophy of company law which is particularly evident by the expressions "public interest" or "national interest" writ large over the Companies Act, 1956. It is hoped that Mr. Swarup will want to advert to this aspect in the next edition of this important work. The book is bound to be very useful for all concerned with the teaching, practice and working of the company law.

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V.D. Kulshrestha's Landmarks in Indian Legal and Constitutional History: revised by Vijay Malik, (Lucknow: Eastern Book Co., 3rd ed. 1975, pp. XVII+456 : Rs. 24.00 paperback Rs. 20.00)

The book under review[1], already known to students of Indian legal history, first appeared in 1959 and was revised in 1968. The third edition by Mr. Vijay Malik updates the constitutional developments since 1968 and adds a new chapter on the legal profession but has otherwise left the book almost untouched.

The book is divided into sixteen chapters and covers the legal developments since ancient times and the constitutional developments since 1600. Perhaps because the book covers a very wide ground and a long period in a short compass, it tends to be too sketchy, particularly in its discussion of the Hindu and Muslim periods. It deals with the Hindu period as if from the time of the Vedas to the time of the Sultans there existed the same law and legal institutions without any change or development. Little effort is made to substantiate the claim that the "social and legal order. . .of our glorious past can be corelated to meet the growing problems and new conditions of India today."[2]

The major portion of the book is devoted to the discussion of the development of law and legal institutions since the establishment of the East India Company. This discussion is quite detail, but is mostly descriptive and not critical. The constitutional history has been traced in a very cursory manner without probing into the underlying forces. Mr. Malik has updated the constitutional developments by referring to the *Kesavananda Bharati*[3] decision and the

1. *V. D. Kulshrestha's Landmarks in In Indian Legal and Constitutional History* (3rd ed. 1975) (hereinafter cited as *Kulshrestha*).
2. *Kulshrestha*, 344.
3. *Kesavananda Bharati* v. *State of Keralas*, A. I. R. 1973 S. C. 1461.

constitutional changes upto thirty-fiifth amendment. The addition of a chapter on the legal profession has certainly enhanced the usefulness of the book.

Professor Plucknett has said, "Legal history is a story which cannot be begun at the beginning".[4] There is always scope to probe into the further past. New researches in history go on clarifying the mist around many historical events and throw fresh light on many of the impressions of past developments. Unfortunately, there is no evidence of any new light in the new edition of this book. For example, in the chapter on "Influence of English Law in India" the statement appears that "In the garb of the phrase 'Justice, equity and good conscience' English notions of law and justice were introduced in India."[5] No notice is taken of Professor Derrett's[6] observation that the phrase is of Roman origin and through it not only the principles of English law but also of Roman and other civil law systems were received in India.

Most books on legal history do not go beyond narration which strikes the reader as purposeless and often dull. The purpose of the study of legal history, as outlined by Chief Justice Coke,[7] Homes[8] and Holdsworth,[9] is to understand the existing legal concepts with refernce to the context in which they emerged and the reasons underlying them so that, in the words of Pollock and Maitland, we are able to grasp that "The matter of legal science. ..is the actual result of facts of human nature and history"[10] or that, in Savigny's sense, the development or evolution of law and legal institutions is interlinked with the development and needs of a people or society. The second and more important purpose of such study is expressed in the following words of Professor Stone[11].

4. T.F.T. Plucknett, A *Concise History of the Commnn Law*, 3 (5th ed. 1956).
5. *Kulshrestha*, 26.
6. J.D.M. Derrett, "Justice, Equity and Good Conscience" in J.N.D. Anderson (ed.), *Changing Law in Developing Countries*, 114 (1963).
7. *Co. Litt.*, f. 183 b cited in Potter, *Historical Introduction to English Law and Its Institutions*, 3 (4th ed. 1962),
8. O.W. Holmes, *The Common Law*, 1 (1975) reprint).
9. Holdsworth, *A History of English Law*, vol. 1, viii (7th ed. 1956).
10. W.S. Pollock and Maitland, *The History of English* Law, vol. I, xciii (2nd ed. 1968).
11. J. Stone, *Social Dimensions of Law and Justice*, 110 (1966).

