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Delhi Law Review

Volume XVI 1994

Editor
TAHIR MAHMOOD

Faculty of Law
University of Delhi

FACULTY OF LAW DELHI UNIVERSITY

Delhi Law Review -- Volume XVI : 1994

Editor
Professor Tahir Mahmood
Dean, Faculty of Law & Head of the Department

Journal Committee

(a) *teacher-members*

Campus Law Centre
Professor P.S. Sangal, Dr. Nomita Aggarwal, Dr. Suman Gupta

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Professor Hoti Prasad, Ms. Lakshmi Jambholkar, S.L. Mirashi

Law Centre II
Professor Baldev Kohli, Dr. S.C. Khare, O.B. Lal

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mailing address

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

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From the Dean's Desk

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> "No law school, much less Delhi Law School, will be worth its name without a journal projecting the research work of the Faculty. The primary purpose of this Journal is to focus attention on the burning legal problems as perceived by a discriminiating Faculty. Though we are not very ambitious in our plan, our aim is to develop into a first rate journal."
>
> *—Dean K.B.Rohatgi: DLR,Vol.I: 1972*

> "The plans for making *Delhi Law Review* a premier law journal, at least for developing countries, are no doubt ambitious. But then one may recall the Biblical saying and ask: `A man's reach must exceed his grasp, or else for what is the heaven meant? "
>
> *—Dean Upendra Baxi: DLR, Vol.III: 1974*

> "According to our perception the role of law-teachers is not only teaching of law but also to advance the frontiers of knowledge in the field of law so that law performs its true function of social engineering for solution of socio-economic problems of the nation. The Law Faculty will keep this goal constantly in view and the *Delhi Law Review* will serve as the vehicle for carrying thoughts of our teachers and students.
>
> *—Dean P.S.Sangal : DLR,Vol.XII: 1990*

Has the *Delhi Law Review* achieved the goals which it set for itself? Is it going on the right track? Let the readers decide.

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

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

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

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

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

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

New Delhi
15 February 1994

T Mahmood

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

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

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

I. Introduction

The Delhi University Act, which established and incorporated the University of Delhi, came in force on the first day of May 1922. The Act had given to the newly established University the power, inter alia, "to provide for instruction in such branches of learning as the University may think fit, and to make provision for research and for the advancement and dissemination of knowledge."[1] In terms of this statutory provision the University established, in the third year of its life, the Faculty of Law with the Vice-Chancellor as its Dean. The Faculty started professional law classes in July 1924.

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

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

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

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

II. Courses & Curriculum

Bachelor's in Law

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

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

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

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

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

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

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

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

Master's in Law

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

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

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

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

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

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

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

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

Research degrees in law

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

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

III. Faculty Units

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

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

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

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

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

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

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

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

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

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

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

IV. Builders, Reformers & Administrators

The founder of the Faculty was a noted jurist of his time, Sir Hari Singh Gour[8] — the first Vice-Chancellor of the University (1922-26). His early successors made their respective valuable contributions during their tenures—the most distinguished among them being Nawab Abdur Rahman (1930-34) and Sir Maurice Gwyer (1938-50).[9] It was Sir Maurice who, in 1944, turned the Faculty — until then a centre of professional training — into an academic Department of Studies.

The Faculty owes its present academic system and curriculum, to a great extent, to two eminent judges of Independent India. The first of them was the former Supreme Court Chief Justice late P.B. Gajendragadkar who headed in 1963-64 a Faculty Reform Committee[10]. The other was a former Chief Justice of the Delhi High Court, late V.S. Deshpande, who in 1986 chaired the second Faculty Reform Committee.[11] Major recommendations of the two committees have given to the Faculty most of its present academic and administrative rules and regulations.

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

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

Deans & Heads of the Department

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

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

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

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

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

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

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

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

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

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

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

Campus Law Centre

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

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

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

Law Centre I

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

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

Law Centre II

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

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

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

V. Teaching Staff

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

Many stalwarts of the past are still alive in our memory. Who can, for instance, ever forget Professor Sivasubramanian[13] or eminent ancient-laws specialist Dr. Hamid Ali?[14] During the past about two decades the Faculty has lost quite a few eminent teachers. Among them M. Ramaswami[15], M.L. Shrimali[16], Shiv Dayal [17] and G.M.Sen[18], died after retiring from or

otherwise leaving the Faculty. Among those who were snatched away from us by the cruel hands of destiny while still in the service of the Faculty were D.K. Singh[19], Kanwar Sheo Kumar[20], Rangunath V. Kelkar[21] and P.G. Krishnan[22]. The Faculty will always remember all these former colleagues for their qualities of head and heart. Some of our former part-time colleagues, too, are no more — including M.I. Khwaja and C.L. Joseph. They are also still alive in our memory.

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

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

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

VI. Contribution to Human Resources

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

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

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

VII. Epilogue

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

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

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

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

References

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

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

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

I. LAKSHMI JAMBHOLKAR
Reader in Law, Delhi University

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

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

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

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

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

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

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

Appendix

Major Research Papers of V.C. Govindraj

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

6. "Law of the Sea: Rights of Land-Locked States, Marine Pollution and Succession of States in Relation of Treaties", *Report: Asian-African Legal Consultative Committee* (New Delhi 1974)

7. "Land-Locked States : Their Rights of Transit and Access to the Sea and to the Resources of the Sea-Bed", XIV *Indian Journal of International Law* (1973-1974)

8. "Foreign Torts in Conflicts Cases - A Plea for a Viable Social Environmental Theory: The English Double Actionability Doctrine", *Columbia Journal of Transnational Law*, (Columbia University, New York 1970)

9. "Foreign Arbitral Awards and Foreign Judgments Based upon Such Awards", *International and Comparative Law Quarterly* (London 1964)

10. "The Law of International Institutions", II *Indian Journal of International Law* (1961-62)

II. TAHIR MAHMOOD

Dean, Faculty of Law, Delhi University

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

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

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

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

K. PONNUSWAMI

Professor of Law, Delhi University

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

Editorial Note

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

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

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

—Tahir Mahmood

I. Proposed LL.B. Curriculum

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

Explanatory notes :

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

II. Proposed LL.M. Curriculum

(a) compulsory courses

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

(b) elective courses

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

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

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

groups	3rd. term	4th term
I	Administrative Discretion	Techniques of Judicial Control
II	Social and Economic Offences	Juvenile Delinquency
III	Religious and charitable endowments	Laws of Succession

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

Explanatory notes :

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

III. Advanced Diploma in Law

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

IV. Proposals Compared with CDC Report

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

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

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

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

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

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

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

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

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

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

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

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

Table I

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

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

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

Table II

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

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

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

Table III

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

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

Tables IV & V

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

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

One feature of the elective groups in my scheme is worth

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

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

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

Table I

LL.B. Curriculum : Core /Compulsory Courses

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

004 Torts	105 Torts
005 Criminal Law	104 Criminal Law-I 204 Criminal Law-II
006 Family Law	103 Family Law-I 203 Family Law-II
007 Law of Property Relations	304 Property-I 404 Property-II (including Rent Control)
008 Elements of Indian Legal System	101 Introduction to Indian Legal System
009 Power, Procedure and 010 Justice-I & II	201 CPC 302 Evidence 402 Cr. P.C. 503 Limitation and Arbitration 603 Pleading & Conveyancing
011 International Law	205 Public International Law--I 305 Public International Law-II
012 Jurisprudence	502 Jurisprudence-I 602 Jurisprudence-II
013 Practical Training	601 Practical Training; Professional Ethics, Moot Courts; Clinical Legal Education; SC Rules and Minor Acts
--	303 Business Associations
--	403 Labour Laws
--	405 Taxation Laws

Table - II

LL.B. Curriculum: Elective Courses

CDC scheme	*my proposals*
013 Jurisprudence: Judicial Process	--
014-015 Corporate Law	303 Business Associations (core)

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

Table III

LL.M. Curriculum : Foundational Courses

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

Table IV

LL.M. Curriculum : Elective courses

CDS scheme		*my proposals*	
Gr A	International Law and Organisations	Gr IV	International Law
Gr B	Law and Deviance	Gr II	Criminal Law
Gr C	Law and Economic Regulations	Gr V Gr VI Gr IX Gr XI Gr VII	Corporate Law Commercial Law Intellectual and Industrial Property Laws International Business Law Taxation Law
Gr D	Labour, Capital and Law	Gr VIII	Labour Law
Gr E	Ecology, Natural Resources and the Legal Order	—	
Gr F	Jurisprudence	001 Gr X	Comparative Jurisprudence Comparative Law
Gr G	Democratic Aspirations & Legal Order	Gr I	Constitutional & Administrative Laws
Gr H	Feminist Critiques of Legal Order	—	
Gr I	Science, Technology and Law	—	
—		Gr III	Family Law
—		Gr XI	Tort Law
—		Gr XIII	Fiduciary Relationships

Table V

LL.M. Program : Sequencing of Courses

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

R.V. Kelkar Memorial Lecture 1993

Criminal-Law Administration and Human Rights in Modern India

A. Prefatory Note

TAHIR MAHMOOD
Dean, Faculty of Law, Delhi University

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

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

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

Full proceedings of the event appear below.

B. Tribute to R.V. Kelkar

AHMED SIDDIQUIE
Reader in Law, Delhi University

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

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

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

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

C. Introduction of Speakers

TAHIR MAHMOOD
Dean, Faculty of Law, Delhi University

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

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

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

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

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

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

I heartily welcome amidst us Janab Sardar Ali Khan Saheb, on my own behalf and on behalf of the Faculty's teachers, karmcharis and students.

D. Custodial Crimes and Ways to Curb Them

V.M. TARKUNDE
Former Judge, Bombay High Court

Police and people

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

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

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

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

Law on arrest

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

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

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

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

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

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

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

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

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

Treatment under custody

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

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

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

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

Trial of custodial offences

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

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

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

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

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

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

cuffing and parading in public streets.

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

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

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

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

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

Provisions of Human Rights Ordinance 1993

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

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

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

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

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

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

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

E. Human Rights in India

SARDAR ALI KHAN
Chairman National Commission on Minorities, Delhi

Sources of Human Rights

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

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

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

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

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

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

Human Rights Ordinance 1993

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

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

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

Beneficiaries of human rights

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

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

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

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

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

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

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

Commissions & courts

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

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

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

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

F. Conclusion

TAHIR MAHMOOD
Dean, Faculty of Law, Delhi University

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

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

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

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

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

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

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

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

PUNEET SINGH ARORA
LL.B. Student, Law Faculty, Delhi University

Inequities of Laws on Dowry Deaths —A Critique

I. Introduction

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

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

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

II. Historical Perspective

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

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

There was yet another reason for such customary gifts. The

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

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

III. Legislative Curbs

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

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

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

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

Section 304-B(1) :IPC

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

Section 113-B: Indian Evidence Act

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

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

IV. Judicial Responses

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

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

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

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

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

(2) such death should have occurred within seven years of her marriage;

(3) she must have been subjected to cruelty or harassment by her husband or any relative of her husband soon before her death; and

(4) such cruelty or harassment should be for or in connection with demand for dowry.[5]

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

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

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

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

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

While commenting on section 303 IPC, the Supreme Court in

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

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

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

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

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

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

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

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

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

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

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

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

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

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

References

1. See AIR 1986 SC 250.
2. See 1988 Cr LJ (SC) 88.
3. 1952 AC 109 at 132.
4. AIR 1985 SC 870.
5. *Shanti v. State of Haryana* 1991 Cr LJ (SC) 1716.
6. AIR 1983 SC 473 at 479.
7. Ibid.
8. *Sharad Birdhichand v. State of Maharshtra* AIR 1984 SC 1622 at 1636.
9. *Gurditta Singh v. State of Rajasthan,* 1922 Cr. LJ 309 at 319.
10. *Textbook of Medical Jurisprudence and Toxicology* (1991).
11. *Samir Samanta & another v. State,* 1992 (1) *Crimes* 850.
12. Supra note 9.
13. 1986 (2) *Chandigarh LR* (Cr) 94.

RAM MOHAN SINGH
LL.M. Student, Law Faculty, Delhi University

Legislatures' Privilege to Prohibit Publication of Their Proceedings and the Freedom of Speech : A Critique

I. Introduction

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

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

II. Constitutional Provisions

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

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

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

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

state legislatures. The two articles add that:

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

Parliamentary privileges have been defined as:

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

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

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

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

III. The Issues

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

rights of the citizens under Article 19 (1) (a) of the Indian Constitution.[7]

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

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

Another work of high authority says:

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

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

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

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

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

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

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

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

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

IV. The Conflict

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

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

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

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

V. How to Reconcile

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

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

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

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

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

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

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

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

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

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

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

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

References

1. AIR 1959 SC 395.
2. AIR 1965 SC 745.
3. May's *Parliamentary Practice*, 42 [16th ed. by Thomas Erskine].
4. H.M. Seervai, *Constitutional Law of India* 1831 (3rd ed.)
5. AIR 1959 SC 395.
6. Halsbury's *Laws of England*, Vol. 24 : 350-351 (2nd ed).
7. May's *Parliamentary Practices*, 56 (16th ed). See also Cockburn, C.J. in (1868) 4 QB 78.
8. Supra note 5.
9. *Constituent Assembly Debates*, Vol. VIII:, 582 (1949).
10. *L.C. Golaknath* v.*Punjab*, AIR 1967 SC 1643; *Keshavanda Bharti v. Kerala*, AIR 1973 SC 1462.
11. Supra note 5.
12. Ibid.

DARPAN WADHWA
LL.B. Student, Faculty of Law , Delhi University

An Autonomous Election Commission —Constitutional Perception

I. Introduction

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

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

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

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

II. Constitution & Powers of EC

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

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

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

Judicial decisions

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

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

III. Imperfections in the System

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

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

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

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

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

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

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

Perfection through appointments

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

Let us first deal with the law and order machinery, which is essential for the peaceful conduct of polls. The Attorney General of India [16], referring to this subject, has said that the assessment of the law and order situation before the polls and the kind and quantum of troops required for each situation must be decided by the states, as it is a state subject.

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

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

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

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

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

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

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

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

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

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

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

Perfection through discipline

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

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

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

The Attorney General of India[25] has stated that in service jurisprudence the borrowing authority does not have the authority to exercise disciplinary powers over the deputed staff, except with the approval of, or with consultation with, the parent authority. He also stated that, the word "discipline", which occurs in the sections mentioned before, relates to the performance of election duty and does not extend to the exercise of disciplinary proceedings. Also that by giving disciplinary powers to the EC, the provisions of Articles 309 and 311 would be violated. The government has taken the stand that the findings of the EC on irregularities committed by the deputed staff would be considered a preliminary enquiry, while the rest of the disciplinary proceedings would be taken up by the Department of Personnel.

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

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

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

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

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

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

IV. Constitutional Validity of Order

The order[30]

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

Bar on writ jurisdiction of courts

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

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

V. Comments & Conclusion

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

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

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

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

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

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

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

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

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

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

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

References

1. Issued on 2nd August 1993.
2. Ibid.
3. Article 324(1) of the Constitution of India.
4. Article 324(2).
5. Article 324(3).
6. Article 324(5), proviso.
7. Article 327.
8. Article 328.
9. *CAD*, Vol. VIII, p. 906.
10. Dawson, *Government of Canada* (1970) 322ff.
11. AIR 1978 SC 851.
12. AIR 1984 SC 21.
13. *CAD*, Vol. VIII, 906.
14. Id, 907.
15. Id, 917.
16. The Attorney General's speech in the Lok Sabha on 4th August 1993.
17. AIR 1984 SC 1406.
18. Article 324(6).
19. Supra note 1.
20. Supra note 16.
21. Ibid.
22. Part II-A of the Representation of People Act 1950; Part IV of the Representation of People Act 1951.
23. Supra note 15.
24. Sec. 13CC of RPA 1950, and S.28A of RPA 1951.
25. Supra not 15.
26. Gharye, *Law and Procedure of Departmental Enquiry*, (Vol. 1, 3rd ed).
27. Article 324 (1).
28. Article 235, word "control" includes disciplinary control.
29. AIR 1976 SC 2490.
30. Supra note 1.
31. AIR 1952 SC 64.
32. Supra note 11.
33. AIR 1952 SC 64 (66).
34. Supra, note 1, Palani Parliamentary Constituency and Ranipet Assembly in Tamil Nadu.
35. Supra note 13.

AMAR KUMAR SUNDARAM
LL.B. Student, Faculty of Law, Delhi University

Offence of Rape — Reflections on A Recent Supreme Court Decision

I. Hassan Case

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

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

II. What IPC Says

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

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

The Supreme Court said that considering the circumstances "it was

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

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

III. New Thinking

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

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

In the tradition-bound non-permissive Indian society disclosure of being raped is likely to ruin the prospects of the girl's rehabilitation in the society for all times to come. So, unless her story was painfully true, she would not take such a grave risk. Rightly said Krishna Iyer J. in *Rafiq* : [4]

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

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

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

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

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

In *Tukaram v. State of Maharashtra*[5], better known as *Mathura* case, the court overruled the Bombay High court's conviction of two police officers for the rape of Mathura, a sixteen year old tribal girl in police custody. The court held that though there was sexual intercourse there was no rape because there was no mark of physical injury and hence no proof that Mathura had physically resisted. The message is that if there is no mark of physical injury then there is lack of resistance from the victim and hence her consent.

In *Premchand v. State of Haryana*[6] the mandatory minimum

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

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

In USA a significant development has been the setting up of "rape crisis centres" and "hotlines". These centres have all female participants including some of the rape victims, and aim at providing counselling and other therapeuatic measures to the victims. They operate through a telephone `hotline' maintained for the purpose.[7] In recent years, new rape laws have been adopted by a majority of states, about one third of them based on the "Michigan model", which describes four degrees of criminal sexual conduct, with different levels of punishment for different degrees of seriousness. In calling the offence "criminal sexual conduct" rather than `rape', the Michigan law also appropriately places the emphasis on the offender rather than the victim.

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

References

1. *Times of India*, 21 November 1993.
2. James C. Coleman ,Robert C. Carson & James N. Butcher, *Abnormal Psychology and Modern Life* 435.
3. As cited in *Times of India*, supra note 1.
4. 1980 *Cr L J* 1344 (SC).
5. AIR 1979 SC
6. AIR 1989 SC
7. A. Siddique, *Criminology : Problems & Perspectives* 543 (3rd ed, 1993).

PRASHANTO CHANDRA SEN
LL.B. Student, Faculty of Law, Delhi University

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

I. Introduction

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

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

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

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

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

II. A Recent Case

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

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

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

The High Court directed that electricity be supplied to the bottling unit only. Within a month's time the court directed the State Level Committee [SLC : a high level administrative body consisting of the Secretary, Commerce & Industries, Secretary, Housing & Environment among other members] and the State Board to take a decision on the matter. The SLC gave clearance for the distillery to be set up without assigning any reasons. Thereafter the State Board also gave its consent. Once again the consent was conditional. The conditions were: (a) effluent treatment should conform to IS 2490,[2] (b) effluent treated should

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

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

III. Reasons for Failure

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

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

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

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

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

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

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

(a) the agencies responsible for prevention of pollution are quite ineffective in enforcing punitive measures, and

(b) since the economic costs of complying with the standards is anyway so high, the industries would rather err than shoulder the economic burden of compliance.

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

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

(a) agency causing harm and the victim suffering it must be directly related through cause and effect relationship;

(b) mens rea of the cause must be established;

(c) causality relationship must be immediate, not remote.

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

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

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

(a) no person shall knowingly cause or permit any poisonous, noxious substances ... to enter into any stream, or well or sewer or on land; and

(b) no person shall knowingly cause or permit to enter into any stream any matter which may tend, either directly or in combination with similar matters, to impede the proper flow of the stream.

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

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

IV. Changes required

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

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

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

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

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

Note:

1. The case referred to in this comment is based on actual facts. Letters 'X ', ' Y ' & ' V ' denote a state, a river and a township respectively, whose actual names have been withheld.