> History. . .is the context of men's struggle for what they mean by justice. It is also part of the outcome of that struggle : but it is not itself justice. Nor are the great "landmarks" in the struggle for justice under law immanent in history, or its criteria given as ready-made, for each generation. Each present generation must. . .identify for itself the enclaves of justice which it holds, in the light of its own concerns, needs and aspirations, and its own understanding of historical experience.

Though the study of Indian legal and constitutional history is compulsory for LL. B. students, the available books including the one reviewed here, do not adequately meet the true needs of the course[12]. For a better involvement of, and response from, the students the authors of works on Indian legal and constitutional history will have to reorient the contents and the substance of their writings in the light of the objectives outlined above.

The book contains two appendices—one on the Gentoo Code and the other on the Union territories. The former gives a fairly good description of the Gentoo Code and the latter of the administration in the Union territories. The present reviewer, however, fails to understand any particular relevance of the latter in the book.

The book also has a fairly long bibliography which enhances its utility. But one wonders whether works such as Avtar Singh's *Indian Company Law* and *Mercantile Law*, or Surendra Malik's *Supreme Court on Constitutional Law* and *The Fundamental Rights Case* should be in the bibliography.

Important and major topics are properly indexed at the end of the book which would certainly help the reader in locating the matter of his immediate interest.

The get-up and the printing are good, though the pagination of the copy in the hands of the reviewer is defective.

12. The present reviewer himself has written two small volumes entitled *Outlines of Indian Legal History* (*Ancient and Medieval Periods*, 3rd ed. 1972) and *Outlines of Indian Legal and Constitutional History* (*Modern Period*, 4th ed. 1975). To be sure he does not mean to spare his own works from this criticism.

The value of the work will be significantly enhanced by a little change in the writing style to make it more readable and by a reorientation of its contents to make it more purposeful.

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An Indian Civil Code and Islamic Law by Tahir Mahmood (N.M. Tripathi Private Limited, 1975 : Rs. 25/-, pp XIV+119)*

This slim volume of essays by Tahir Mahmood makes a substantial contribution to the ongoing dialogue on the problems of Muslim law reform and the uniform civil code. The book explores a wide range of themes : the law of divorce[1], adoption[2] pre-emption[3] and codification of Muslim personal law[4]. In addition, historical sidelights are provided by an account of the British Indian legislation on Muslim law[5] and Jinnah's view on law reform.[6] There is also, as one would expect from the author, an essay on the reform of Muslim law in Islamic countries.[7]

The task of the reviewer is somewhat pre-empted by the 'foreword' contributed by Mr. Justice Krishna Iyer, who describes the author as "a sociologist-cum-jurist, a law-man with a bee in his bonnet, not a law teacher doing his repeat chores to students of stale lessons". The learned judge also describes the author's views as "progressive, critical, courageous creative and suggestive so far as they go"[8] (The meaning of judicial caveat remains problematic). The author is described a "pioneering jurisprudent" with "intrepid learning".

Such praise coming from so luminous a judge, is like good wine which, consumed in improper quantities, is apt to distort vision. This reviewer is all for just praise but he would draw a line between just praise and panegyric, to which he is opposed to as a matter of principle. The reviewer whole-heartedly agrees with the learned judge that the book under review is eminently

* The book under review is hereafter cited as *Mahmood*.

1. *Mahmood*, 92-98.
2. *Id.*, 98-102.
3. *Id.*, 103-111.
4. *Id.*, 65-84.
5. *Id.*, 152-64.
6. *Id.*, 111-114.
7. *Id.*, 85-91.
8. *Id.*, vi-viii.

readable, that it raises very pertinent issues in a thoughtful and constructive manner, and that it deserves sustained and wideranging attention by lawmen, laymen and legislators. Anyone who has some experience of legal writing will want or have to agree that this is no mean achievement, particularly in an area which is at once so complex and controversial or, to use the learned judge's phrase, in a "sector where fantacism and fear cloud the mind."[9]