2. Help has been taken in writing this comment from the works of P.V.S. Namboodripad and Chhatrapati Singh.

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

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

I. Introduction

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

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

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

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

II. Hindu-Law Acts 1955-56

Non-Hindu mother as guardian of Hindu child

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

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

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

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

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

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

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

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

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

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

Restitution of conjugal rights

Harvinder Kaur[5] judgment of the Delhi High Court related to the constitutional validity of the provision for restitution of conjugal rights in the Hindu Marriage Act 1955. Prior to it, in *T.Sareetha,*[6] P.A. Chaudhary, J. of the Andhra Pradesh High Court had expressed an opinion that the "barbarous and uncivilized" remedy of restitution was ultra vires Articles 14 and 21 of the Constitution. Criticising the Andhra judgment of 1983, I had said:

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

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

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

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

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

I have always held an opinion that, whether under the Hindu Marriage Act or any other law, failure to comply with the decree of restitution of conjugal rights up to the prescribed period should in itself result into dissolution of the marriage — in the restitution--decree the court could make an order to this effect[12]. In *Harvinder Kaur* the Delhi High Court referred to this opinion of mine:

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

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

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

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

III. Muslim Personal Law

Out-of-court divorce at wife's instance

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

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

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

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

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

Did the Dissolution of Muslim Marriages Act, enforced in India in 1939, abolish all the above-stated avenues of extra-judicial divorce for Muslim wives and replace them with a single remedy, i.e., fault-based judicial divorce? In the Kerala case of *K.C. Moyin*[17], V. Khalid, J. ruled that it did so. In order to substantiate his stand he examined the background and nature of the 1939 Act. It was in this connection that he quoted, in English translation (perhaps his own), a passage from one of my Urdu books.[18]

Khalid read too much in the Dissolution of Muslim Marriages Act. He also misread my exposition of its scope and objects[19] — perhaps due to language difficulty. I have a convinced opinion that as long as Muslim husbands are free to pronounce an extra-judicial divorce, Muslim wives' right to do the same cannot, and should not, be taken away. To do so will be both un-Constitutional and un-Islamic. Most certainly the legislature did not intend it in enacting the Dissolution of Muslim Marriages Act.

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

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

> "The Magistrate, relying on certain observations made by Dr. Tahir Mahmood, in his renowned treatise on Muslim law, held that (a) the delegation must not be absolute, (b) the wife should be authorised to pronounce divorce only when any of the conditions specified in the agreement is violated, and (c) those conditions must be reasonable and not opposed to the policy of Islamic law. It appears, however, that the learned author has also observed, in the very next paragraph, that the aforesaid requirements do not apply where a husband unilaterally authorises a wife to divorce herself without an agreement with her in this regard."[23]

'Delegated divorce' of either kind is, in fact, a very useful institution of Muslim law which, if properly used, can effectively balance wife's rights against those of the man in respect of divorce. While even Khalid, J. did not bracket it with other Islamic forms of extra-judicial divorce by wife, which he inexplicably tried to outlaw[24]— Calcutta High Court's appraisal, and approval, of the same must be hailed.

Wife's right to dower (maher) and maintenance

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

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

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

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

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

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

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

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

Bai Tahira and *Fuzlunbi*, both decided by Krishna Iyer, J., came out with precisely the same basic ruling which a few years later was adopted in the celebrated *Shah Bano* case[31]. Unlike that case, in which Islamic law was referred to in rather uncharitable terms, Krishna Iyer's judgments evidenced due respect and deep appreciation for the letter and spirit of Islamic law. This is, doubtless, the reason why his judgments did not snowball into a *Shah Bano.* How we wish *Shah Bano* was decided before Krishna Iyer laid the august office.

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

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

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

Marriage-guardianship

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

be lawfully "contracted into marriage" by her guardian -- took in my opinion, an extremely distorted view of Islamic law.

In the recent Madhya Pradesh decision of *Noor Mohammed*[35] my viewpoint has been judicially noticed:

> "Dr. Tahir Mahmood's view is that Muslims in India regard marriage not as a contract but as a 'solemn occasion in life' because of its socio-religious significance".[36]

On the nature of marriage-guardianship the court observed:

> "Tahir Mahmood stresses the correct position that the marriage-guardian acts as a 'mediator' and the minor is not his property."[37]

It is indeed gratifying to find the courts discarding the old erroneous perceptions regarding Islamic marriage-law and applying it in its correct perspective.

IV. Civil Marriages & Uniform Civil Code

Inter-religious marriages

Which law should apply when the parties to a marriage belong to different religions and are otherwise governed by two different personal laws? On this question I have expressed the following opinion:

> "In the Indian Republic all religions and all personal laws have an equal recognition. Therefore, in a case of inter-religious marriage personal law of one party cannot be applied in preference to or to the exclusion of the personal law of the other party".[38]

Inter-religious marriages of all Indian nationals should, in my opinion, be governed — depending on whether the marriage takes places in India or abroad — by the Special Marriage Act 1954 or the Foreign Marriage Act 1969, as the case may be.

My viewpoint on the law to be ideally applied to inter-religious marriages, stated above, was noted in the Bombay case of *Dr. Abdur Rahim* [39]. Referring to it, the Bombay High Court observed:

> "It can safely be said that the Special Marriage Act is in reality an Indian Marriage Act which applies to all Indian communities irrespective of caste, creed or religion... So far as secular marriages are concerned the said law will become lex domicile of India for the purposes of matrimonial reliefs. Such an interpretation will be in tune with Article 44 of the Constitution."[40]

Uniform Civil Code

Lying in Part IV of the Constitution of India containing Directive Principles of State Policy, Article 44 — referred to in the Bombay decision quoted above and in several other cases —says:

> "The State shall secure for the citizens a uniform civil code throughout the territory of India".

Why has this constitutional ideal remained out of the citizens' reach all these years? The popular belief that the reason for this lies in the state's policy of "appeasement" of the minorities has been created by the Muslim leaders who have been opposing Article 44 by all their might, oblivious to the fact that there is no will or plan on the part of the state to evolve a uniform civil code of a totally non-religious nature. The fact, nevertheless, remains that the stumbling block to a non-religious uniform civil code is the so-called modern Hindu code which the 'secular' Indian state has gifted to the majority community, in stages, in the post-Constitution era — wholly ignoring the provisions of the Constitution on secularism, equality before law, equal protection of laws and uniformity of civil law. Let me elaborate.

> (i) If the state really meant to implement the Directive Principle of Article 44, after enacting a new Special Marriage Act in 1954--which, according to the Bombay decision in *Dr. Abdur Rahim*'s case, was "in reality an Indian Marriage Act"[41] [that indeed it was, at its inception, meant to be]—there was no need for it to enact a separate "Hindu" Marriage Act, which it in fact did the the very next year, containing provisions drawing from Hindu religion and custom.[42]

> (ii) To the Special Marriage Act 1954 was tagged, as its supplement on succession, the Indian Succession Act 1925. Discarding that law, Parliament enacted a separate "Hindu" Succession Act 1956 — replete with provisions running directly contrary to Articles 14 and 15 of the Constitution and curtailing the scope of the century-old Caste Disabilities Removal Act 1850.[43] Despite all these weaknesses of the Act, by an amendment made in 1976 it was made applicable to the Hindus even in the cases of intra-religious civil marriages — a situation in which all other Indian communities continue

to be compulsorily governed by the Indian Succession Act.[44]

(iii) Impliedly regarding the non-religious Guardians and Wards Act 1886 as unsuitable for the majority community, Parliament enacted a separate "Hindu" Minority and Guardianship Act in 1956 — providing, inter alia, that a father or mother who "has ceased to be a Hindu" shall not be entitled to act as the natural guardian of a minor under its provisions.[45]

(iv) Lastly, ignoring the secular maintenance-law of the Criminal Procedure Code 1898, Parliament came out with a separate maintenance-law for the Hindus as part of the newly enacted Hindu Adoption and Maintenance Act 1956 — declaring, inter alia, that a non-Hindu cannot legally claim maintenance from a Hindu father, mother or relative.[46]

On what constitutional, legal or logical grounds can, then, be disputed my viewpoint that as long as the "modern" Hindu law— despite its many un-Constitutional, religion-based, discriminatory and anachronistic provisions — is being enforced and administered by the state, a uniform civil code answering the call of Article 44 of the Constitution will remain a cry for the moon?

This was the factual situation which I was explaining in the following passage in one of my books, published in 1977, which the Supreme Court of India picked up in the celebrated *Shah Bano*[47] :

> "Dr. Tahir Mahmood in his book says: 'In pursuance of the goal of secularism the State must stop administering religion-based personal laws".[48]

To my assertion that "The lead in this respect must come from the majority community" Chandrachud, J. so reacted:

> "He [myself] wants the lead to come from the majority community, but we should have thought that, lead or no lead, the State must act".[49]

In other words, leaving the Hindu personal law intact along with all its religion-based and discriminatory provisions, the State should

repeal the personal laws of the minorities. Needless to say how unreasonable and illogical was the learned judge's stand. And, not too unexpectedly, it boomeranged — leaving behind a trail of far-reaching consequences — ugly and undesirable.

Shah Bano had also quoted from my 1977 book my viewpoint on the possible place of Islamic law in the civil code of this country:

> "Instead of wasting their energies in exerting theological and political pressure in order to secure an 'immunity' for their personal law from the State's legislative jurisdiction, the Muslims will do well to begin exploring and demonstrating how the true Islamic laws, purged of their time-worn and anachronistic interpretations, can enrich the emerging civil code of India".[50]

The Supreme Court judgment had, further, referred to another work of mine, published in 1981, to draw attention to the exhortation I have repeatedly made to my co-religionists — that they must put their house in order by understanding and practising their law in its correct perspective.[51]

V. Epilogue

The courts in the country have a solemn obligation to explain, interpret and apply the laws of the land as per the true intentions of the law-giver or legislature. In their search for aids to the discharge of this sacred obligation they have always been looking into scholarly legal literature. What is notable is that now, transcending the all-time classics in the field, more and more courts are peeping also into contemporary works. This is a welcome change. In no other field the new trend would prove more fruitful than in the area of religion-based family laws of India. Developing these laws in tune with the social ethos of the age, without detaching them from their essential roots, is a delicate and sensitive job. It is here that contemporary opinion has its utmost utility. The courts may or may not agree with the new opinions, but they are now finding it advisable to look into them. I regard it as healthy judicial activism.

The year 1994 has been recommended by the United Nations to be celebrated as the `International Year of the Family'. In this context laws of family relations all over the world assume great importance. A fresh look at these laws, especially with a view to ensuring gender justice and securing proper rights to children and the aged, is the need

of the hour everywhere, including India where the judiciary has a special role to play in this regard. Looking into opinions and views of contemporaty exponents of family laws amounts to an attempt on the part of the courts to place this role effectively. It must be hailed.

References

1. AIR 1989 Cal 165.
2. See my book *Studies in Hindu Law* 518 (2nd ed., Allahabad 1986); also p. 196 of Part III of the book published as a separate volume (1986).
3. Id at 170, para 8.
4. Id at 168, para 2.
5. AIR 1984 Del 66.
6. AIR 1983 AP 356.
7. See my comment on the case published in the *Hindustan Times*, 11 November 1983, later reproduced in III *ICLQ* 261 (1983).
8. Supra note 5 at 75, para 47.
9. Sec. 13 (1) (viii) —repealed in 1964.
10. Sec. 13 (1-A) (ii) — as enacted by the Hindu Marriage (Amendment) Act 1964.
11. Ibid, as amended by the Marriage Laws (Amendment) Act 1976.
12. See my works *Civil Marriage Law: Perspectives and Prospects* (ILI 1975); also "Religious Provisions under a Secular Marriage Law: A Critique" in V. Bagga (ed.), *Hindu Marriage and Special Marriage Acts* (ILI 1978).
13. Supra note 5 at 74, para 39, referring to my first work noted in note 12 above.
14. Ibid.
15. *Saroj v. Sudarshan*, AIR 1984 SC 1562.
16. See Muslim Personal Law (Shariat) Application Act 1937 and the Registration of Muslim Marriages and Divorces Acts of the states — Bengal & Bihar: 1876; Assam & Meghalaya: 1935; Orissa: 1949.
17. 1972 KLT 785.
18. Id at 787-88, para 5, quoting from my book *Muslim Personal Law Key Tahaffuz Ka Mas'ala* [The Issue of Protecting Muslim Personal Law] 30 (Delhi 1972).
19. This I had quickly pointed out in the national press — "Divorce in Muslim Law: Repercussions of A Recent Kerala Verdict", *Hindustan Times*, 3 May 1973; later included in my anthology *Islamic Law and An Indian Civil Code* (ICPS — Tripathis 1976).
20. Supra note, 17 at 789.
21. AIR 1992 Cal 92.
22. *The Muslim Law of India*, 124-25 (Allahabad 1980/82).
23. Supra note 21 at 95; para 6.
24. Supra note 17.
25. Supra note 19 at 132-33.
26. AIR 1980 SC 1730.
27. Id at 1734-35, para 14.

28. Ibid, para 15.
29. AIR 1979 SC 362.
30. Supra note 22.
31. AIR 1985 SC 945.
32. V *ICLQ* 110 (1985).
33. AIR 1990 AP 225.
34. Id at 241, para 37.
35. AIR 1992 MP 244.
36. Id at 247, para 8, citing my book, supra note 22, p. 47.
37. Ibid, citing p. 52 of the same work.
38. Supra note 22 at 57.
39. AIR 1982 Bom 341 at 355 referring to my book, supra note 22, pp. 57, 91.
40. Id at 355, para 23.
41. Ibid.
42. See sections 3 (a), 5(iv), 5(v), 7 and 29 of the Act.
43. See the critique of the Act in my book *Personal Laws in Crisis* [P.B. Gajendragadkar Endowment Lectures, Bombay University], 130 (Metropolitan 1986); also the commentary on the Act in my work *Studies in Hindu Law* (Allahabad 1981/86).
44. See sec. 21A inserted into the Special Marriage Act 1954 by the Marriage Laws (Amendment) Act 1976.
45. See sec. 6(c) (i) of the Act. For my interpretation of this provision, referred to by the Calcutta High Court in a 1989 case, see supra note 1.
46. See sec. 24 of the Act.
47. AIR 1985 SC 945.
48. Id at 954, para 33, quoting from my book *Muslim Personal Law : Role of the State in the Subcontinent* 200-202 (Ist ed., Delhi 1977).
49. Id at 955.
50. Ibid. My 1977 book was published in a second paperback edition by the All India Reporter, Nagpur in 1983. The concluding chapter of the first edition which required a thorough recasting in view of the post-1977 developments, was not included in that shorter edition (1983). After due revision, it will be incorporated again in the next edition of the book.
51. Ibid, referring to I *ICLQ*, 146 (1981).

K.I. VIBHUTE
Reader, Postgraduate Department of Law, University of Poona

Transnational Commercial Activities of States and Sovereign Immunity — An International Perspective

I. Background

In the contemporary world trade participation of governments through their departments, agencies or instrumentalities in international transactions with foreign nationals, an individual, a partnership firm or a private corporation, is not uncommon. However, presence of a state or its instrumentality in international commercial transactions raises a set of pertinent issues. One of such issues is the claim by a state or its instrumentality for sovereign immunity from jurisdiction in case of breach of the contract.

The notion of sovereign immunity, which is premised on the principles of independence, sovereign equality and dignity of states, connotes that a state, unless it chooses to waive its immunity, is not amenable to the jurisdiction of a foreign court. A study of the law of sovereign immunity, however, reveals two conflicting theories: the theory of absolute immunity and the theory of restricted immunity. According to the absolute theory of immunity, sovereign of a foreign state is to be accorded jurisdictional immunity for all the activities attributable to the state, virtually regardless of the nature of the activities involved and irrespective of the capacity in which a state organ has done those activities. The modern restrictive theory of immunity, on the other hand, rejects the absolute immunity to a state or its instrumentality and argues that it goes against the principle of equality and offends the ideal of justice. It maintains that when a state engages in business competition with a foreign private party or corporation, this competition would be unfair, unjust and violative of rule of law to the private person if the competing state is not made answerable in the courts of the state where the business in transacted. It accordingly accords immunity to a state or its instrumentality only with regard to a 'governmental' or 'public' act (*acta jure imperii*) and not with respect to its 'non-governmental' or 'commercial' or 'private' act (*acta jure gestionis*)

Restrictive theory of sovereign immunity, thus, insists that if governments or their instrumentalities are to engage in commercial activities it is imperative to make them accountable for their commercial activities in the same way as private entities are held accountable. It

cannot be, obviously, desirable and expected that private parties would depend upon the goodwill of the states or their instrumentalities for redress in case of non-fulfillment of the contractual obligations. This would not only lead to uncertainty, but also deter private parties to deal with states. The restrictive theory of immunity intends to do away with these anomalies and to hold the state accountable for its non-governmental actions.

The contemporary state practice, reflected in the domestic immunity statutes and national court decisions, unmistakably demonstrates acceptance of the restrictive sovereign immunity. Foreign states, their agents or instrumentalities, therefore, are subjected to the jurisdiction of local courts with regard to acts *jure gestionis*, and, accordingly, actions relating to any conduct of commercial activities exercised by them in another state do not provide them immunity from jurisdiction. The rationale and raison d'etre of the restrictive theory of immunity rests on the proposition that a state cannot exploit its position of privilege when it engages itself in act *jure gestionis* devoid of sovereign power.

II. Laws & Instruments

Against this background, it is worth noting that recent legislations, international and regional instruments dealing with jurisdictional immunities of foreign states invariably contain a provision with regard to the exception of trading or commercial transactions. Thus, the Foreign Sovereign Immunity Act of the USA (hereinafter FSIA), the first enactment attempting codification of sovereign immunity, provides:

> "(a) A foreign State shall not be immune from the jurisdiction of courts of the United States or of the States in any case:
> (1)...
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign states or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere: or upon an act outside the territory of the United States in connection with a commercial activity and that act causes a direct effect in the United States...."[1]

Definition of 'commercial activity' is set forth as :

> "either a regular course of commercial conduct or a particular commercial transaction of act ..."[2]

The definition of the phrase 'commercial activity carried on in the United States by a foreign state' not only includes commercial activity performed and executed in its entirety in the United States but also

a commercial transaction or act having a substantial contact with the United States.[3] A careful reading of the provision makes it clear that a foreign state would not be entitled to immunity with respect to a claim based upon a commercial activity if :

(i) the commercial activity is carried on in the United States by the foreign state; or

(ii) an act performed in the United States relates to foreign state elsewhere or to a particular commercial transaction conducted or carried out in part elsewhere; and

(iii) an act done outside the territory of the United States in connection with commercial conduct abroad having direct effects within the United States, subject to the legislative jurisdiction of the US under 'effects' principles embodied in the Second Restatement of the Foreign Relations Law of the United States.

The Sovereign Immunity Act of the United Kingdom (hereinafter SIA) in which, like the FSIA, definition of a commercial activity exception occupies a central place, also does not accord jurisdictional immunity to a foreign state in proceedings relating to its commercial activities. It declares that immunity does not attach to 'a commercial transaction entered into by the state', or in 'an obligation of the state by virtue of a contract (whether commercial transaction or not) falls to be performed wholly or partly in the United Kingdom.'[4] Commercial transaction is defined in section 3 (3) to mean :

"(a) any contract for the supply of goods or services;

(b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligations; and

(c) any other transaction or activity, (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority,—."

It is of interest to note that all but one of the state immunity Acts[5], passed subsequent to the British SIA, not only disallow jurisdictional immunity to a foreign state in matters relating to commercial activity but also adopt *verbatim et literatim* the English definition of commercial transactions.[6]

Regional instruments prevailing in Europe, American hemisphere and Asian-African countries, as well as international instruments in the

area of sovereign immunity, exhibit similar approach to commercial activity vis-a-vis sovereign immunity. A mention may be made of a few of such leading instruments. The European Convention on Sovereign Immunity[7] disentitles a contracting state from jurisdictional immunity in another contracting state if that state, itself or through its agency or instrumentality, engages, in the same manner as a private person, in industrial, commercial or financial activity.[8] The Inter-American Draft Convention,[9] in terms of wide amplitude, also directs a state not to invoke immunity in claims relating to its commercial activities undertaken in the foreign state. And commercial activities of a state, according to the Draft Convention, are to be construed to mean the performance of particular transaction or commercial or trading act pursuant to its ordinary trade operations.[10] However, the ILA Draft Convention on State Immunity proposed by the International Law Association[11], during the same year, exhibits a different approach to the commercial activity exception to jurisdictional immunity and its definition. It, like the Inter-American Draft Convention, inter alia, does not accord jurisdictional immunity to a foreign state in cases arising out of a commercial activity carried on by it or in an obligation arising out of a contract, commercial or non-commercial, other than a contract of employment,[12] but while defining the term 'commercial activity' for the immunity purposes, it attempts to take a combined approach reflected in the British SIA and the American FSIA. It, like the FSIA, defines the term 'commercial activity' as meaning of commercial conduct or a particular commercial transaction or act including (like the SIA) 'any activity' or transaction into which a foreign state enters or in which it engages otherwise than the exercise of sovereign authority, particularly:

(a) arrangements for the supply of goods or services, and

(b) any financial transaction involving lending or borrowing or guaranteeing financial obligations.[13]

Similarly, the Asian-African Legal Consultative Committee (AALCC), composed of representatives of Burma, Sri Lanka, India, Indonesia, Iraq, Japan, Pakistan, Sudan, Syria and the United Arab Republic which, in its third session, considered the question as to jurisdictional immunity of a foreign state in respect of liabilities arising out of commercial transactions other than the 'governmental activities', recommended that a state which enters into transactions of a commercial or private character should not raise the plea of sovereign immunity if sued in courts of a foreign state in respect of such transactions and even if raised it should not be allowed.[14]

The International Law Commission (ILC) in its recently adopted Draft Articles on Jurisdictional Immunities of States and their Property,[15] in somewhat different way but in essence, recognizes the commercial activity as an instance of non-immunity. Draft Article 11, which stipulates the commercial activity exception to the state immunity, inter alia, reads as under :

> "If a State enters into a commercial contract with a foreign natural or judicial the person, state is considered to have consented to the exercise of that jurisdiction in a proceeding arising out of that commercial coutract and, accordingly, cannot invoke immunity from jurisdiction in that proceeding."

And Article 2 of the ILC Draft Articles defines 'commercial contract' as meaning:

> "(i) any commercial contract or transaction for the sale or purchase of goods or the supply of services;
>
> (ii) any contract for a loan or other transaction of a financial nature, including obligation or guarantee in respect of any such loan or of indemnity in respect of any such transaction;
>
> (iii) any other contract or transaction, whether of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons."

It also makes clear that in determining commercial contract for the purpose of no-immunity, primarily nature of the contract be looked into and purpose of the contract be also considered if practice of the state requires it as a relevant factor in such a determination.[16]

III. Comparisons

A careful reading of the immunity exception based on commercial activity of a foreign state in the FSIA, SIA and other statutes modelled on the SIA, and regional arrangements and international instruments which deny a claim of sovereign immunity to a foreign state engaged in commercial activity, reveal a set of significant differences in, and diverse approaches to, the treatment of the problem of sovereign immunity vis-a-vis a transnational commercial activity carried by itself or through its agency or instrumentality.

A simple reading of the definitions of commercial activity and the commercial activity as an instance of non-immunity embodied in the FSIA and the SIA reveals significant differences. First, scope of these provisions is not the same. The FSIA only mentions that immunity does not extend to commercial activities of a state, and it does not

incorporate a provision dealing with the immunity of a state in proceedings arising out of contractual obligations. The SIA, on the other hand, extends its provisions to the proceedings arising from contractual disputes involving commercial activities. Secondly, the American Act, which intends to apply to activities of foreign states taking place or having direct effect in the United States, requires jurisdictional connecting factors.[17] The British Immunity Act, on the other hand, does not require such territorial connection relating to commercial activities or contractual obligations. Similarly, it contains no 'direct effects' limitation, but extends to 'any commercial transaction entered into by the state'. As a result states might be subject to jurisdiction before U.K. courts concerning activities carried on wholly outside the United Kingdom and possibly not affecting property in the United Kingdom.[18] Thirdly, the FSIA definition amounts to no more than a general guideline to the courts to look to the nature of the course of conduct or particular transaction or act, rather than to its purpose, in determining whether it amounts to a commercial activity. While the SIA in categoric terms solves the issue of characterization in respect of two of the most frequent transnational commercial activities of foreign states, namely, those arising out of contracts for the supply of good and services and those relating to loans or similar financial transactions. Even the 'catch all' provision embracing other activities — commercial, industrial, financial, professional or other similar characters — engaged in by a state 'otherwise than in the exercise of its sovereign authority' which requires determination by courts, affords them some guidance by listing the type of activities most likely to fall within the commercial category.

Further, a comparative analysis of the provisions dealing with the commercial activity exception to sovereign immunity of national legislations, and regional and international instruments, which exhibit a basic agreement that trade activity of state does not entitle jurisdictional immunity in the forum state, broadly indicate two approaches regarding definition and scope of commercial transactions as an exception to state immunity which occupies a central place in the doctrine of restrictive sovereign immunity. The FSIA and the State Immunity Act of Canada accord some flexibility in definition of a commercial transaction of a foreign state. While the SIA and the statutes modelled on it, the European Convention on State Immunity, the Inter-American and the ILA Draft Conventions, inject greater predictability and certainty in definitional clauses of commercial transaction by stipulating broad categories/classes of commercial activities of a foreign state. But whichever approach is adopted in the absence of direct legislative criteria, judicial inquiry into

determination of commerciality of a state activity has to base on one or the other decisive criterion. The FSIA and the SIA of Canada, expressly, and the British SIA, State Immunity Ordinance of Pakistan the Inter-American Draft Convention and the ILA Draft Convention, which incorporate activities of non-governmental nature (other than the sovereign authority) and ordinary trade operations in its definitional clause, impliedly, propose determination of commerciality by looking into 'nature' and not purpose' of the activity. While the ILC Draft on jurisdictional immunity suggests a criterion combining nature as well as purpose of a state activity for determination of its commercial character. The European Convention on State Immunity and the American Law Institute's Restatement, on the other hand, suggest that the manner in which, a private or otherwise, any industrial, commercial or financial activity is performed, be taken into account for determination of commerciality of an act. The key phrases such as, nature and purpose, acts done like a private person and ordinary trade activities do vest a court with judicial discretion not only determination of commerciality of an act but also in opting decisive criteria to adjudicate open the characteristic of a state activity Influence of individual ideology and subjectivity of a judge in such a judicial inquiry cannot be rule out. Most significantly the American Congress recognising the drawbacks of such judicial discretion and explicitly showing reluctance to attempt an excessively precise definition of the term 'commercial activity' even though it was practicable, left the courts to have a good deal of latitude in determining what is a commercial activity.[19] Monroe Leigh, the then Legal Adviser to the Department of State, in no uncertain terms, testified that:

> "We probably could not draft legislation which would satisfactorily delineate that line of demarcation between commercial and governmental. We therefore thought it was the better part of valor to recognize our inability to do that definitively and to have it to the courts with very modest guidance.[20]

Though the FSIA, in comparison to the British SIA and the Acts modelled on it, provide grater flexibility and wider judicial discretion in determination of commercial activity, the House Report makes mention of a few other general criteria, other than the nature and not purpose of the activity relating to commerciality. The House Report, discussing the scope and contents of the term commercial activity as defined in section 1603 (c), assumes commerciality of an act if that activity could customarily be carried on for profit. It also treats a conduct as commercial if it could be undertaken by a private person.[21]

IV. Conclusion

The preceding discussion, in ultimate analysis, exhibits two distinct patterns of commercial behaviour so far adopted in the domestic statutes, regional and international instruments. They are : (1) activities customarily carried on for profit, and (2) conduct in which a private person might engage (including non-governmental activities and activities done in other than the sovereign authority).

However, it can be argued that neither profit motive nor the private conduct criterion should be a sole determinative factor because the doctrine of restrictive theory of sovereign immunity rests on the central premise that those activities of a foreign state which can ordinarily be 'performed by a private individual' are private in character and they do not enjoy jurisdictional immunity. An activity customarily carried on for profit would be of a kind normally engaged in by private persons and would accordingly be considered commercial.

With a view to avoiding uncertainty and ensuring uniformity in application of these criteria and questions begging decisions by national courts, a choice-of-custom approach is suggested.[22] The proposed approach is recommended to be made applicable only to non-contractual claims between a state and a private party particularly when international consensus with respect to the commerciality of a given activity or mutual agreement between the parties as to commerciality of the act is not clear. The approach pleads that a court while determining commerciality should select the norms of the state bearing 'the most significant relationship' to the issue of commercial character. And if the defendant state's activity has taken place in a third state, a court should first apply the choice-of-custom analysis by reference to the defendant state's own socio-economic standards in order to determine whether they conflict with those of the forum. If this preliminary step results in a strong finding of commerciality, the inquiry need not proceed further. But if the standards of the forum and the defendant states conflict, the approach suggests, the relative interests of the forum state, defendant state and private plaintiff, as well as the policies underlying the doctrine of restrictive sovereign immunity, indicate the choice of appropriate custom.[23] The suggested approach also recommends a court to consider other objective criteria in determination of commerciality of an act. They are : profitability of the act; enjoyment or no enjoyment of sovereign immunity to similar act in the state with which the act has most significant relationship; the forum of business chosen by the foreign state; percentage of total governmental revenue that the defendant state derives from the activity; role of the state as a market regulator or as a market participant, and

degree of international consensus not earlier determined to be conclusive on commerciality.[24]

The suggested choice-of-custom approach would not only help courts in determining commerciality of a given act but would also contribute to predictability of the decisions and to the progressive evolution of foreign sovereign immunity law. Further, the choice of custom approach, unlike the FSIA,[25] the British SIA and other regional and international instruments on sovereign immunity which do not offer any guidance on the question as to whether which standards, internal law — of the forum or of the defendant state — or international, be applied in determination of commerciality of a given act, partially eliminates the problem of application of the standards in judicial inquiry of commerciality of an act. It is important to note that the recently adopted ILC Draft Articles on Jurisdictional Immunity of States, more or less, indicate similar approach to the standards or norms to be applied in deciding commercial characteristic of an act for the immunity purposes. Draft Article 3 (2) directs the court to take into consideration purpose of the contract if practice of the defendant state treats it as a relevant factor in determination of non-commercial character of a state activity.

References

1. Sec. 1605.
2. Sec. 1603 (d).
3. Sec. 1603 (e).
4. Sec. 3 (1) (a) and (b).
5. Sec. 5 of the State Immunity Act of 1982 of Canada declares that 'a foreign state is not immune from the jurisdiction of a court in any proceedings that relate to any commercial activity of the foreign state', while sec. 2 of the Act defines 'commercial activity' as 'any particular transaction, act or conduct or any regular course of conduct that by reason of its nature is of a commercial character'.
6. For example, see section 5(6) of the Pakistan State Immunity Ordinance of 1981, and section 5(1) (b) of the Singapore State Immunity At of 1979.
7. European Convention on State Immunity and Additional Protocol, 11 *ILM*470 (1972).
8. Art. 7. The states which have ratified the Convention, such as Austria, Belgium, Cyprus and the U.K., have adopted internal legislation or made necessary declarations to give effect to the provisions of the Convention, See YBILC 1982, Vol. II (Part I), p. 210 *et seq.*
9. Inter-American Draft Convention on Jurisdictional Immunity of States, 22 ILM. 292 (1983)
10. Art. 5.
12. Art. III (B) (1) and (2).
13. Art. I (C).

14. Asian-African Legal Consultative Committee, Final Report of the Committee on Immunity of States in respect of Commercial and other Transactions of a Private Character, New Delhi (1960), reprinted in Whitman, *Digest of International Law*, vol. 6, pp. 572-574.
15. International Law Commission, Draft Convention on Jurisdictional Immunities of States and Their Property, 26 ILM 625 (1987).
16. Art 3 (2).
17. For further comments see Brower, Bisline and Loomis, 'The Foreign Sovereign Immunities Act of 1976 in Practice', 73 *AJIL* 200 (1979).
    However, the European Convention contains stricter territorial restrictions on the extension of jurisdiction in the context of commercial transactions (see art. 7).
18. For criticism see Delaume 'Economic Development and Sovereign Immunity', 79 AJIL and Sinclair, 'The Law of Sovereign Immunity: Recent Development, *Collected Courses of the Hague Academy*, (Sijthoff, 1981) 117 (1980-II).
19. See the House Report No. 94-1487, reprinted in United Nations, *Materials on Jurisdictional Immunity of States and Their Property* St/Leg./Ser.8/20 (1982) p. 107.
20. Jurisdiction of U.S. Courts in Suites Against Foreign States : Hearing on H.R. 11315 before the sub-commission on Administrative Land and Governmental Relations of the House Committee on the Judiciary, 94th Cong., 2nd Session, 31 at 53.
21. *Supra* n. 19 p. 107.
22. David A. Brittenham, 'Foreign, Sovereign Immunity and Commercial Activity : A Conflict Approach' 83 *Col LR* 1440 (1983).
23. Ibid, 1487-1501.
24. Ibid, 1502-1504.
25. However, comment (a) to the commercial activity provision of the Restatement (Second) of the Foreign Relations Law of the United States (1985) states that "in considering what is commercial activity, the standard to be applied is that of the state exercising jurisdiction".

SONIA BALDIA *LL.M. (Georgia, USA)*
and
DHEERAJ SANGHI *Ph.D. (Maryland, USA)*

Software Protection under Intellectual Property Regime— Is Fine-Tuning of Copyright Law Necessary ?

I. Introduction

Today international competitiveness of a country depends on its ability to keep pace with the technological revolution. Dynamic innovation in high technology is becoming vital in retaining the competitive edge in global markets. The erosion of this comparative advantage due to the growth of counterfeiting and piracy world—wide has magnified the economic significance of intellectual property rights (IPRs).[1] This is particularly true in case of computer software. These days computer companies are generating more profits from developing and marketing software than hardware, since the price of hardware has been steadily falling for the last several years. The average annual growth rate of the software industry is estimated to be more than 20 per cent. As as result, these companies have become much more aggressive in protecting the IPRs on the software they develop.

In 1980 the US Congress amended the US copyright law to include software in its ambit. In 1981 the US Supreme Court, in *Diamond v. Diehr*,[2] held that software-related inventions were not *per se* unpatentable. Since then software developers have applied for a large number of patents. Several computer companies have launched legal proceedings against those who have violated their patents and copyrights. The lack of proper statutory guidelines has triggered a debate in the United States on the appropriate level of protection for software. The growing confusion in this area has vividly demonstrated the fundamental weakness in the present system of software protection, thus creating the need for effective restructuring of the existing framework. At the international level, the necessity and scope of software protection is being hotly debated in the Uruguay Round of GATT negotiations. One of the goals of the Uruguay Round is to formulate an IPR regime which will balance the protection for computer software with the dissemination of technology. Since GATT

is going to affect a country's economy in significant ways, all countries are taking a closer look at the various proposals that have been forwarded.

In the United States the Constitution gives Congress the power "to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."[3] Creators must be assured of recouping their research and development costs and realizing some profit if they are to develop an innovative product. Exclusive rights are granted as adequate economic incentive to encourage innovation and creativity. By granting limited monopoly in exchange for public disclosure, and use of the creation or discovery, the state ensures the advancement and dissemination of technology, and provides protection against monopolistic and restrictive trade practices.

The traditional IP laws (patents, copyrights, etc.) have been flexible enough to accommodate new developments in technology over the past 200 years. Copyrights, for example, have been able to protect new methods of expression such as photography and motion pictures. However, the development of software industry has created a situation that defies easy answers for copyright and patent laws. Software does not fit neatly into any existing category of intellectual property law.

The confusion is unique to software because of its "dual nature". Software has both an utilitarian element (it is used for data processing, for example), and an expressive element (the instructions used to carry out the operation). Utilitarian objects have traditionally been the subject matter of patents, while expression falls under the domain of copyright.

Software may be physically embedded in a machine (in Read-Only-Memory, for example). This raises the question whether the software is also protected when that machine is granted a patent. On the other hand, software can be stored on a floppy disk, which is analogous to music being stored on a cassette tape. This analogy suggests the copyrightability of software.

Software can be expressed (i.e., written) in several different languages. It can be expressed in higher level languages (like Basic, Pascal, etc.) which are human readable. It can also be expressed in series of Os and 1s (binary form) which is understood only by machine. The former is called *source code*, and the latter is called *object code*. Traditionally, copyright protection has been provided for expressions understood by humans. Applying that criteria would imply granting copyrights only on the source code and not on the object code.

Software is inherently different from the conventional manufacturing products. Once developed, it can be easily and cheaply reproduced. Also, due to its intangible nature, it flows across national borders more easily than conventional commodities. This nature of software, while simplifying world wide marketing, makes it susceptible to illegal copying, thus creating a greater need for international protection.

Software has become critical to many industrial sectors like electronics and computer hardware and to the overall national economic development. Recognizing that software must be legally protected in order to encourage technological advancement, the judiciary and the legislature in various countries have acted to safeguard the proprietary rights of software developers. The protection differs from jurisdiction to jurisdiction. It may be in the form of patent protection, copyright protection, trade secret protection or some combination of the three. This varied legal treatment of software has resulted in widespread confusion and an incoherent system of statutory protection for software.[4]

Many commentators in the software industry believe that software is ill-suited for traditional patent and copyright protections. Samuelson characterizes this difficulty as software being "too much of a writing to fit comfortably into the patent system and too much of a machine to fit comfortably in the copyright system". Some observes are of the view that the development of *sui generis*[5] protections for software would inject a much-needed dose of certainty into software protection and make the environment stable and conducive to software innovations. This concern occurred in the semiconductor chips technology in the United States in 1980's and resulted in a *sui generis* law for semiconductor chips protection in 1984.[6] This Act provides a hybrid form of protection to semiconductor chips by blending the copyright and patent elements. The distinctive nature of software has been compared to that of semiconductor chips; many are calling for major revisions in software protection modeled after the Semiconductor Chip Act. Other observers argue that it would be impractical to legislate separate laws to provide IP protection for each new technology that does not neatly fit into the traditional IP framework. They suggest that the existing framework could be fine-tuned to accomplish the proper 'fit' of the software in the current system. The ongoing controversy is further complicated by the international scope of software markets, the imbalance of technology and the conflicting interests of the developed and the developing nations, thus retarding

progress in establishing an international legal system for the protection of software.

While the need to provide legal protection to software is obvious, care should be taken to balance the needs of the society and those of software developers. Literal copying and subsequent sale of the software would greatly inhibit software innovation while overprotection would reduce competition in this industry and create barriers to the entry of new companies. The socially optimal choice lies somewhere in the middle of overprotection and no protection at all. Protection should not block the use of ideas previously developed by others when the use is imperative to attain certain results. A programmer should be free to incorporate the new ideas into her own work. Continued growth in the software industry is accomplished by borrowing and building upon pre-existing ideas in the field.

We are of the view that the current copyright laws can be modified to address the unique demands of software technology. A complete overhaul of IP laws is unnecessary. In this paper, we are proposing a scheme to protect software IPRs. The scheme protects the expression but not the idea. It allows independent development, but prohibits copying of software. The scheme takes into account the concerns of developing countries as well as provides sufficient incentives for software developers worldwide.

II. Current State of Software Protection

The United States was the first to content with software-protection issues due to its world leadership in the production and marketing of software. The US software industry holds 70 per cent share of the world software market.[7] This industry accounted for domestic revenues of about 60 billion dollars in 1988.[8] Since the United States has the most developed case law, we describe the state of software IPRs there in greater detail.

Patents

Patent protection is becoming increasingly available as a method to protect software. The trend towards greater availability of patent protection can be witnessed in the United States, in Europe, in Japan and in many other countries.

Software patentability has become a *de facto* reality in the United States since 1982, when the US Supreme Court held in the landmark case of *Diamond v. Diehr*[9] that software related inventions were not *per se* unpatentable. Subsequently, this protection has been extended by the US lower courts to provide patent protection to "pure" programs

that stand alone.[10] The US Patent Office issued new guidelines[11] assisting "an administrative policy in favor of patents on most types of programs" and has been issuing patents on software programs at an accelerating rate.[12] This trend has triggered a debate about the desirability of patent protection for software programs, the scope and duration of protection, and the overlap of patent protection with copyright protection. The US case law is far from conclusive on these issues.

In Europe, the European Patent Convention, in article 52(2)(C), explicitly declares that "programs for computers" are not patentable subject matter.[13] However, the European Patent Office guidelines specifically state that patentability should not be denied to a process merely because one or more steps are performed by a computer program[14].

Copyrights

While the US courts are providing for the patentability of software, copyright law remains the internationally favored means of software protection. Computer programmers all over the world have repeatedly sought copyrights for their software innovations. At present, many countries expressly provide copyright protection to software by case or statutory law. New statutes establishing copyrightability of software have been enacted in the United States, India, Japan, Taiwan and many other countries. In addition, those countries where no express legislation has been enacted and no case law developed yet, there is a likelihood that software would be protected predominantly under copyright law.

Copyright protection in most countries is substantially similar in form. The copyright law protects the novel expression of a software (program) while statutorily excluding ideas, processes and procedures of operation from its scope.[15] Current case law in the United States provides for copyright protection to software formats of source code, machine or object code,[16] microcodes,[17] operating systems,[18] object code embedded internally on semiconductor chips, and non-literal aspects such as structure, sequence and organization of the software.[19] The software developer also has the absolute right to develop "derivative works."[20] A derivative work is a work based on one or more pre-existing works, for example, a translation, abridgement, or other form of adaptation.