The basic theme of this book is gradualism in the evolution of a uniform civil code. The author expresses the conviction in the preface that the code "can happily emerge only out of an evolutionary process".[10] But, on close analysis, the book really pleads for activist strategies to accelerate the evolutionary processes. Dr. Mahmood *seems* to accept, as a matter of course, that the code cannot be imposed by "government committed to democratic ways which may not like to injure the sentiments of any section of the electorate"[11]. But he insists, rightly, that the solemn obligation of article 44 applies to the executive as well. It is the Government's "constitutional duty to win the confidence of all the citizens and prepare them mentally, emotionally and psychologically, to gradually accept the social goals laid down for them by the constitutions".[12] To this end, he suggests various measures, the most important of which is the establishment of a Family Law Board in the Union law ministry which will have amongst its salient functions : the promotion of legal literacy among concerned sections, the fostering of public opinion in favour of change, and of expert interdisciplinary action-oriented research on the problems of the creation of socially acceptable Uniform Civil Code.

The author feels that the Board's programmes "if intelligently planned and strenuously implemented, will revolutionize the popular trend and mould public opinion in favour of a uniform civil code."[13] This is not a task which can be attempted successfully by a "handful of progressive intellectuals" but requires from the

9. *Ibid.*
10. *Mahmood*, 17.
11. *Ibid.* I use the word "seems" because in the immediately following sentence the author refers to this attitude as an "exercise". The ambivalence is somewhat puzzling.
12. *Id.*, 18.
13. *Id.*, 21.

state a "wise exercise of its authority and a liberal use of its resources".[14]

This is a proposal of momentous importance. Unfortunately, it has not received its due even from the two distinguished jurists who have contributed prefatory remarks to the book. Their highlighting of this proposal, and their support for it, would have substantially advanced the cause of a Uniform Civil Code. It is time that all those committed to social change in this area of Muslim law aggressively espouse this proposal. One does not, of course, urge an uncritical support. One may, for example, plead not for a departmental cell but for a wholly autonomous commission with statutory auspices and one may vary the priorities of the work. But the idea is so inherently precious as to make unproblematic the agreement on details.

The suggestion of Dr. Mahmood also opens up a wider question of the role of the executive in the implementation of the major directive principles of state policy. It is clear that this technique of organising the implementation of the directives could be applied to other areas as well. The choice of such areas, and the manner of organisation, may again vary but it is clear that the underlying form suggested for implementation of article 44 can be extended in other contexts. This is a theme which needs to be pursued in other contexts.

The second element in the strategy of planned evolution (if one might so call it) is the author's advocacy of a "transitory dual system of family laws". The author suggests that a Uniform Civil Code "based on the *cream* of modern family jurisprudence"[15] be prepared and put to a referendum. If the majority of the concerned community accepts it, the Code may be compulsorily applicable. Otherwise, the Code may remain available to those who wish to be governed by it. The author takes care to add that in the event of the Code being rejected by Muslims, they may be allowed to be governed by their own personal law "as *reformed* and *modernized* wherever necessary."[16]

14. *Ibid.*
15. Id., 38.
16. *Ibid.* The author urges a purge of unsatisfactory elements, and revival of beneficial provisions (e.g. Kazis Act, 1881) see Chapters 2, 3 and 9 of the book.

Once again one wishes that the prefatory panegyric would have taken specific note of this novel idea. The task of embodying the best in Indian family jurisprudence into a Uniform Civil Code requires near-Herculean effort. Such an effort is possible only with the creation of the agency proposed by Dr. Mahmood. After an initial bout of healthy cynicism (bout as to the feasibility of drafting such a Code and the mechanism of a referendum) one does begin to see a lot of merit in the author's suggestion. It does offer a worthwhile way out of the present—and in some respects a cruel—stalemate on the issue of Muslim law reform.[17]

UPENDRA BAXI**

17. The book is replete with substantive suggestions and worthwhile information concerning Muslim law and its development. Those can form, by themselves, the basis of detailed critical assessment. However, it is more important (at any rate for the present reviewer) to highlight the action-oriented aspects of the book.

No review is complete, especially when the work under review is published by M/s N.M. Tripathi Pvt. Ltd., without commending the high standards of publication.

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BOOKS RECEIVED

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