Overview of Legal Protection for Software World Wide (December 1990)

country	*copyright of software*	*membership*
United States	1980	B,U,P
Canada	1988	B,U,P
United Kingdom	*	B,U,P
Germany	1985	B,U,P
France	1985	B,U,P
Switzerland	**	B,U,P
Poland	*/***	B,U,P
Romania	unclear	B,P
Japan	1985	B,U,P
Australia	1984 +	B,U,P
Mexico	1984	B,U,P
Brazil	1985	B,U,P
Nigeria	1988	U,P
Saudi Arabia	1990	
Hong Kong	1985 *	
Indonesia	1987 ++	P
China	1990	P
Singapore	1987 ***	
Taiwan	1985	
India	1984	B,U

Sources: Robert P Bigelow, *Computer Law Newsletter*, Vol. 6, No. 4, 1990; Marshall A. Leaffer, *International Treaties on Intellectual Property* (1990)

B Berne Convention of 1886, for the protection of literary and artistic works, as revised in 1971 and further amended in 1979.
U Universal Copyright Convention of 1952, as revised in 1971.
P Paris Convention of 1883, for the protection of industrial property, as revised in 1967.
* New UK Act passed Nov. 15, 1988. By Order in Council, the 1985 Act covering software extended on Feb 1, 1988 to Hong Kong.
** Legislation or decree pending.
*** Special arrangement with the United States.
\+ Limited 25 year term.
++ For works first published there, but bilateral treaty with the United States, effective Aug. 1, 1989.

Since the national laws do not adequately cover the global use of software, internationally concerted approaches have become vital in harmonizing the national legal systems and providing uniform solutions to the problems that arise out of international legal diversity. WIPO and GATT are such global efforts towards attaining these goals.

World Intellectual Property Organization (WIPO)

WIPO has extensively explored the international protection of software. In 1970 a United Nations ad hoc working group, in an effort to facilitate developing countries' access to computer technology, invited WIPO to working a study on the appropriate form of international legal protection for software. As a result, WIPO developed *sui generis* model provisions on the protection of software and proposed a draft treaty in 1983. The main features of this model law included a copyright kind of protection for software without mandatory registration or deposit of the software protected. Due to relative difficulty of detecting misappropriations of software, WIPO suggested that unrestricted disclosure to the public was undesirable. The proposed duration of protection was 20 years which was restricted to original creations, while the concepts on which software was based were excluded from the scope of protection. The draft treaty did not gain sufficient support as there was a growing trend towards copyright protection of softwere at the national level in many countries. Therefore, WIPO decided to undertake a study on the protection available under existing national copyright laws and treaties.

A draft of the model provisions for software protection under copyright law was prepared by WIPO in 1989. This draft not only established copyright protection for software, but also discussed the scope of subject matter covered by copyright law. Subsequently, most of the participants endorsed copyrightability of software.

Despite the efforts of WIPO and other organizations to reconcile the IP laws of its member nations and develop international standards for software, no international legal system has emerged yet.

General Agreement on Tariffs and Trade (GATT)

The debate over software protection has not been confined solely to WIPO; it has become a contentious issue in the Uruguay Round of GATT negotiations since the late 1980s. The underlying cause for the inclusion of trade related IPRs (TRIPs) in GATT is the computer industry's disenchantment with the existing IP regimes under WIPO, as they have proved insufficient to mitigate the extensive distortions

in international trade caused by software piracy. Also, WIPO lacks mechanisms for consultations, settlement of disputes and enforcement of IP laws.

GATT, which is a comprehensive multilateral effort to reduce distortions in the global trading system, is trying to establish a separate code for international intellectual property protection by reconciling the differences between the developed and the developing countries. Since the outcome of these negotiations might significantly affect the wealth allocation between the developed and the developing world, the challenge to reconcile the divergent views is not an easy one

The United States and various other countries have submitted proposals which include full copyright protection for software. Most of the countries agree with the copyright approach but differ in the specifics, scope and implementation of such protection. The draft proposed by Arthur Dunkel, the Director General of GATT, has characterized software as literary work protected under Berne Convention.

The draft, which purports to be the "final global package of the results of the Uruguay Round,"[21] had to be reviewed and accepted or rejected by the GATT signatories by June 20, 1993. It is still unclear what directions the international consensus and compromise will take in GATT.

III. Proposals

In our opinion any protection mechanism for software IPRs should satisfy the following broad principles:

1. The system should provide protection against copying, not against independent development. In software technology, it is a common occurrence for several programmers to solve a problem independently.
2. The duration of the protection should be in line with the commercial lifetime of the product.
3. The system should strike a balance between rewarding he technological innovator and disseminating technical information for the public good.

Patents for software are undesirable because they disallow independent development. Further, patent searches are prohibitively expensive. The searches are often unreliable and there is no way to find out pending patent applications. Thus even after spending a large amount of money, the software developers cannot avoid the risk of patent violation lawsuit.

Trade secret law is not particularly useful in a mass-marketing context. for the holder of an alleged trade secret to obtain legal relief, the holder must have undertaken reasonable steps to protect that secret, steps which are antithetical to the concept and practice of mass-marketing.

Full copyright is not desirable because it would be used as one more device to prevent rather than enable access to innovative programs. The public's justification for copyright is not to serve a private financial interest of one group or another. It is to serve the public interest. It is only to that extent that copyright is justified.

We propose giving (modified) copyright protection to software on the premise that the process of writing computer programs is highly creative and individualistic, and any two programmers working on the same problem would do it in different ways. While the creativity assumption may generally be true, there might be cases where programs can be effectively expressed (i.e. written) in only one way. In such cases, the copyright protection would not be provided. If copyright protection is provided to all computer programs in the belief that there is always a high degree of creativity involved, then it could result in a software developer obtaining something tantamount to patent protection. This would enable him to deprive computer owners of a functional capability of their machines, but without being subject to the novelty examination process and other safeguards that precede the grant of a patent. Worse, the protection would be for a much longer time than a patent.

We propose to create a distinction between software in human readable form (source code) and machine readable form (object code). Typically, software developers keep improving their software, adding new features. They bring out a new version every few months. Thus the software becames obsleete very fast. Since the new version of the software is often based on older versions (the developer starts with the previous source code and adds new features), the software in source code form remains valuable to the developer for a longer time. Therefore, we propose to give longer protection to source code than to object code. This idea has been proposed earlier in the white paper on copyright reform issued by the Canadian government in 1984.

Since software has more of an utilitarian value (compared to traditional forms of expression protected by copyright), it should be protected for a smaller duration (similar to patents). This with the aim of optimizing social benefit. Also, this is commensurate with the smaller lifecycle that a typical software product has. We suggest a

twenty year protection for source code, similar to that provided in the draft treaty promulgated by WIPO in 1983. For object code, we suggest a five year protection period. After that period, the object code would be in public domain, and everybody would be allowed to us it. Because the developers gain maximum profit from a software in the first few months after it comes out in the market, allowing free copying of five year old object code would not hurt them financially. But it would allow access to old software to those who would not be able to afford any software at all, otherwise. This clause would ensure that the technological gap between the haves and the have-nots does not increase indefinitely.

In exchange of much smaller duration of protection, we provide more protection for that duration. The developer, for example, would have certain rights on the sue of software. Such rights are normally associated with patents. For example, developers can restrict the number of people using the software. Developers can also put restriction on resale of the software. Also, the copyright wouldn't just protect the written code, but also the structure, sequence and organisation of the code, In absence of such protection, it would be trivial for others to take the code, change names of variables, procedure names, and do other similar cosmetic modifications and claim the code as their own.

Making copies of the software

Our scheme allows making an archival copy of the software. This is a necessary security against accidental destruction of software. Despite advances in computer technology, is errors still occur occasionally. Even without hardware or software faults, users are known to delete files accidentally. It is common among users to keep a copy of all their programs and data to insure against such errors, and we support their right to continue doing so. Several users these days own multiple machines. They may have a personal computer in their homes, and may also have portable computers to use while they are travelling. We would allow users to have a copy of the software in both their machines. The only restriction that developers can impose is that at any given instant, only one copy of the software should be used.

Translations and decompilation

Under our scheme users are also allowed to translate software to another form as long as it is for personal use only. To take an obvious example, users should be able to compress the object code to save pace on the disk. Users should be able to "decompile"[22] for research

purpose. (These kinds of uses are covered by "fair use doctrine" in the normal copyright protection.) However, only the original developer retains the right to develop "derivative works."

Moral rights

Developers would not have any "moral right" over the software. Thus, suers would be allowed to modify the software for the purpose of tailoring it to their own specific needs, and to adapt it to a different environment (e.g. different hardware) than the one it was originally intended for. Developments in the field of software technology would be severely hampered if unconstrained applications of moral rights were to allow the repeal of licenses due to "unauthorized" modifications by users.

Public disclosure

• The expression in a traditional copyrighted work is for everyone to read, see, or hear, In the case of software, the expression or the program is often in object code and not easily understood. Source code, the only form in which the software is human readable, is rarely given out by the developers. We support giving copyright protection for the source code even if it remains unpublished. Our position, in this regard, is similar to the US copyright law which was amended in 1980 to allow copyrights for unpublished works.

Registration

Registration of software for copyright purposes would be optional. Developers may choose to register their software because it would make it easier to prove misappropriation of expression, in case such a need arises. But there is no need to make registration mandatory.

Our proposal would allow independent developers to write software which is functionally equivalent to an existing piece of software, but without copying it. This is in agreement with the "black box models" that have been proposed elsewhere. According to the black box model, internal aspects of a program should be untouchable while the external attributes should be considered completely reverse engineerable. The external aspects are the input, the output, the user interface and, in many programs, the data set format. An independent developer would be free to run the software, note the input-output relationship, and emulate all external aspects of the program.

How to prove copyright infringement

As suggested by Davidson and others, evidence of substantial similarity would be used to prove misappropriation of copyrighted software. The plaintiff would have to show that the software developed

by the accused is substantially similar to that of the plaintiff. Such similarity would be very unlikely if the software development was completely independent.

Typically software programmers leave "signatures" in the code they write. These signatures could be in terms of unnecessary code, non-standard algorithms, comments, which include authors' names, etc. In a large program, it is very difficult to find to if a particular piece of code is unnecessary or uses non-standard algorithms. If another developer copies the source code and makes cosmetic changes, she is likely to leave those parts in the code, and these would form evidence of substantial similarity. Other parts of the code the experts typically study to find substantial similarity include data structures, sequence of routines, and names of variables, labels and functions.

The IP laws should be such that they encourage software innovation. Software needs protection, but traditional patent and copyright laws are not the right approaches. Our approach attempts to achieve a fair balance between social benefits and private incentives.

Most developed countries have strong IPR regimes whereas many developing countries have less stringent IP laws and a weak enforcement mechanism. Developed countries want to safeguard strong sectors in their economies, while the developing countries want access to technology at low costs in order to promote national technological advancement. New technologies — like computer software — have highlighted the difficulty in reconciling these conflicting interests of different countries. For developing countries, the short-term costs of strengthening their IPR regimes substantially outweigh the long-term benefits of domestic innovation and foreign investment.

Increased protection for software will make it much harder for developing nations to get a foothold in the high-tech world. They will have to pay royalties for a long time before software is available in public domain. These protections will restrict poor nations from entering the silicon age. Thus, a large population of the world will always remain technologically backward.

Our proposal takes the need of developing countries into account when it suggests that object code can be copied freely after a period of five years. Our proposal encourages independent development. This is very important for developing countries since they may now get into the "information age" without worrying about patent violation or having to pay huge royalties.

IPR regimes that do not stem from developing countries' perceptions of their own interests and needs, and that are not articulated

in keeping with broader economic and technological policies, are unlikely to result in stable, predictable, and enforceable rules.

IV. Further Studies

1. Organization for Economic Co-operation and Development. *The Internationalization of Software and Computer Services*, volume 17 of *Information, Computer, and Communication Policy* OECD, (1989)
2. Sonia Baldia. "Emerging conflicts over intellectual property in recent GATT negotiation", Master's thesis, University of Georgia, School of Law, Athens, GA, (1992)
3. Duncan M. Davidson, Protecting computer software: a comprehensive analysis. *Arizona Law Journal*, 611 616, (1983)
4. John. P Sumner and Dianne Plunkett. Copyright, patent, and trade secret protection for computer software in Western Europe. *Computer Law Journal* 8(4):327-374 1988)
5. Idelle R. Abrams. Statutory protection of the algorithm in a computer program: A comparison of the copyright and patent laws. *Computer Law Journal*, 9(20):125-144 (1989)
6. Peter Heeseok Kang. `Canada, copyright computers: Impact and analysis in an international perspective or from Gutenberg to Uruguay: Protecting the soul of new machine, *Computer Law Journal*' 19(3):265-334 October (1990)
7. Pamela Samuelson, `Why the look and feel of software user interfaces should not be protected by copyright law', *Communications of the ACM*, 23(5):563-572, (May 1989)
8. Peter S, Menell. Tailoring legal protection for computer software. *Stanford Law Review*, 39:1329 (1987)
9. Duncan M. Davidson. The future of software protection: Common law, uncommon software. *U. Pittsburgh Law Review*, 47:1037-1117 (1986)
10. Pamela Samuelson. CONTU revisited: The case against computer programs in machine readable form. *Duke Law Journal*, 663 (1984)
11. John R. Harris. Legal protection for microcode and beyond: A discussion of the applicability of the Semiconductor Chip Protection Act and the copyright laws to microcode. *Computer Law Journal*, 6(2);187-222 (1985)
12. Donald E. Stout. Protection of programming in the aftermath of Diamond v. Diehr *Computer Law Journal*, 4(2):207-242 (1983)

13. Brown, `The protection of high technology intellectual property, *Computer Law Journal*, 11:29,34 (1991)
14. The League for Programming Freedom Against Software Patents (Viewpoint). *Communications of the ACM*, 35(1), January 1992. Prepared by Richard Stallman and Simson Garfinkle.
15. Deptt. of Consumer & Corporate Affairs and Deptt. of Communications, Government of Canada. From Gutenberg to Telidon: A white paper on copyright, (1984)
16. K. Gopinath and M.K. Ravishankar, `Intellectual property rights in computer software: issues at stake for developing countries vis-a-vis Dunke Draft', Draft copy of the paper, 1993

References

1. IPRs are the ownership rights generated by invention and creativity. Four basic IPRs are as follows:
   (a) patents encompass scientific and technological inventions, machines, products and processes.
   (b) copyrights protect the creators of original literary works such as articles, movies, records fixed in any tangible medium of expression.
   (c) trademarks are words, marks, mottos, emblems or names used by the manufacturers to distinguish their goods from others.
   (d) trade secrets are information such as patterns, devices or formulae known only by certain persons in the business and are of economic value since they are used as an advantage over competitors. IPRs most relevant to this paper are patents and copyrights.
2. 450 US 175 (1981).
3. US Constitution, art. I, clause 8.
4. See, e.g. *Gottschalk v. Benson*, 409 US 63 (1972), *Diamond v. Diehr*, 450 US 175 (1984); Apple *Computer, Inc. v. Formula Int'l, Inc.*, 725 F. 2d 521 (9th Cir. 1984).
5. "of its own kind or class" — Latin phrase.
6. Semiconductor Chip Protection Act of 1984.
7. Office of Technology Assessment, US Congress, Computer Software and Intellectual Property: Background Paper 1 (1990).
8. Id.
9. 450 US 175 (1981). A computer program was used in a process for curing rubber to continuously monitor internal temperatures and make adjustment.
10. *Paine, Webber, Jackson & Curtis, Inc. v. Merrill Lynch, Pierce Fenner & Smith, Inc.* 564 F. Supp. 1358 (D. Del. 1983).
11. Manual of Patent Examining Procedure, Section 2110: Patentable Subject Matter _ Mathematical Algorithms or Computer Programs 538-38.3 (Oct. 1981).

12. Maier Software Protection - Integrating Patent, Copyright and Trade Secret Law', 69 *J. Pat. & Trademark Off. Soc.* 151, 157 (1987).)
13. Convention on the Grant of European Patents, Oct. 5, 1975, art 52, 12 ILM 276, 285.
14. See 18 Int'l Rev. Indus. Prop. & Copyright L.' 101 (1987).
15. 17 USC, S102 (b) (1988).
16. *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F. 2d 1240 (3rd Cir. 1983), cert. denied, 464 US 1033 (1984).
17. *NEC Corp. v. Intel Corp., F. Supp.* 590, 595 (N.D. Cal. 1986) vacated, 835 F. 2d 1546 (9th Cir. 1988).
18. Apple Computer, 714 F. 2d at 1251.
19. *Whelam Assoc. v. Jasloro Dental Lab.*, 797 F. 2d 1222 (3rd Cir. 1986), cert. denied, 107SC 877 (1987).
20. 17 USC S103 (1982).
21. Draft Agreement on Trade-Related Intellectual Property Rights (TRIPs), GATT Document MTN.TNC/W/35/Rev.1, Dec. 20, 1991.
22. Decompilation is the process of converting an object code back into a human readable higherlevel language.

C. M. JARIWALA
Professor of Law, Benaras Hindu University, Varanasi

Indian Environmental Law in 1992 — A Critical Appraisal

I. Introduction

In the Rio Conference on 'Enivronment and Development' 1992 the world community showed concern for the environmental illiteracy among the nation states and their people. Rose Kelly, Minister of Environment, Australia, made an important suggestion worth implementing. He pointed out that environmental education must be imparted not only in the schools or universities, in our homes, factories and industries, but also in government departments and in the community at large. At the close of the general debate four children, addressing the plenary on behalf of the future generation, also raised the demand to make available to them the right to know their environment and the environmental pollution.[2] The Indian environmental jurisprudence of the right to environmental education and information and the duty to protect and improve the environment is also gaining ground in this direction. These international and national developments make it necessary for every one of us to educate the people. This in turn throws a challenge before the law academics to spread the public awareness of the environmental law. It is time that the law academics and the law institutes must make efforts in the direction.

The present paper makes a humble attempt in this direction by highlighting the developments relating to the law of environment during the year 1992. A survey is undertaken of an important amendment law enacted by Parliament, Rules passed by the central government and judgements handed down by the courts. An attempt is also made to critically evaluate the high water-marks and shortfalls in the law of environment in 1992.

II. Legislation

The Act of 1992

During the period under study, Parliament enacted the Public Liability Insurance (Amendment) Act 1992 which made the following changes. The expression 'accident' was defined to mean an accident involving a

fortutious or sudden or unintended occurence while handling any hazardous substance resulting in continuous or intermittent or repeated exposure to death of, or injury to, any person or damage to any property. The present definition will not cover accidents due to war or radio-activity. Secondly, any injury or damage to any animal, aquatic organism, or plant is kept outside the purview of the present legislation. It is unfortunate that the Bhopal Mass Disaster Settlement also left the losses to the above components of environment uncompensated. These components are important ingredients of the environment and any damage or loss to them would adversely affect the environment. And, therefore, while calculating the compensation amount above losses cannot be neglected. Further, an accident may have immediate or long term effects as was visualised by the Supreme Court in the *Union Carbide* case,[1] where the court directed the Union Carbide Corporation to establish "a full-fledged hospital of at least 500 beds strength with the best of equipments for the treatment of MIC related afflictions" and that it shall maintain it "for at least a period of eight years." The present legislation does not take into consideration the long term consequences.

The Amendment Act defines 'owner' to mean a person who owns, or has control over handling any hazardous substance at the time of accident. It further spells out that the partners of a firm shall be its owner, in case of an association its members shall be its owner, and in case of a company it shall include its directors, managers, secretaries or other officers who are directly in charge of, and are responsible to the company for, the conduct of its business. The present definition keeps out the owner's agent from its purview. It is interesting to note that in the *M.C Mehta* case,[5] the Supreme Court of India did not stop at the officers' level but went down to the grassroot level and imposed the liability of compensation even on the workers of the company. But the court, realising the problem of poverty of the poor workers, by a subsequent order confined the liability up to the officer's level.

The Amendment Act prescribes the maximum amount for which an insurance policy could be taken. The amount would be not less than the amount of the paid up capital of the undertaking but not exceeding fifty crore rupees. In order to determine the paid up capital, it would not be as given in the books of accounts but the market value of all the assets and stocks held on the date of the contract of insurance.

The present legislation provides two more sources from where the victims of an accident could be compensated. Firstly, the environment

relief fund would be created wherein every owner is required to pay to the insurer a sum equal to the premium amount against the relief fund. And, in turn, the insurer would remit the amount so collected to the appropriate authority to be credited to the fund's account. The collector of each district is authorised to pay to the victims of an accident out of the environment relief fund. For the better disbursement, the Amendment Act could have involved the nationalised banks rather than the collector's secretariat. Secondly, the owner is required to contribute to the remaining award money left over after payments made by the insurer and the collector. In case the owner tries to evade the above payments by removing or disposing off his property, the district collector is authorised to grant a temporary injunction to restrain him from committing such an act.

The Rules

Apart from the above provisions of the law, the Union Ministry of Environment and Forest from time to time made rules relating to environmental protection. The central government realised that the environmental pollution in India had reached a stage where it was affecting not only the components of environment but also the health and very survival of the living beings. During the year 1992 the first three months saw three Rules making exercises.

The Environment (Protection) Rules of 29th January 1992 provides for the environment clearance by the appropriate government for certain projects. The projects are divided into two schedules. There are twenty-four projects in each schedule. The Rules, require clearance of the appropriate government for any expansion, modernisation of the existing industry or any new project coming within the projects mentioned in schedules I & II. In case of the projects mentioned under schedule I, clearance of the central government is necessary. It includes hazardous and non-hazardous projects like river valley project, port harbour, air port, railway line projects and fertilisers, pesticides and insecticides, explosives, asbestoes, potassium syanide, etc. The projects mentioned in schedule II require the clearance of state government. The nature of he projects in schedule II are of minor nature in terms of their impact on environment. For example, ceremics, briqueting, food and milk processing and paper products are some of the projects where an environment clearance was required from the state government. The Rules, in order to get clearance, require the person concerned to submit a detailed project report which includes an environmental-impact assessment report and environmental-management plan in the prescribed manner. It may be pointed out that the Rules should have provided that the report should be prepared by an approved environmental engineer rather than the

personnel of the undertaking who in order to get the clearance might fiddle with the data.

The Environment (Protection) Rules take special care to protect the ecologically sensitive areas. Any project within ten kilometers of the reserved forests or a designated ecological sensitive area or within twenty-five kilometers of a national park or sanctury requires environment clearance from the central government. The central government is further given power to review the environment clearance orders issued by the state government from time to time.

The Public Liability Insurance Rules 1992 [framed on 6th February 1992] prescribe the maximum aggregate liability of the insurer. In case of one accident the maximum award money is fixed as Rs. five crores, but in case of more than one accident during the continuance of the policy or one year, whichever is less, the award money is not to exceed Rs. fifteen crores.

The last Rules of the year, made on 13 March 1992, called the Environment (Protection) Second Amendment Rules 1992, introduced the system of environmental auditing. Section 25 of the Water (Prevention and Control of Pollution) Act 1974 and the Air (Prevention and Control of Pollution) Act 1981 require every person carrying on an industrial operation or process to get the consent of the Water Board and Air Board respectively. The new Rule 14 makes it mandatory for the above persons to submit with the respective board an environment audit report for every financial ending on 31st March. These Rules provide for a detailed application form for environment-audit report. The Rules do not provide whose audit report will be accepted by the board. It should provide for the audit report from the government-recognised environmental auditor. In case such auditor gives an incorrect report, there should be a provision for black listing such auditor.

III. Judicial Decisions

During the year 1992 there were in all sixteen cases[7], decided by the Indian courts, out of which seven were handed down by the Supreme Court and nine were High Court judgments.

In case of the Supreme Court judgments, out of seven opinions, there were judgments delivered by a maximum of five and minimum two judges. Justice Ahmadi sat on maximum Benches, Ranganath Misra, C.J. and Venkatachaliah, J. had to their credit three cases each; followed by Ojha and Singh, JJ. who were parties to two decisions each. The interesting part of the Supreme Court cases was that the decisions adopted a balanced approach in the administration of environmental justice. The year saw

only one judgment where the judiciary was divided; rest of the opinions were unanimous. One of the points which deserves mention is that the Supreme Court of India while administering environmental justice depended, apart from the Indian case law, on the English law and the American case law. The Supreme Court took on an average one to two years in disposing off the matters but there were three cases where the court passed the order in the same year. Thus the Supreme Court adopted a speedy process in delivering environmental justice. In four cases the social-interest groups and in three cases the industry moved the Supreme Court. The Supreme Court cases pertained to the states of Madhya Pradesh, Rajasthan, Punjab and Haryana and the Union Territory of Delhi. It was air pollution which attracted the attention of the court most. The cases which deserve special mention are the *Bhopal Mass Disaster Settlement* and the relief orders thereto and the environment-education cases.

Now coming to the High Court cases, out of the nine cases the Bombay High Court decided the largest number of cases. The High Courts of Karnataka and Kerala decided two cases each, followed by the Orissa and Patna High Courts who delivered one case each. In two-third of the total cases, the Division Bench delivered the judgment and in five out of nine cases, the court gave decision in favour of environment. The interesting aspect of these judgments was that in all the nine cases there was unanimity among the judges in settling the environmental disputes. On an average, the High Courts took two years and six months to deliver the order. The Kerala and the Bombay High Courts were the two High Courts who delivered the judgment in the year of the filing of the writ petition but in other cases the High Courts took five to six years. One High Court had to its credit one case which took eleven years to get the final order of the court. The majority of the cases were relating to water pollution. In three cases the capitalists, and in rest of the cases the social-interest litigant or groups, moved the High Courts. The States of Maharashtra, Karnataka, Kerala, Orissa and Patna were the five states which contributed to the case law of the year 1992.

The Bhopal mass disaster

The Bhopal mass disaster saw two decisions of the Supreme Court of India. One of it was the lengthiest judgement of the year 1992 on environment and the judges were divided. In the first *Union Carbide* case, the settlement of compensation to the Bhopal Mass Disaster victims at 470 million US dollars was challenged. This settlement reached through the Supreme Court exempted the Union Carbide from any further liability including the criminal liability. The main grounds of attack were : firstly, the court was without jurisdiction for such settlement; secondly, the

settlement was reached without any notice or fair hearing to the victims and it was adjudged bad; and lastly, the court had no power to withdraw to itself the criminal proceedings and quash them and such withdrawal was bad in law. Venkatachaliah, J., speaking for himself and K.N. Singh and Ojha, JJ., delivered the majority opinion, Chief Justice Ranganath Misra, C.J., gave the concurring verdict and Ahmadi, J. dissented from the majority opinion.

The Supreme Court brushed aside the first attack on the ground that Articles 136 and 142 (1) vest in the court plenary and residuary power which could be exercised when the need of justice demanded. The contention of violation of principle of natural justice was not accepted in the present case for the simple reason of the magnitude and reminifications of the Bhopal Mass Disaster. Venkatachaliah, J., speaking for the majority, opined:

> "The legal and procedural technicalities should yield to the paramount considerations of justice and fairness.... It is of utmost importance that great issues of human suffering are not subordinated to legal technicalities".[9]

The order of the Supreme Court dated 14th February, 1989 provided that "all criminal proceedings related to and arising out of the disaster shall stand quashed wherever these may be pending." The court took the stand that the power under Article 142 (1) read with section 321 of the Criminal Procedure Code included the power to make the above order. The court did not stop there; it proceeded further and enquired whether on merits there were justifiable grounds to quash the criminal proceedings. Venkatachaliah, J., came to the conclusion that as no specific grounds were given at the stage of quashing the said proceedings, the order was declared as bad.

The other noteable features of the present judgments are : *M.C. Mehta's* strict liability principle was not allowed to operate in the present case by Justice Venkteachaliah because it was "notionally substituted by the settlement fund which now represents and exhausts the liability of the alleged hazardous enterpreneurs, viz. U.C.C. and U.C.I.L." The learned judge further exempted the application of the *Mehta* principle to the Union of India because it could not be treated as a 'joint tort-feasor' rather it was only a welfare state.' Chief Justice Ranganath Misra, refuting the *Mehta* principle, took the stand that the said principle would further delay the relief by ' at least 8 to 10 years' and that too 'at the eventual risk of ultimately losing the legal battle.' There was a divided opinion about the compensation to the victims who may be left out because of exhaution of the Bhopal relief fund. The majority court declared that the Union of India, as a welfare state should make 'good the deficiency, if

any.' The minority brushed aside the role of the Union of India in this connection because it was neither held liable in tort nor was it shown to have acted negligently in entering upon the settlement. It may be pointed out that the minority opinion is correct because when there was no case made out against the Union of India for its involvement in the mass disaster then it would not be justified to shift the responsibility of the pollutor on the innocent party. The concept of welfare state connot be stretched to compensate for the fault of the rich. Moreover, we must not forget that when the burden is shifted on the Union of India it will be ultimately the tax payer, as pointed out by the court, who will be subject to such liability. Thus it would punish the people of India for no fault on their side.

In the present case, the Supreme Court further increased the compensation amount by Rs. 50 crores more. The Supreme Court took into consideration the medical surveillance for those who may develop in future 'any of the dreaded symptoms' and for such future consequences the court opined that:

> "For at least a period of eight years from now the population of Bhopal exposed to the hazards of MIC toxicity should have provision for medical surveillance."

And for this the court ordered for the establishment of a full-fledged hospital of at least 500 bed strength with best of equipment for treatment of MIC related afflictions. The court directed the State of Madhya Pradesh to provide suitable land free of cost within a period of two months for the hospital and, further, that the hospital should be constructed within 18 months. The responsive and co-operative approach of the UCC and the UCIL led Justice Venkatachaliah to "hope and trust that UCC and UCIL will not be found wanting in this behalf." In the whole compensatory exercise the Supreme Court missed the injury and miseries caused to the animals and plants and the adverse effects on the water and soil of Bhopal. These segments of the environment remained uncompensated in the long journey of the *Bhopal Mass Disaster* case.

On the date when the above judgment was delivered, the Supreme Court, consisting of all the judges in the above case, also passed an order[10] that the amount of 5 million dollars given to the Indian Red Cross Society under the order of Justice Keenan, of the Southern District Court at New York, being the part of the settlement money, the unutilised amount should be credited to the Bhopal gas relief fund. Thus the application of the Indian Red Cross to retain the left over amount with it was dismissed by the court. This way the amount which could have been spent on the general medicare in Bhopal would go only to the relief of the victims of Bhopal.

Industrial pollution

V. Lakshmipathy v. State[11] is a black spot in the history of environmental administration where the governmental agencies, instead of fulfilling their constitutional obligation to protect and improve the environment, allowed willfully and actively the degradation of environment of the Garden City of India, Bangalore. An area which was earmarked for residential purpose only was converted into industrialists, abode with the environment conspiracy, on the one hand of the governmental authorities including, the Karnataka Municipal Corporation, the Bangalore Development Authority, the Town Planning Authority, the Health Service Department, etc., and on the other hand of the industrial houses. This change in the use of land, it was urged by the petitioner, was not only without the authority of law but also caused air and noise pollutions which deprived the residents of a clean environment, quality of life, peace and tranquility which was reasonably expected in a residential area. The most shocking scene in this environmental dispute was that none of the concerned authorities and big industrial houses had time to come before the court to defend their case.

In view of the silence and mysterious aloofness, the Karnataka High Court allowed the petition and declared the change in land use and consequential actions thereto as void. The court directed the appropriate authorities to abate the pollution and stop the industrial processes within sixty days from the receipt of the order.

The present case exposes the indifferent and insensitive approach of the government authorities. The court should have ordered these authorities to make good the loss caused by the illegal state action. The role of petitioners deserves apprecition for their persistent efforts to awake the authorities from hibernation, collection of data and materials to support their case and their articulated arguments resulting in a powerful judicial jolt.

The callous approach was repeated in a place none other than the National Capital Territory of Delhi,[12] previously known as Union Territory of Delhi. In spite of the palatial offices of the Delhi Development Authority like the Department of Environment and Forest, stone-crushing industries were allowed to flourish in the nearby areas of Delhi. Delhi has been already labelled by the World Health Organistion as 'the world's third grubbiest, most polluted and unhealthy city'. These authorities, according to the Supreme Court, had been "wholly remiss in the performance of their statutory duties and have failed to protect the environment and control of air pollution." In order to ptotect the environment of the areas nearby

Delhi, the Supreme Court ordered that no stone crushing industry should operate in this area and that the appropriate authorities would create a 'crushing zone' to rehabilitate the displaced stone crushers where these industires could be localised in one place. The court in order to clear any doubt further pointed out that the first part of the order was absolute and not dependent on the fulfilment of the second condition. Though the ban on the stone crushing industries would affect the development process but the Supreme Court was aware of the outcome of its order and it provided an alternative place for the process to continue. This way the Supreme Court leaned in favour of the environmentally sustainable development.

Water pollution

In *Rajiv Ranjan Singh v. State of Bihar,* [13] a newspaper brought out the state of affairs of the environment around Shiv Shankar Chemical Industries Limited, Jagdishpur near Bhagalpur town. It was reported that the untreated trade effluents discharged from the above industrial house caused, in addition to the abnoxious fumes and odours, water pollution, affecting seriously not only the crops and cattles but also the health and well being of the residents of that area. The petitioner, a social worker, moved the Patna High Court against the inaction of both the capitalists and the environmental machineries of the government which was alleged to have infringed the inhabitants' rights guaranteed under Articles 14 and 21 read with Articles 47 and 48A of the Constitution. It was only after the commencement of the judicial proceeding that the Pollution Board and the Bihar Government became active and they ordered for the closure of industrial process which was also challenged in the present case. The Patna High Court concentrated its attention on this part and the court looking to the necessity to preserve the environment on the one hand and the pressing need for the industrialisation of the backward state, the Patna High Court set aside the closure order and allowed the chemical industry to operate subject to certain conditions. However, the High Court warned the company that in case any person contacted any ailment directly related to the company's trade effluent then the company would be responsible for all the expenses of his treatment along with any further compensation to the victim as decided by the court. It is unfortunate that the Patna High Court was so mush engrossed with the development process that it left the plea of protection of the right to environment untouched. The result of present legal battle was that the industry got the victory and the environment was on the loosing side.

One more case[14] to the credit of the environmental lawyer, M.C. Mehta, comes from Cuttack where the history of *Ratlam Municipality*

case[15] is once again repeated. The Cuttack Municipality showed its ignorance and helplessness in the state of pollution and took the shelter under the 'failure of electricity.' The Health Department of the state, instead of accepting its fault, shamelessly pleaded 'no information about the people suffering from pollution', 'not responsible for supply of drinking water', rather it 'is the job of Urban Development Department' and 'subject to availability of funds'. In this case, the water was polluted by the municipal sewage, the domestic waste water from a largest hospital complex of Orissa and the residential areas of the schools of engineering. The result of survey showed that the water was unsustainable for bathing and drinking purposes particularly in respect of biochemical oxygen demand, coliform and turbidity.

The Orissa High Court directed the government to take immediate steps to control water pollution and further issued order to constitute a high power committee to take necessary steps in this regard. All these exercises, according to the court, could be taken within one year. It emerges from the efforts in the present case that the municipality, being the grass root level environmental machinery, supposed to be more responsive to the protection of environment of its area, did not perform its due constitutional role; rather it became functional irrelevant and insensitive. The judiciary and the public opinion must realise that pollution is a matter which affects not just few individuals but the humanity at large and they must come down on the inactive authority more severely so that they rise much early before the degradation of environment takes a serious turn.

Forest protection

Forests play an important role in the preservation and maintenance of our environment. One of the main causes of the present state of degradation of the natural environment is the withering away of the forests. This sensitive area led K.K. Vasant, a practising advocate of Bangalore, to knock the doors of the High Court of Karnataka for appropriate relief for the protection of the forests of the western side of the western ghats and also to maintain the ecological balance in the state[16]. The petitioner requested the court to issue eleven directions to the appropriate authorities. These directions included mainly not to allow "any exploitation in any way whatsoever, and there should be strict execution of the same, to identify, preserve and protect the rich flora and fauna and other medicinal plants in all forests to achieve the coverage of forest area to a minimum of 35% in the State of Karnataka.

The Karnataka High Court,realising that this was a public interest litigation, issued notice through the newspaper to the persons interested

to support or oppose the petition and allowed as many as 28 respondents for impleading. On behalf of the State of Karnataka the charges were refuted as incorrect or baseless and a stand was taken that "forest is a renewable resource available to mankind not only for protection purposes but for productive purposes as well and that "in no country all the forests are preserved totally in prime condition. "The state government concluded its argument by saying that it had taken due care" to strike a balance between industrialisation in production as well as preservation of forests". The High Court of Karnataka upheld this stand.

It may be pointed out that the development process requires the use of forests and forest products, but it should not be indiscriminate cutting of forests, rather it should aim at a sustainable development. The capitalist took another stand that if the petition was accepted then it would affect 'its investment' and 'the labour force,' but the court did not respond to it.

The High Court, applying the doctrine of "separation of powers,' dismissed the petition on the ground that the petitioner's request required the court to interfere with the daily administration of the state or in the making of laws by the legislature wherein 'the court has no role whatsoever to play,[17]. It is submitted that the court should have at least balanced the development process against the sustainable environment plan instead of applying rigidly the doctrine of separation of powers. There were occasions when the judiciary did not hesitate in interferring in the day to day administration and in the inaction of the legislature. However, one thing which emerges from this case is the great concern shown by the public-intersest group for the reckless deforestation. It is unfortunate that the court instead of saying 'no relief' drives the petitioner. "to move the concerned legislators who came from the areas of the Western Ghat to take initiative and to fill up the lacuna..... and get the relief which the court is unable to give". Does not the inability of the High Court go against the general judicial vision in the field of environment ? The role of the Indian judiciary in this area has been appreciated not only as the competent authority to handle environmental dispute but also as well equipped to launch any innovation.

A further assault on the forest land can be seen in *Tarun Bharat Sangh, Alwar v. Union of India.*[18] In the environmentaly sensitive area known as Sariska Tiger Park, having the protection of the multi-legislations including the Rajasthan Wild Animals and Birds Protection Act 1951, the Rajasthan Forest Act 1953 and the Wild Life Protection Act 1972, the government of Rajasthan issued 400 mining privileges to various persons. These privileges included extraction of lime and dolomite stones

by blasting, drilling, chiselling, etc., in the above well protected area. The social action group claimed that the above mining operations would not only disturb the forest and the habitat of wild life but also affect the ecology of the area. For the illegal act of the government of Rajasthan, it is surprising that the Supreme Court simply said, "It is indeed odd", rather it should have come down heavily on the default of the government in view of the protected area under number of laws. The government goes scot free in this case. The leaseholders of mines were directed, it is submitted correctly, by the court that "no mining operation of whatever nature shall be carried on within the protected area," and further during the pendency of the writ petition the government was also prohibited from granting or renewing any lease in the protected area. The court, looking to all the circumstances of the case, appointed a committee to "ensure the enforcement of the order of the court and to prevent devastation of the environment and wild life in the protected are". The Supreme Court further directed the committee to asses the damage to the environment and suggest the remedial measures thereto along with the necessary financial outlays for the restoration purpose.

Another case where the development process came in conflict with the preservation of forests was the *Goa Foundation* case.[19] In this case the central government constituted the Konkan Railway Corporation to construct a rail line for 760 kilometers running into four states. The Corporation, out of the total estimated cost of Rs. 1391 crores, already invested Rs. 300 crores and the projected investment for the 1991-1992 was Rs. 400 crores. The Goa Foundation, a registered society working for the protection of environment, moved the Bombay High Court to withhold the operation till the corporation got the environment clearance from the Union Ministry of Environment and Forest. The main ground of attack was that the proposed alignment was destructive of the environment and the eco-system of the above areas and violated the citizens' right under Article 21 of the Constitution. The corporation refuted the above charges as without any substance and deviod of any merit. The High Court also did not accept the contentions of the petitioner and dismissed the petition. The court took into account the project of jigantic magnitude involving substantial investment and future cost excelleration, which became available after the people fought for over a century and it would provide the basic necessity of cheap and quick mode of transport leading to speedy development of backward areas' and will hearld the prosperity for the poor people on the western coast. In view of these facts the High Court came to the conclusion that it was not open for the court to frustrate the project of such a'huge public utility' to safeguard the interest of 'few

persons' or 'petty interests'.

It may be pointed out that the court looked to the immediate need of a rail line and the peoples' demand. When a rail line is constructed through the forests, such an area will be disturbed and it will have long term effects, for example, first the forest is cut for laying the rail lines followed by further deforestation for the railway stations, township, roads and industrial area and what not. Can such dimension of deforestation be called a matter of 'few persons' interest' or 'petty interests' ?

It is unfortunate that the court relied on the reports of the chairman of the Railway Board and the Rail India Technical and Economical Services and did not press for a report by an impartial environment expert. Further, the court refused to take notice of the alleged correspondence between the inter-ministerial departments reflecting that the Environment Ministry was not inclined to give permission to the corporation for the said project and also the public objections thereto. When the court itself confessed that it would have 'some adverse' effect on the ecology and environment, then it should not have been swayed away with the jigantic project having 'huge public utility'. More set back to the environmental justice was that the court left the balancing of the environment and development to the persons "who are familiar and specialised in the field." Is not the court shirking its environmental responsibility of examining the environment impact assessment and the management plan.? Will not the opinion of the experts belonging to the same interest group result in a biased opinion ?

Another dimension of the *Goa Foundation* case nas been that the court upheld the plea of the corporation as correct in view of the provision of section 11 of the Railways Act 1989. This section, inter alia, provides that:

> "Notwithstanding anything contained in any other law, the railway administration may, for the purpose of constructing or maintaining a railway, make or construct, as it thinks proper."

This section was interpreted by the Bombay High Court as having wide ambit as not to attract the provisions of the Environment (Protection) Act which was enacted before the Railways Act. The court, it seems, missed the provision of section 24 of the Environment (Protection) Act which also says that the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other enactment. One can see here the court's inclination towards the development but it would have been better had the court adopted a harmonious construction putting more emphasis on the sustainable development.

Environmental education & awareness

One of the basic postulates of the protection of environment is the environmental literacy and awareness among the people. The more environmentally literate a nation the better environment it can have. The Indian environmental laws[20] have provisions for both the above aspects but not much serious attention is paid by the appropriate governmental agencies. In this slow process of implementation of the environmental law of education and mass awareness, the *M.C. Mehta* case[21] must deserve all praise. The present case was public-interest litigation where the Supreme Court of India was moved under Article 32 of the Constitution of India by a practising advocate of the Supreme Court who had been not only taking a keen interest in matters relating to environment and pollution but also knocked the doors of the appex and High Courts to get environmental justice. The petitioner claimed reliefs in the form of appropriate directions to be issued to the authorities responsible for education and mass awarencess of environment and pollution.

The Supreme Court started with the history of environmental awareness in India. It began with the year 1972 when the Stockholm Conference on environment took place. The present author has time and again raised the voice that the starting point of the Indian environmental law cannot be the above period, rather it is much more older than 1972. The second point the court touched upon was the importance of education. The first advantage, according to the court, was that it helped in 'prescription', 'enforcement' and 'acceptance' of law by the people. Secondly, it would regenerate the died out anxiety to do good to the needy or for the society and thus, in particular, it would control the vice of pollution and its evil consequences. And lastly, according to the court, democratic polity demanded dissemination of information so that the social level was kept up.

The directives of the Supreme Court may be divided into two parts. The first part dealt with the mechanisms to be adapted to spread mass awareness on environment in the people of India. The court touched upon three segments of disseminating authorities. The cinema halls, touring cinemas and video parlours would now be given license to run their establishment provided that they exhibit at least two slides or messages on environment in each show undertaken by them. The slides, as per the court's direction, would be prepared by the Ministry of Environment within two months. The slides would not only 'efficiently carry the message home on various aspects of environment' but also 'at once be impressive, striking and leave an impact on every one who sees the slides.' These slides would be distributed to the collector of each district who

in turn would see that they were exhibited in the above places, failing which the collector was directed by the Supreme Court to cancel their licence.

These directions attract some difficulties. Who will prepare the slides ?. If the answer is the government or its officials then the next question arises, how far will the message be impartial ? Will it not tell the one-sided story only ? If it is to be given to any outside agency then will not the capitalist have a hold in the matter ? Who will decide that the slide is 'effective, impressive, 'striking' 'leaving impact on every one who sees the slide, ? Further, it does not say about the time when it should be shown and its duration. When the exhibition is free of cost then the cienma halls may show the slide at an odd time and for a short duration. The Ministry of Environment was further required to complete the above formilities within 'two months' from the date of the order of the court. was it not too short a period for its compliance ?

Now coming to the directions to the All India Radio and the Doordarshan authorities, the Ministry of Information and Broadcasting agreed to devote five to seven minutes every day and once a week to a longer programme on the All India Radio and Doordarshan. The court required these programmes to be 'interesting'. The T.V. viewers have varities of tests and various groups of age, sex and education. And therefore one uniform programme for all these sections and cross-sections of viewers may not be of interest to all.

The court also issued directions relating to teaching of environment in the educational institutions. So far as the school education was concerned, the court directed that a compulsory course on environment should be introduced. In case of the higher education, the colleges and the universities should take steps to enforce compulsory education on environment in a 'graded way.' However, the court fixed the outer time limit for its enforcement, i.e. 'next academic year.' It may be pointed out that the court had given only five to six months to get infra-structure ready for the compulsory course, It will require specialists to teach the course, text books,journals, lab and field works, pollution spot visits, preparation and approval of the corse by the appropriate authorities, financial resources, etc. It may be mentioned that the judiciary has evolved the right to education as a fundamental right and it imposes a corresponding duty on the state, including the educational institutions, to make necessary arrangements to the give life to the above right.[22] There is already a specific duty on the state under Article 41 of the Constitution of India to make effective provision for securing the right to education. The educational institutions must come forward to fulfil these constitutional directives

including the education relating to environment within reasonable time. The environmental literacy would to a cetain extent avoid further degradation of the environment.

In the age of fundamental right to education and the duty of the government to educate the people in the field of environment, there are occasions when the governmental agency tries to stifle, suffocate or gag this right and creates inroads in spreading such education and allow the people of India to remain environmentally illiterate. Such autocracy in democracy can be seen in *Life Insurance Corporation of India v. Manubhai Shah.*[23] In the present case in one of the appeals before the Supreme Court the facts were that a trust producted a documentary film on the Bhopal Mass Disaser entitled 'Beyond Genocide.' In 1987 this film won the Golden Lotus award, being the best non-feature film of 1987. The respondent submitted the film to Doordarshan for its telecast but Doordarshan refused to telecast the same on the ground : "the contents being outdated do not have relevance now for the telecast." But the ground culled out from the pleading tell the horrifying story of the education-right jurisprudence. The grounds included, "the film was outdated, outmoded, irrelevant, unfair, imbalanced"; further, "the political parties were raising various issues of the Bhopal Mass Disaster," "it dealt with a sub-judice matter." To these, two more grounds were added in appeal which stated : it was likely "to create commotion to the already charged atmosphere," and finally, the devastating truth comes out in the end that the film criticised the action of the state government. In the present case the government's intolerance crossed the boundries of Article 19(2) which permits the state by law to restrict the fundamental rights through reasonable restriction on eight specifically provided grounds, and it resorted to dictatiorial attitude in the world of freedom of speech and expression. The High Court, setting aside the order of refusal, directed Doordarshan to telecast the respondent's film at a date and time looking to the public interest. The Supreme Court also came down heavily on Doordarshan who could submit hardly any material to support the grounds of refusal and the court upheld the High Court order as valid. Ahmadi, J., speaking for himself and Punchhi, J., in view of the Mass Disaster rightly pointed out that the community had keen interest to know:

> "What actually had happened, what is happenning, what remedial measures state authorities are taking, and what are the likely consequence of the gas leak."

The court further refused the baseless charges that the film had become 'outdated' and 'lost relevance' because, according to the court, "it is even today of relevance and the press has been writing about it periodically."

It is surprising that the judiciary did not pass any stricture against Doordarshan nor ordered to compensate the respondent for ligalising its illegality and the long hibernation of the state in the field of environmental education[25]. Is not the government's approach in not allowing a powerful means of communication which had stronger impact on the visual and oral senses of the spectators in the present case anti-environmental ?

The *Life Insurance* case attracts one more criticism pertaining to the guidelines framed by the central government for screening of films for exhibition. The High Court took the stand that Article 19(2) allowed only 'any law' to impose reasonable restrictions on the grounds mentioned therein and the purely departmental executive instructions were not protected under the said Article. The Supreme Court took the stand that the guidelines had 'statutory flavour and they fall within the protective umbrella of Article 19(2)'. It may be pointed out that the central government from time to time issues notifications and has laid down fifteen grounds under which a film may not be entitled to get a clearance certificate. These grounds restrict the freedom of speech and expression, a death-knell to democracy, the court should have required a democratic process to effect the basic postulate of democracy rather than the matter to be decided by the autocrates.

Pollution cess and charge

Those who pollute the water or environment must also pay for its clearance. There were three cases in this area where the Supreme Court[26] and the Bombay and the Kerala High Courts exempted the industrialists and the traders from paying the water pollution cess and trade refuge charge. Parliament passed the Water (Prevention and Control of Pollution) Cess Act 1977 to augment the resources of the water boards. The cess was imposed on certain specified industries which included industry of 'processing of animal or vegetable products'. The question before the Supreme Court and the Kerala High Court was whether manufacture of sugar from sugarcane or rubber from latex respectively was 'processing of vegetable products.' Both the courts, adopting a 'strict' construction of the fiscal measure, held that the above industries were not covered by the specified industries and no cess could be imposed on them.

It may be pointed out that there were in all 15 industries specified for the purpose of cess liability. The Items 1 to 14 deal with certain specified industries: while Item 15 says "processing of animal or vegetable products industry." This means that it deal with the residuary industries of two broad types: the animal and 'vegetable' products. And thus vegetable products cannot be confined to literal meaning.[29]

Further, one has to make a distinction between a 'tax' and cess and

the tax case law cannot afford any help in the present matter. The pollution cess was nothing but a 'fee'. The intention of the legislature also shows that it was imposed to help the economy of pollution prevention and control measures and both the above industries contribute to the pollution of water, and hence they cannot be allowed to go scot free form giving their due share in the economy of prevention and control of water pollution.

IV. Conclusion

The legislative approach indicates the following directions. The aftermath of the Bhopal Mass Disaster activised the legislature to pay special attention to industrial accidents. The industrialists were subjected to further financial liabilities so as to better administer the relief programme. The vicarious liability was given further extension so as to bring in the liability zone more persons except the government departments which should have been included in the present exercise. India for the first time introduced two important control mechanisms. The environmental clearance certificate; and secondly, the compulsory environmental auditing. It is expected that these measures would to a certain extent save the environment from further degradation. It is only time that will show how much success will these provisions get in the inactive and ineffective machineries and the poverty jurisprudence. The need of the time is that the environmental authorities must be made accountable for their responsibilities. To sum up, the environmental law of 1992 deserves appreciation for tilting the balance on the side of the protection of environment.

The environmental case law of 1992 showed many ups and downs. The increase in number of cases shows the people's concern over the illegal assaults on the environment. The social workers and the environment lovers deserve all praise for taking active part in moving the various courts for environmental justice. There were in all sixteen cases wherein 36 judges participated in the administration of environmental justice and except one judge, Ahmadi, J., of the Supreme Court, dissenting, the rest of the judges of the Supreme Court and High Courts adopted unanimity in the settlement of the environmental disputes. This shows that the courts tried to give a clear vision to the emerging law of environment. In majority of cases, the judiciary was confronted with the problems of water and air pollution. In litigations, the States of Madhya Pradesh and Maharashtra contributed the largest number of cases followed by Delhi, Karnataka and Kerala. The courts generally tried to deliver speedy justice, a basic postulate of the environmental justice. In important case the courts fixed a time schedule within which the orders of the judiciary must be complied with. On the point of balancing environment and development, in majority of the cases the Indian courts have decided in favour of environment.

The industrial and water polluuon cases have exposed the industrial houses and also the inactive and callous environmental authorities but no sanction was used to make these machineries responsive and environmentally sensitive. The Mass Disaster had multi-dimensional and complex situations but the Indian judiciary did not shirk its responsibility and followed the principle that the pollutor must pay for not only the present but also the future losses to the environment and further there sould be no bargain for the responsibilities. The courts adopted a balanced approach so that the environmentally sustainable development could operate in the three important cities, Bangalore, Bhopal and Delhi.

The forest case-law depicts a contrast picture where on the one hand the Supreme Court and the High Courts adopted a divided approach; and on the other, the majority of the case law favoured the development over environment. The judiciary was carried away by the jigantic nature of the project, the long pending public demand, the capitalist's investments and the fate of the forest labour force. It did not take into account long-term impact of the deforestation. The saddest part in the present scene is that the petitioners were directed to move the legislators of the concerned constituencies or the persons familiar and specialists in the field. In spite of the above failures, the judiciary made two important contributions : firstly, the general public was invited to give their responses in the public interest litigation; and secondly, apart from the prevention and control of pollution, one more responsibility was imposed on the state--to restore the environment.

The finest contribution of the environmental case-law of 1992 was the guidelines to spread the environmental education to the masses through the mass media and educational institution and further to make available to the people of India the right to know and their right to information about their environment. Is not this a matter of coincidence that the Indian environmental jurisprudence of education, knowledge and information was emerging at an opportune time when the Rio Conference 1992 also raised a similar voice? Once the environmental literacy rate reaches to a reasonable level then no force, pressure or power can withstand the protectionists' wave length. In this branch of environment what is necessary is not the bureaucratisation or politicisiation but the domocratisation of education. The court has done its job and now the government and people must see that court's directions travel from court-room to masses.

References

1. XXII *Environmental Policy and Law* 226 (1992).
2. Id. at 207.
3. *Union Carbide Corpt. v. Union of India,* AIR 1990 SC 273.
4. *Union Carbide Corpt. v. Union of India,* AIR 1992 SC 248.
5. *M.C. Mehta v. Union of India,* AIR 1987 SC 965.
6. Public Liability Insurance (Amendment) Act 1992, sec. 7A
7. The above data is based on the cases reported in the *All India Judgments* (Supreme Court) 1992.
8. Supra note 4.
9. Id at 302.
10. *Union Carbide Corpt. v. Union of India,* AIR 1992 SC 317.
11. AIR 1992 Kant. 57.
12. *M.C Mehta v. Union of India,* (1992) 3 SCC 256.
13. AIR 1992 Pat. 86.
14. *M.C. Mehta v. State,* AIR 1992 Ori. 225
15. *Ratlam Municipality v. Vardichand,* AIR 1980 SC 1622.
16. *K.K Vasanta v. State,* AIR 1992 Kant. 256.
17. The Karnataka High Court, following Bhagwati, C.J. 's development-oriented approach in *Rural Litigation and Entitlement Kendra v. State of U.P.*, AIR 1988 SC 2187 vetoed the capitalist approach.
18. AIR 1992 SC 514.
19. *Goa Foundation v. Konkan Rly. Corpt.*, AIR 1992 Bom.
20. See ss. 16 (1) (d-f), 17 (1) (c-e), Water Act 1974 and Air Act 1981; sec. 3 (2) (xii), Environment Act 1986.
21. *M.C.Mehta v. Union of India,* AIR 1992 SC 382.
22. *Chandel v. Univ. of Delhi,* AIR 1978 Del. 308.
23. (1992) 3 SCC 637.
24. *Ramesh v. Union of India,* (1988) 1 SCC 668.
25. See, for example, *Rabindra Nath Ghosal v. Univ. of Calcutta,* AIR 1992 Cal. 207, where the Calcutta High Court awarded compensation to the petitioner to the extent of Rs. 60,000/- for the inaction of the educational institution.
26. *Saraswati Sugar Mills v. Haryana State Board,* AIR 1992 SC 224.
27. *D.B Ghadiali v. Jamshed Kanga,* AIR 1992 Bom 13.
28. *Harrisons Malayalam Ltd. v. Kerala State Pollution Control Board,* AIR 1992 Ker 168.
29. See *Kisan Sahakari Chini Mills Ltd. v. State of U.P.*, AIR 1987 All. 298 where the court allowed the Cess Act to apply to the sugar industry. See aslo *Travancore Sugars and Chemicals Ltd. v. Pollution Control Board, (1990) 2 KLT 924.*

MOHAMMAD SHAMIM
Judge, High Court of Delhi

Expediting Justice —How to Clear Backlog of Cases in the Courts

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I. The Problem

One of the biggest problems besetting the country at present is with regard to the arrears of cases pending before the courts, including the High Courts and the Supreme Court, i.e., the apex court. According to the latest figures published by the government of India with regard to the pendency of the cases in the Supreme Court and different High Courts, the pending cases were as under on December 31, 1991:

(a)	Supreme Court	134221
(b)	High Courts	
	Gujarat	91156
	Rajasthan	91578
	Punjab & Haryana	97757
	Sikkim	72
	Himachal Predesh	13029
	Andhra Predesh	76314
	Delhi	13453

In some other High Court the number of pending cases on 31 July 1991 was as follows:

Allahabad	568847
Madhya Pradesh	70096
Assam	22499

On 31 December 1990 there were 23657 pending cases in the Madras High Court; while on 30 June 1990 their number in the Calcutta High Court was 200528.

A mere glance at the above mentioned figures of pendency is sufficient enough to scare a man out of his wits.

The 18th Chief Justice of the Supreme Court of India, Justice Venkatramiah once observed in view of the above pendency that if steps were not taken within a year or so to clear the above backlog, the judicial administration may collapse under its own weight. This observation may not be the whole truth but it has got a grain of truth. Nobody would disagree with me when I say that justice is one of the

attributes of God Almighty and those who have been entrusted with this job are the regents of God on earth. Hence a sacred duty has been cast on their shoulders to administer justice as expeditiously as possible.

It is said 'justice delayed is justice denied'. Thus, the question is how to cut the gordian knot which is as knotted as the hairs of a beloved and requires gargantuan efforts to find a way out of this impasse. In fact by now it has defied all solutions and still stares at our faces.

II. Number of Judges

The first and foremost step which can be taken in this direction is to increase the strength of the judges. At present, the number of judges who are working in different High Courts and subordinate courts is much less than what it ought to be keeping in view the pendency of the cases. The population of our country is more than 82 crores, yet the number of the judges for the aforesaid population is only 7,615 as per the figures collected in the year 1987-- i.e., an average of 10.5 judges per million of population. In fact, this was one of the grounds urged by the Union of India before the American courts to proceed with the Bhopal gas tragedy case in 1985.

Thus, the strength of the judges is almost negligible in proportion to the cases which they have to deal with. Between 50 to 60 cases are enlisted per day before a judge on the original side of the Delhi High Court and other High Courts. The position is in no way different in the Supreme Court. Thus, it is well nigh impossible for a judge to dispose of the cases. As a corollary thereof adjournments are given for the asking.

A comparative study of the number of the judges working in other countries go a long way to show how far we are lagging behind. Below are being given the number of judges per million of the population in some of the countries :

country	no. of judges per million
1. Australia	41.6
2. Canada	75.2
3. England	50.9
4. U.S.A.	107

In fact the Law Commission in one of its reports strongly recommended that the number of judges should be raised to 50 per million. However, like any other advice it also fell flat on deaf ears as

usual. Thus, there is nothing strange that the condition is going from bad to worse with no hope of any amelioration in the near future.

III. Efficiency & Skill

Nobody would disagree with me when I say that a competent and efficient judge is not only an asset to the judiciary but a blessing to the country. An efficient judge, whenever a case is put up before him, understands the core of the problem at once and can deal with it immediately. He can distinguish between a frivolous case and a genuine case and can see through the mischief of the litigant and nip it in the bud.

This is not possible for an inefficient judge before whom the trial may continue for years together in as much as he is not in a position to have proper control over the proceedings. Thus, the need for appointment of a meritorious and efficient person as a judge who can quicken the pace of the disposal can hardly be overemphasised. Hence, the appointment of a judge should be only on merit and on of no other consideration.

Complaints are mounting that the judges do not deliver the judgments quickly. Instances are cited of the cases when judgments were not delivered after the conclusion of arguments for months/years together. In certain cases the judges retired without delivering the judgments, leaving the litigant in a lurch. The poor creature had to start afresh.

Thus a time frame should be fixed for the judges to deliver the judgment after the conclusion of the arguments. Justice Venkatramiah is reported to have issued instructions in this regard that the Bench which fails to deliver the judgment within three months after the conclusion of the arguments must indicate the reasons for the delay.

People now-a-days often talk of the dwindling standards of the quality of the judges. To improve the quality of the judges, only those persons should be appointed as judges who possess honesty, integrity, impartiality, intrepidity, and efficiency.

The next point which I would lay emphasis on is that the judges should be brief and concise in their judgments. Now-a-days the judges have taken fancy to writing long judgments. 'Brevity is supposed to be the soul of the wit'. This maxim is no less applicable to a judge.

"Words are like leaves and where they most abound.
Much fruit of sense beneath is rarely found."

We should learn a lesson in this connection from our fellow judges of the past who wrote very brief judgments running into three or four

pages. A litigant is more concerned with the dispensation of justice than with the quality of the judgment. A judge is not required to write a thesis except in those few discerning few cases where he is required to lay down the law. Verbosity in judgment should be avoided at every cost. It will facilitate the disposal of the case.

IV. Lawyers' Role

One of the reasons for the delay in the disposal of cases is that the arguments continue for months together. In order to do away with this problem the lawyers should be asked to give their arguments in writing and the time for addressing the arguments orally should be confined to an hour or so if the lawyer so desires even after the submission of the written arguments. It would go a long way in curtailing the delay in disposal of the cases.

Learned counsel for the parties more often than not seek adjournment on the ground that they are not available. It is true that this is no ground for adjournment under Order XVII of the Civil Procedure Code , yet most of the cases are adjourned on this ground. Thus, the said provision of law has almost been flung to the winds. It is observed more in its breach. What is required is that it should be strictly complied with.

It has been observed that the parties who want to delay the proceedings often take recourse to the provisions under Order XXIII Rule 3(1) of the CPC by moving an application under the said provision of law, alleging therein that the matter has been settled amicably. The moment an application is moved under the CPC that the matter has been compromised, it is denied by the opposite party and the court has to ascertain the factum of compromise. This would be done by recording evidence. The aforesaid provision thus often helps those who want to delay the proceedings. It has proved itself to be a veritable source for adjournments. By moving an application under the said provision of law proceedings can always be obstructed. Thus, I feel that the abovesaid provision should be amended to do away with the said mischief.

V. Appeals & Revisions

It has been observed that the parties often delay the disposal of cases by going in appeal or revision against every order passed by a judge. Some sort of check or restraint is required to be put on the exercise of this right. Once the parties choose a particular forum for ventilating their grievances, they should be bound by the verdict given by the presiding officer of that forum. Why should they be allowed to

question it? Even if they are allowed to question it, they should be permitted to do so only once. I thus feel that a litigant should not be provided with a right of second appeal.

In case it is not completely abolished, at least it should be suitably amended to provide appeals only in those discerning few cases where some point of law is involved. The High Courts and the Supreme Court should be very choosy and selective in admitting the appeals--because once an appeal is admitted it takes at least 10 to 12 years in disposing it of. There should be no appeals against interlocutory orders.

VI. Criminal Cases

If we want to do away with the delay in the disposal of criminal cases, we should make every offence compoundable by the parties. At present the situation which is obtaining in our country is that only some cases are compoundable with the consent of the parties, while in others the permission of the court is required to enter into a compromise. Majority of the offences mentioned in the Indian Penal Code are not compoundable even when the parties are willing to do so.

Whenever an offence is committed, it gives rise to feelings of vengeance. But what happens later on is that passions subside and feelings which upsurged within cool down with the passage of time, as the man happens to be oblivious by nature. Thus, it has been observed that a compromise can be effected in every case, irrespective of the nature of the offence, whether it is murder, dacoity, rape or any other offence. So, what the parties do is that they take recourse to out-of-court settlement.

One of the courses adopted by them is that the aggrieved or injured party charges a hefty amount from the accused for not prosecuting him. This they can afford to do by not deposing against him at the time of recording of evidence. When they appear before the court as witnesses, they either pretend ignorance with regard to the facts of the case or refuse to identify the culprit, with the result that the entire trial is reduced to a mockery and becomes an exercise in futility and a sheer wastage of time of the court. Thus by making every offence compoundable we would not only quicken the pace of the disposal but would also avoid the discomfiture and embarrassment which the judge is put to while presiding over such mock trials.

VII. Conclusion

Last but not the least, the panacea for the delay which we are suffering from lies in our mind and not outside. The crying need of the time is an improvement in character. Character is the rarest commodity

in our country. If we take a solemn oath not to bring forward false claims and desist from putting up false defences, it would lead not only to a marked decline in the institution of cases but would also quicken the pace of disposal.

Every case now-a-days takes a very long time to adjudicate upon. The question is why? The answer is not far to seek. People of our country never come out with truth. I may illustrate my point by citing an example. A bank files a suit for recovery against a defendant, It will take no time for the court to settle the dispute if the claim is admitted by the defendant. However, what has been observed is that the claim is denied even in view of the overwhelming evidence. It leads to protracted trials. In matrimonial cases the husband and wife are not ready to see the faces of each other, but the litigation goes on for years together simply because of instinct of vengeance not to allow the other spouse to marry again or lead a peaceful life.

Thus, a change in our mental attitude is very much necessary to cope with the problem. A person should approach the court with a view to seeking justice and with no other motive. He should be there to help the court in arriving at a correct conclusion. As ill luck would have it, the people now approach the court, more often than not, for the purpose of obstructing the course of justice. They raise all sorts of false pleas and defences with the sole intention of delaying the disposal of the case. The court naturally takes a lot of time in sifting the grain from the chaff.

VIRENDRA KUMAR AHUJA
Research Associate, Faculty of Law, Delhi University

Space Activities and Environmental Pollution — A Critique

I. Introduction

Since that historic date of October 4, 1957, when Soviet Union launched the SPUTNIK-I into orbit, a new era began in the life of mankind known as the space age which changed the ideas, sciences, communications and life itself. Only a few years later, in April 1961 man himself entered outer space and by the end of the same decade, in 1969, the first astronaut landed on the moon and brought back samples of rock from that celestial body.

The rapid development of space science and technology opened far-reaching prospects for human knowledge and experiences. Today, outer space is being used for following three basic types of space activities:

(i) scientific investigation of outer space,

(ii) manned space flights, and

(iii) utilization of artificial earth satellites for telecommunication, meteorology, remote sensing of the earth's natural resources, geodesy, direct broadcasting and navigation.

Space law already recognizes the rights of states to explore and use for peaceful purpose the outer space including the moon and other celestial bodies. At the early stages of outer space exploration, states were the only actors in outer space because of the high cost of space vehicles, technologies and other factors. But later on, private enterprizes and international organisations have also joined them in the endeavour. This is mainly because some of the space activities hold out the promise of commercial gains.

Though the rapid progress of space technology had opened up enormous opportunities for the exploration of outer space, the intensive and extensive exploration of outer space and of the moon and other celestial bodies has led to a situation in which it has become necessary to take measures to protect the environment of the earth and its neighbourhood outer space from the hazards brought by the space activities.

Although, the existing legal regime consists of a few treaties and agreements having some relevant provisions seeking protection of the environment of the earth and its neighbourhood outer space, but these are not adequate today.

II. Environmental Pollution by Space Activities

In the course of his day-to-day existence, man has always ben obliged to submit himself to dangers of different kinds and to run the risk of being involved in accidents.[1] Quite apart from the small risk of accidents to individuals engaged in space activities, there is also a potential risk of damage to the environment of the earth and the outer space including the moon and other celestial bodies.

The launching of vehicles to outer space and celestial bodies is known to involve inevitable contamination as they emit exhaust gases throughout their burn. The terms "pollution and contamination" denote the introduction into an environment of toxic substances or other elements, materials or energy in quantities that exceed the natural ability of the environment to render them harmless or purify them and thus cause harm to animate and inanimate nature, and the health and welfare of man.[2]

Chemical pollution

A spacecraft while launching produces the so-called "ground cloud" consisting of exhaust gases, cooling water, sand and dust.[3] Its engine injects exhaust material into the atmosphere throughout its burn. The exhaust gases from spacecraft are mainly composed of nitrogen oxide, carbon dioxide, chlorine and hydrogen chloride, the latter two having a depleting effect on the ozone layer which is situated about 16 to 48 kilometers above the earth's surface. The ozone depletion results in increase of incoming ultraviolet radiation which causes harmful effects on plants, and skin cancer, eye damage, etc. on animals. Thus, the ozone layer, by absorbing the sun's harmful ultraviolet rays, constitutes a very important protective shield around the earth.[4]

The exhaust gases and operational water may provoke large local changes in the ionosphere situated about 80 kilometers above the earth's surface. These elements can affect the electron density, cause plasma depletion and create a "hole" in the ionosphere. By reducing the density of the electrons in the ionosphere, these elements may change the radio communications.[5]

Biological pollution

There are two types of possible biological contamination associated with space activities though there is no evidence that any danger really exists. These are 'forward' and 'back' contamination.

"Forward contamination" may occur when micro-organisms from earth are carried by spacecraft to other planets or celestial bodies creating distortion of biological conditions prevailing there.

Earlier, sterilization of spacecraft was considered necessary in order to prevent distortion of biological conditions on the moon and other celestial bodies. But in the due course of space activities it was decided that the surfaces of the planets are so hostile to life that they would be totally unsuitable to the development of terrestrial organisms. Consequently the risk of contaminating the planets with terrestrial micro-organisms is not of serious concern.

"Back contamination" involves the contamination of the earth by micro-organisms brought to the earth or its atmosphere from other planets or celestial bodies. Since there is no evidence that life forms exist outside the earth's biosphere, the possibility of back contamination is very small.

Radiological pollution

Active payloads with Nuclear Power Sources (NPS) on board are a prime source of radioactive contamination. Collisions between active payloads and space debris or other space objects could release radioactive contamination and other waste products into the earth and outer space environment.

Radiological pollution also occurs due to disintegration or failure of launching of space objects carrying NPS. The possibility of malfunctioning nuclear powered satellites entering the earth's atmosphere is not rare and several such incidents have already been recorded. For example, the U.S. Transit/SNAP-9A in 1964,[6] Nimbus/SNAP-19 in 1968,[7] Apollo 13/SNAP-27 in 1970[8], COSMOS-954 in 1977[9] and COSMOS-1402 in 1982[10] caused radiological pollution of the environment.

A 1986 study indicated that 48 radioactive satellite components carrying more than one tonne of highly enriched uranium-235, plutonium-238 and assorted fission products are orbiting earth.[11] Since the half-life of uranium-235 is in excess of 7,00,000 years, the impact of a spent NPS fuel core with a space station could be devastating, causing radioactive contamination in addition to structural damage.[12] It is estimated that by the end of this century, there will be more than three tonnes of toxic fuel and fission products in orbit unless there are setbacks in NPS satellite programmes.

Space debris

The greatest threat to human activities in outer space has been recognized to be the hazards coming from space debris. Space near the earth is becoming filled with an increasing quantity of man-made debris of spacecraft. This debris orbiting the earth poses dangers to spacecraft

and astronauts alike. Since such debris travels at a speed of approximately 35,000 km per hour in most cases, even small fragments can do enormous damage.[13] They have even aborted space missions by damaging spacecrafts.

Space debris has been divided into four classes: inactive payloads, operational debris, fragmentation debris and microparticulate matter.[14]

Inactive payloads are those formerly active payloads which do not any more perform any useful function or are out of control of their operators. Spent or defunct satellites and space probes dominate this category.

Operational debris are those objects associated with space activities, which remain in outer space. They consist of materials such as burnt-out first and second-stage rocket bodies, orbital transfer vehicles, apogee kick motors and other mission related objects e.g., ejected satellite shrouds and clamps, exploded restraining bolts, fairings exploded fuel tanks, window and lens covers and flakes of paint peeled off from orbiting space objects.

Fragmentation debris are produced when space objects break up as a result of explosions, collisions and possible other unknown phenomena.

Microparticulate matter consists of particles, space glow and released materials including cabin leakage, outgassing of heavy molecules, water dumps, flash evaporator system operation, reaction control system engine firings and gases.

The latest available issue of the Satellite Situation Report of 30 June 1988 lists a total of 7184 space objects including 1777 payloads and 5407 debris in orbit around the earth. Out of 7184 space objects only 150 to 350 are active satellites while the rest are dysfunctional.[15] In addition to the larger fragments, there are at least 2000 objects ranging in size from 10 to 20 cm and abut 50,000 in the 1-10 cm range. Below this range there are estimates of millions to billions of metal and paint chips in the millimeters and Sub-millimetre range.[16] It must be recognized that a 0.5 mm metal chip with an average speed of 30,000 km per hour could easily penetrate a space object and even cause the death of an astronaut.[17]

It has been suggested that even with a constant launch frequency of about 100 space crafts per year, our planet may become surrounded by a belt of space debris into the next century, since fragmentation grows exponentially.[18] The error in allowing the pollution of the world ocean to go out of control should not be repeated in the case of pollution of outer space by debris. It would be tragic if we had to wait for an accident to make us awake to the problem.

Microwave beams and laser beams

There are plans for space electrical stations in geostationary orbit to tap the sun's energy via Solar Power Satellites (SPS), and to transmit that energy to ground stations on the earth for use as an economically competitive source of electric power.

The massive size of the Solar Power Satellite would allow for maximum concentration of sunlight for the purpose of generating electricity. The satellites will use highly directional transmitting antennas in space for the transfer of energy in the form of microwaves to ground stations on the earth. The very intense beam will be directed into special antennas on the ground where it will be transformed back into electricity, but there will also be some stray radiation at a much lower level, to which the general population and the ecology will be exposed.[19] Workers at the ground and space antenna sites will be exposed to higher level of radiation.[20]

Laser beams generated from the space or the earth will have great impact on the earth and space environment and activities. Exposure to an intense laser beam can cause burns and skin damage.[21] There is a possibility that a laser beam emitted either from the ground or from a spacecraft may be accidentally directed towards an aircraft and damage it.[22]

In addition to this, intensified militarizations of the outer space and the development of high energy laser and particle beam weapons will also constitute serious threats to the peaceful uses of outer space. If man's activities regarding laser beams in outer space goes uncontrolled, it can play havoc with the earth and space environment.

Space experiments

Certain experiments also give rise to pollution of space environment. There are three such experiments conducted by the United States in 1950's and 1960's known as the Argus Project, the Starfish Project and the Westford Project.

Project Argus involved a series of high-altitude nuclear explosions over the South Atlantic conducted on August 27 and 30 and September 6, 1958.[23] It was designed to create an artificial belt of trapped radiation comparable to then discovered Van Allen belts.[24]

The Starfish Experiment conducted on July 9, 1962 was the thermonuclear explosion by the United States above Johnston-Island in the Pacific.[25] The blast of a hydrogen bomb carried out with the help of a Thor intercontinental missile, representing a one-megation blasting power,[26] resulted in an artificial radiation belt extending to within 200

miles of the earth at some points and blending with the Van Allen belts of natural radiation elsewhere.[27] Thus, this radiation zone had led to widening the Van Allen belt and altering the radiation situations of the earth's environment in a lasting manner.[28] On 21st October 1961 the satellite MIDAS launched by the United States Air Force put into orbit 350 million fine copper needles designed to form a narrow belt eight kilometers wide around the earth at a height of some 3,500 kilometers.[29] The purpose of this launching, known as operation West Ford, was two-fold-first: to determine the possibility of using this belt for long-distance communications, with the idea that the fine needles launched would reflect radio waves back to the earth, and second: to provide an opportunity for an objective assessment of the possible effects of the dipole technique on space activities or on any branch of science.[30]

This experiment was unsuccessful as the copper needles did not disperse into the belt as planed but collected in seven big groups.

The second West Ford experiment was carried out on May 12th, 1963. This time 400 million copper needles scattered at an altitude of about 2,000 miles formed a belt round the earth.[31]

III. Environmental Provisions in Texts of Treaties

The period of the exploration and use of outer space since 1957 has witnessed the adoption of a number of important international agreements that bear directly on the protection and conservation of the earth environment and its neighbourhood outer space.

Outer Space Treaty 1967 & Moon Agreement 1979

Article IX of the Treaty on Principles governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies 1967, popularly known as Outer Space Treaty, obliges states parties to (i) avoid harmful contamination of outer space or adverse changes in the environment of the earth resulting from the introduction of extraterrestrial matter, and (ii) enter international consultation if their activities would cause potential interference with activities of other parties.

Article IX though important is of a limited character, as it does not apply the term 'harmful contamination' in relation to earth's environment. The consultation envisaged in Art. IX is not mandatory but optional. If the party concerned does not initiate consultation or refuses consultation demanded by other party, it does not constitute violation of the Treaty.

Article IV of the Outer Space Treaty 1967 and Article 3 of the Moon Agreement 1979 seek to protect the environment of the moon and other celestial bodies from military activities. But these treaties only partially demilitarize the whole outer space, particularly the near

earth space by merely banning the placement of nuclear weapons and "any other kinds of weapons of mass destruction" in earth orbit. Thus they leave open the following loopholes: (i) no ban on testing and deploying other space weapons including ASAT weapons; (ii) no ban on warheads carried by strategic missiles on trajectories travelling through outer space; (iii) no definition of "weapons of mass destruction".

Article 7 of the 1979 Moon Agreement enhances the environmental obligations of States parties found in Art. IX of the Outer Space Treaty 1967. It obliges parties to (i) take measures to prevent the disruption of the existing balance of the environment of the moon and other celestial bodies by introducing adverse changes, by harmful contamination or otherwise; (ii) avoid harmful effects to the earth environment through the introduction of extra terrestrial matter or otherwise; (iii) inform the United Nations of the measures being adopted to prevent the disruption of the existing balance of the environment of the moon and any plans to place any radioactive material on it. This provision removes some of the deficiencies of the Art. IX of Outer Space Treaty.

Partial Nuclear Test Ban Treaty 1963

The purpose of Partial Nuclear Test Ban Treaty is to prevent the wide-ranging distribution of radio active debris.[32] The prohibition contained in this Treaty seems to be applicableto all nuclear tests carried out in atmosphere and beyond its limits, including outer space. Such prohibition would also apply to all nuclear tests conducted on celestial bodies, since they form part of outer space and testing could result in contamination.

Agreement on the Rescue of Astronauts, etc 1968

This agreement obliges the launching states to take effective measures in order to avoid the possible danger of inflicting harm on another state, if a space object discovered on the latter's territory is perilous or harmful. The measures by launching states would be taken under the direction and control of the contracting party on whose territory such space object or its component parts have been found.[33]

Space Liability Convention 1972

The Convention on International Liability for Damage Caused by Space Object 1972 applies to harms produced by debris and by activities having pollution effects. It deals partially with the liability aspect of environmental protection by establishing the launching state's absolute liability for all damages caused by its space object on the earth or to aircraft in flight. According to the definition given in Article I of the Convention, "damage" could cover damage to the environment of the

earth as far as this means the surface of the earth under jurisdiction of states.[34]

Registration Convention 1975

The major purpose underlying the Convention on Registration of Objects Launched into Outer Space 1975 is to gather factual information of the space objects that launched into earth orbit or beyond for the purpose of identifying them in case they cause harm but it does not require notification of explosions or out of function space objects, chemical or radioactive substances, etc. which affect the space environment.

Environmental Modification Convention 1977

Article I, para 1 of the Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques 1977 states:

> "Each state party to this Convention undertakes not to engage in military or other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other state party".

Article II states as under:

> "As used in Article I the term `environmental modification technique' refers to any technique for changing through the deliberate manipulation of natural processes - the dynamics, composition or structure of the earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space.
>
> 'Environmental modification techniques' include changes in weather or climate patterns, ocean currents, the state of the ozone layer or ionosphere, or upsetting the ecological balance of a region."

These provisions are applicable only to state parties and not to all states. In addition to this, the use of environmental modification technique for peaceful purposes is not prohibited.

IV. Conclusion

The present level of space activities does not appear to be having extensive and long-term undesirable impacts on he environment of the earth and its neighborhood outer space to be of urgent concern. But because of our imperfect knowledge of environmental processes and of outer space phenomena, simulations cannot reliably predict when this problem will become severe and what shape it will take. Nor do we have any scientific data to indicate or even guage the threshold point of

the space environments resiliency to absorb or neutralise the amounts of pollution being released to that environment by space activities. It is conceivable that slow cumulative changes have been initiated that might continue for some time even if the activity causing the changes are stopped.

Therefore, the time is ripe now for a new convention which will provide adequate safeguards to guarantee the protection of the earth and the outer space environment. The convention consisting following suggestions may prove effective:

The legal terminology of space treaties relating to environmental harms such as "harmful contamination", "adverse changes in the environment", "harmful interference" should be defined in order to foreclose any controversy or dispute whether a particular activity contravenes the general obligation under the Treaty.

The term "debris" should mean those man-made objects in outer space deemed to be valueless, as evidenced by an absence of operational control and include inactive payloads, operational debris, and microparticulate matter.

A complete ban should be imposed on the states to test and deploy the space weapons including Anti-Satellite (ASAT) weapons and Anti-Ballistic Missile (ABM) weapons and the flight of strategic missiles on trajectories in outer space. This will stop the increase in the population of space debris in outer space.

Some practical measures should be adopted by an agreement to minimize the production of debris. These measures should include, the improved design of the launch system thus limiting the number of loosely attached mechanisms and components such as paints, thermal coatings and binder agents elimination of unspent fuels, thereby reducing the chances of self-explosion, controlled re-entry and total burn-up in the atmosphere of satellites after completing their function.

It should be the duty of states to remove their inactive satellites from the outer space. To avoid collisions between satellites, certain internationally agreed lanes or altitude should be reserved for a partial traffic separation for specific peaceful applications and for active satellites. This will not only reduce the problem of collisions but also facilitate the exploration of outer space and celestial bodies.

States should provide information regarding the instantaneous position of their space objects. It is quite important for avoiding close encounters or collisions during the launching phases of manned and other sensitive missions.

Use of Nuclear Power Sources (NPS) in low earth orbit should be prohibited. An international organization composed of well qualified space scientists and technicians should be established. The task of such an organization will be to review, assess and establish standards of environmental impacts of space activities. It should be the duty of states to provide such organizations with all the necessary data and information from prelaunch to postlaunch, concerning type and amounts of fuels, radioactive payloads, exhaust gases and other chemicals released in all stages of flights of satellites, as well as explosions, collisions and other causes producing debris, so that after full examination, international standards and recommended practices may be established. Such standards should be mandatory and observed by all states.

In addition to the above mentioned suggestions the existing treaties should also be amended.

Under the Registration Convention marking of space objects should be made compulsory so that it becomes easy to identify the state of registry in case of an accident.

Under Liability Convention the term "damage" should include damage caused by space object to the outer space environment including the moon and other celestial bodies.

Under Outer Space Treaty the principle of holding preliminary consultation between the states concerned before carrying out potentially dangerous activity must be regarded as an indispensable condition for environment protection.

Indeed much of these ideas can only bear fruit if the states display constructive political will in their favour. Therefore, only by taking adequate and effective measures in time, environment can be protected from the hazards brought by space activities. If we remain unsuccessful to take proper actions in time, it would be very dangerous for the environment because, like a chain reaction, once natural collision begin the environment will start to deteriorate at an accelerated rate. At that time our efforts may be too little, too late.

References

1. Impact of Space Activities on the Earth and Space Environment, UN Doc. A/Conf.101/BP/4, 30 January 1981, p. 6.
2. Sergei Vinogradov, "Space Activity and Environmental Protection"in V. Vereshchetin (ed), *Space and Law* (Moscow, 1985), p. 165.
3. Supra note 1 at 7.
4. He Qizhi, "Environmental Impact of Space Activities and Measures for International Protection", 16 *Journal of Space Law* (1988) 117 at 118.
5. Ibid.

6. He Qizhi, "Towards A New Legal Regime for the Use of Nuclear Power Sources in Outer Space", 14 *Journal of Space Law* (1986) 95 at 96.
7. *Ibid.*
8. Id at 96-97.
9. Outer Space Committee to Recommend Study of Use of Nuclear Power Sources in Space, U.N. Press Release, COPUOS 21st Session, 187th Meeting (AM), OS/865, 5 July 1978, p. 4.
10. Supra note 6 at 97.
11. Howard A. Baker, *Space Debris : Legal and Policy Implications,* (Dordrecht, 1989), p. 14.
12. N.L. Johnson, "Nuclear Power Supplies in Orbit", 2 *Space Policy* (1986) 230, cited in Baker, 15.
13. Id at 10.
14. Id at 3.
15. Environmental Effects of Space Activities, UN Doc. A/AL.105/420, (15 December 1988), p. 22.
16. Space Debris: A Status Report Submitted by the Committee on Space Research, UN Doc. A/AC. 105/403 (6 January 1988), p. 3.
17. Ibid.
18. Id at 5.
19. Supra note 1 at 20.
20. Ibid.
21. Ibid.
22. Ibid.
23. Philip C. Jessup et al., *Controls for Outer Space and the Antarctic Analogy* (New York: Columbia University Press, 1959) at 224-5.
24. Andrew G. Haley, *Space Law and Government* (New York: Meredith Publishing Company, 1963) at 267.
25. Gyula Gal, *Space Law* (New York: Oceana Publications Inc. 1969) at 149.
26. Ibid.
27. Haley, supra note 24 at 268.
28. Declarations by Van Allen and J. Warwick, Nspszobadsa 22nd August 1962 cited in Gal, supra note 25 at 143.
29. Modesto Seara Vzques, *Cosmic International Law,* Elain Malley, trans. (Detroits, 1965), p. 181.
30. John A. Johnson, "Pollution and Contamination in Space", in Maxwell Cohen (ed.), *Law and Politics in Space* (Montreal: 1964), p. 46.
31. Gal, supra note 25 at 146.
32. Article I of the Treaty Banning Nuclear Weapon Test in the Atmosphere in Outer Space and Under Water 1963 popularly known as Partial Nuclear Test Ban Treaty.
33. Art. 5, paragraph 4, of the Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects launched into Outer Space, 1968.
34. Art. I(a) of the Liability Convention 1972 states:
The term "damage" means loss of life, personal injury or other impairment of health; or loss of or damage to property of states or of pesons, natural or juridical, or property of international inter-governmental organizations.

P. S. SANGAL
Professor of Law, Delhi University
and
S. K. DIXIT
UGC Research Associate, Faculty of Law, Delhi University

Problems in Transfer of Technology to Developing Countries : Responses of International Law*

I. Introduction

Political freedom of developing countries is not enough unless it is accompanied by economic freedom also. Economic freedom can be achieved by development of the developing countries, which is possible only with the help of science and technology. It is axiomatic that developing countries do not have the technology, nor the means to generate technology by their own research and development. And therefore, they can develop only when access to technology is made available to them on reasonable terms and conditions. The importance of technology for development can scarcely be exaggerated. The disparities in the technological capabilities of the rich and poor countries is not merely a reflection of their inequalities but an important cause of it. As long as the industrialized countries retain their superiority in technological resources over the poor countries, they are likely to retain their hold over the process of economic and social change in the latter countries. This point is better appreciated in the industralized countries than in the developing world, as is evident from the resources the former are willing to commit to the development of new technological capacity, compared to the efforts of the latter.[1]

In the process of acquisition of technology, the developing countries are often faced with numerous problems. Generally, the supplier party imposes upon the acquiring party harsh and unreasonable restrictions to which the acquiring party is bound to concede.

II. Modes of Transfer of Technology

The commercial transfer of technology to developing countries usually takes place, through enterprise-to-enterprise arrangements, by way of transfer of industrial property rights, licensing, execution of agreements for the supply of technical knowhow or for the provision of technical services and assistance or in connection with the sale and import of capital goods, parts or other components, or as an element of

franchise or distributing agreements, or as a result of direct foreign investment (including joint ventures), with the consequent infusion by one enterprise of entrepreneurial, managerial or technical skills normally associated with ownership or control of another enterprise.[2] On the one hand, partners in these arrangements are private enterprises or government institutions in the industrialized market economies acting as transferors or suppliers, and on the other hand, private or state enterprises or governmental institutions in the developing countries acting as transferees or technology recipients.

Assignment of exclusive rights & licensing

The concept of assignment has been recognised in the laws of a number of countries. When all the exclusive rights conferred by the grant of a patent for invention are transferred by the owner of the patented invention to another person or legal entity, it is said to be the assignment of technology. The term assignment also applies to the transfer of exclusive rights in utility models, industrial designs and trade marks.

Licensing is also one of the popular methods of transfer of technology. The licensing takes place where the owner of the exclusive right (patent, industrial-design, utility model, a plant variety, a trade mark or service-mark) gives permission to another person or legal entity to perform one or more of the acts which are covered by the exclusive rights of the owner of the invention. When that permission is given, a 'license' has been granted.

One of the conditions will obviously be related to the payment by the licensee of money in return for the licence that is granted. Thus, the licensee may promise to pay a fixed sum of money at a stated time or at stated times in future. Another condition might be that the invention will be used by the licensee only for the manufacture of products destined for a specific use, or that the licensee will work the invention in certain factories only or sell the product embodying the invention in certain defined areas only.[3]

Knowhow agreements

The supply of knowhow may be the subject of an agreement to communicate technical information and skills concerning the use and application of industrial techniques. The technical information and skills may be described in documentation or furnished orally or through demonstration and training by engineers, technicians, specialists or other experts. Knowhow may also be supplied through consultants or other professional experts who provide services and assistance covering the basic engineering of an industrial plant or its machinery and equipment, the installation, operation, maintenance of industrial plant and its

industrial and commercial activities, etc. Such professional expertise may also extend to pre-investment and post-investment phases of a project, including technical, economic, financial and organizational studies and general planning.

The provisions concerning the transmission of knowhow, in tangible as well as intangible form, might be subject to separate writings or documents. Indeed, under the laws of certain countries such provisions must be the subject of distinct contracts or agreements, like technical information contract, the technical services contract, the technical assistance contract and the management contract. The provisions concerning the knowhow to be transmitted are not limited, however, to a description of the knowhow and the means by which it will be transmitted. They will extend as well to the price to be paid by the recipient for that knowhow, and to certain other matters relating to its disclosure to third persons.

Joint-venture arrangements

The joint venture arrangement is an agreement between two or more parties to combine a certain kind or amount of their resources in order to manufacture, produce or sell a product or to render a service and to share in a specified way the profits that result and the risks that occur. There are two types of joint ventures, i.e. equity joint venture and contractual joint venture. Equity joint venture is an arrangement to create a separate legal entity in accordance with the agreement of two or more parties. Such entity is usually established as a limited liability company and is distinct from either of the parties which participated in its creation. On the other hand, the contractual joint venture arrangement might be used where the establishment of a separate legal entity is not needed or where it is not possible to create such an entity. This may be the case where the project involves a narrow task or a limited activity or is for a limited time. The relationship between the parties will be set forth in the agreement concluded between them.

The different legal methods for the commercial transfer and acquisition of technology can be used in either form of joint venture arrangements. An assignment of the exclusive rights to a patented invention, a utility model, industrial design or trade mark by one of the participants could constitute a portion of that participant's contribution to the capital of the joint venture company.

The commercial transfer of technology may also take place with the sale and import of machinery and equipment and other capital goods or of raw materials, intermemiate goods, parts or other components, that embody technology and related literature. Agreements covering such

sales and imports are sometimes associated with an industrial property license or a knowhow agreement. The commercial transfer of technology may also occur in connection with the system of the franchising, or the distributorship of the methods for the commercial transfer of technology may be combined. Thus the 'turnkey project' involves either comprhensive arranggements of some of the methods referred to above or, more usually, an undertaking to supply to the client the design for the industrial plant and the technical information on its operation.

III. Problems in Transfer of Technology

The process of acquiring technology involves a sequence of interlinked activities, such as the identification of technological needs in the light of the objectives of economic and social development, obtaining of information on alternative sources of technology, the unpackaging of packages of technology to assess the suitability, costs and conditions of their components, the adaptation and absorption of the imported technology, and finally the optimum exploitation of technology in the country and the maximum use of the results of such exploitation within all sectors of the economy. But the potential technology acquirers in devloping countries frequently face serious problems in their commercial dealings with technology suppliers in developed countries. Some of these problems are discussed below.

Even if technology holders in developed countries are willing to part with their technology by selling it to, or by authorising its exploitation by, a local enterprise or institution in a developing country, the question arises whether such enterprises or institutions in developing countries can acquire such technology without becoming, at the same time, technologically dependent or without losing their economic independence. The degree of involvement of the technology transferor and the nature of dependence of acquiring party will vary according to the nature of product to be manufactured or the process to be applied, or according to the necessity for equipment or other inputs or for even an entire industrial plant to exploit the technology.

For developing countries, the most difficult of the problems connected with the transfer of technology is the selection of what technology is needed. That a technology suitable in one environment is not necessarily the best for another has been demonstrated time and again in many countries. A country develops technology mainly to suit its own internal conditions and needs and not necessarily for exporting it to other countries. The organizations that have developed significant new technologies are very reluctant to license them except under very profitable conditions. Even if these conditions are met, these advanced

technologies may not be the most appropriate for a particular developing country.[4]

The process of identifying, evaluating, selecting and, if necessary, adapting to local needs, technology to be acquired from abroad presupposes information and expertise to judge the merits of the technology and the best means of its acquisition. Yet the enterprises and institutions in developing countries frequently lack information about sources of technology and opportunities for its exploitation and do not possess the means to assess and make a choice among alternative technologies, to determine the appropriateness of the technology for their needs, and to negotiate fair and reasonable terms for its acquisition. As a consequence, prospective technology acquirers may find that their bargaining position in dealing with technology holders is relatively weak and, as a result, the latter may present the former with a technology 'package' tied to commercial, financial and other inputs.[5]

The scarce financial resources and high cost of technology makes it difficult for the smaller, poor developing countries to acquire technology on commercial terms. Countries in this category may be able to acquire technology critically needed for their development only through government to government negotiations and with the financial assistance provided by government institutions in developed countries. In the absence of external financing, the acquisition of technology on international commercial terms will impose a burden on the local economy unless the price of technology can be brought within manageable limits.

Additionally, the fact must not be overlooked that a technology transferor may derive substantial indirect gains from the technology transfer transaction as a result of the supply of other inputs necessarily related to the technology transferred. It is for this reason that tie-in arrangements which link the sale of such capital goods or inputs to the technology transferred must be scrutinized, not only from the perspective of the added benefits to the technology transferor, but also from the point of view of their impact in narrowing the latitude of the technology transferee to explore alternative and more economical international sources of supply, as well as from their undesirable effects in discouraging participation by potential local suppliers.

An adequate legal framework is necessary for a successful transfer of technology transaction, because such a framework provides to the parties concerned a basis for fixing their respective rights and obligations and also permits an equitable balance to be struck between the interests of these parties, on the one hand, and the interests of the state or the public

on the other. As far as the legal relations between parties are concerned, their implementation rests on an adequate legal framework for commercial transactions. Yet in many developing countries these laws (laws concerning contracts, business associations, fair trade practices and industrial property) need to be modernised, and institutions for their administration need to be established or strengthened.

Besides the issues between the potential transferor and prospective transferee, the governments in developing countries have to take into account many other considerations-which include the scientific, technological and economic effects in the country of the import of technology, the effect on the balance of payments of the country, the need for parallel negotiations on fiscal matters, foreign exchange transfers and foreign investment. These matters are treated on different levels by the authorities concerned. In developing countries, where the transfer of technology transactions are made subject to the approval of government authority, such a transaction must be regarded in the light of not simply whether, as a commercial transaction, it strikes a fair balance between the interests of the transferor and the transferee but also whether its technical, financial, commercial and legal aspects are consistent with the objectives sought to be achieved by the government, and whether they will result in an inflow of technology that will appropriately promote the scientific, technological and economic development of that country.

In developing countries which set up or desire to set up machinery to control the commercial transfer of technology, difficulties have arisen in establishing the appropriate government policies and in formulating the governing procedure and criteria. Further, enhanced coordination of diverse government-sectoral policies, plans, programmes, the clear identification of decision-making authorities, the stabilization of the legal base for the commercial transfer of technology and its control, greater flexibility in the approval of the technical, financial and commercial terms of the technology-transfer transactions, and continued improvement of the fiscal incentives for investment, can lead to a more favourable climate for the transfer of technology from enterprises in developed countries and its acquisition by enterprises and institutions in developing countries.[6]

IV. Responses of International Law

Identification and reduction of the problems in the transfer of technology to developing countries, facilitating of access by developing countries under fair and reasonable terms and conditions to technology, providing the utilization of technology transferred to developing

countries in such a manner as to assist these countries in reaching their trade and development objectives, adoption of measures to foster creation of indigenous technology, dissemination of information on relevant technologies, adaptation of commercial practices governing the transfer of technology to necessities of the developing countries and prevention of the use of abusive practices in the transfer of technology, have been the key elements in promoting the transfer of technology to developing countries under the International Development Strategy for the Second and Third UN Development Decade, the Declaration and the Programme of Action on the Establishment of a New International Economic Order, Charter of Economic Rights and Duties of States, UN Code of Conduct on Transnational Corporations, and UN Code of Conduct on Transfer of Technology.

International Development Srategy

• The International Development Strategy for the Second United Nations Development Decade emphasised the need for the elimination of restrictive business practices and a review of international conventions on patents.[7]

UNCTAD at its fifth session on June 3, 1979 recognised the importance attached by developing countries to the formulation of a strategy for their technological transformation which could be an important input into the elaboration by the international community of the comprehensive development strategy for the third United Nations Development Decade.[8] In this connection the Conference requested the Secretary General of UNCTAD to submit to the Trade and Development Board his proposals for an outline which would contribute to such formulation, in cooperation with other UN Organizations and in the light of the programme of action to be recommended by the UN Conference on Science and Technology for Development and the efforts already undertaken by and the views expressed within UNCTAD. As requested, the Secretary General submitted his proposals to the Trade and Development Board.[9] The Board took note of these proposals and transmitted them to the Committee on Transfer of Technology for appropriate follow-up action.[10] The Committee on Transfer of Technology again requested Secretary General of UNCTAD to transmit them to government of member states of UNCTAD for comments. The Secretary General submitted his report to the Committee on Transfer of Technology at its fourth session.[11]

The United Nations Conference on Trade and Development, having noted that the report as provided important contribution to further consideration of future action in the field of technology, requested the

Secretary General of UNCTAD to transmit the report to the Committee on Transfer of Technology and Trade and Development Board for review and relevant action including modalities for the formulation of a strategy of the technological transformation of the developing countries.

This strategy for the technological transformation of developing countries is a contribution to the implementation of the International Development Strategy for the Third United Nations Development Decade. In the context of governments' endeavours to establish a New International Economic Order, the strategy centres on the broad objectives of attaining the technological transformation of developing countries by reducing their external technological dependence and strengthening their national capacity to take the decisions needed for their autonomous technological development.[12] The broad objectives of this strategy are as follows :

1. to formulate, within the framework of the technology stragegy, technological plans and policies;
2. to foster the technological development of sectors of critical significance, particularly capital goods and skills which embody technology;
3. to establish appropriate institutional arrangements and infrastructure for implementing technology plans and policies;
4. to strengthen research and development and technological innovation and to inerease financial and human resources devoted to them;
5. to establish an appropriate legal framework (laws, regulations and rules) to regulate the transfer of technology and foster its national development;
6. to promote technological cooperation among developing countries;
7. to undertake special measures for the least developed countries;
8. to establish a framework of cooperation with the developed countries to supplement the national efforts of the developing countries; and
9. to create a suitable international environment through international cooperation.

New International Economic Order [NIEO]

The New International Economic Order is perceived as a movement towards achieving economic and social justice, and it is recognised that it cannot be established on the foundations of an old international legal order. The existing international economic laws which have tended to

accentuate inequalities and inequities have become, lately, the instruments of exploitation and domination in the hands of developed countries and business corporations.[13]

The efforts of the developing countries of the third world for the establishment of a New International Economic Order represents a continuation of the process of decolonisation in the world economic sector. The gap between developed and developing countries continues to widen further within an order which was established at a time when most countries of the third world lived under European colonial empires. Western European colonial empires of the past mostly shaped the ground rules of international law, which even today are predominant in the world as sources of international law.[14]

In 1945 fifty one countries founded the United Nations. Its Charter declared sovereign equality to be one of its basic principles and proclaimed all states sovereign and equal. The economic order created at the end of World War II had been built on the principles of equal and non-discriminatory treatment of all countries in matters of trade and economic relations. The first call for NIEO was made in connection with the question of permanent sovereignty over natural resources. It was in 1952 when a developing country, Chile, raised this question during the debate on the Draft International Covenant on Human Rights.[15] In this connection, the UNCTAD took a decision in 1972 on the urgent 'establishment of generally acceptable norms for a systematic restructuring of international economic relations, proceeding from the recognition that until the implementation of a charter on the protection of rights of all states, in particular of developing countries, it will not be possible to establish a more equitable order and more stable world.[16]

The objective of the establishment of NIEO was formally proclaimed at the Non-Aligned Summit in Algiers in 1973, and reiterated in the Declaration on the Establishment of a New International Economic Order adopted in the Sixth Special Session of the UN General Assembly in 1974. The United Nations General Assembly in its Sixth Special Session on May 1, 1974 adopted two international resolutions namely, the Declaration on the Estabalishment of a New Economic Order and the Programme of Action of the Establishment of New International Economic Order.[17] The first resolution contains provisions relating to the economic rights and duties of all states, while the second one gives a specific programme for meeting these rights and duties.

The programme of action contains, among other things, the provisions regarding the transfer of technology and the regulation and

control over the activities of transnational corporations. These provision are as follows :

(a) As regards transfer of technology, all efforts should be made:

(i) to formulate an international code of conduct for the transfer of technology, corresponding to needs and conditions prevalent in developing countries;

(ii) to give access on improved terms to modern technology and to adapt that technology-appropriate to specific economic, social and ecological conditions at varying stages of development in developing countries;

(iii) to expand significantly the assistance from developed to developing countries in research and development programmes and in the creation of suitable indigenous technology;

(iv) to adapt commercial practices governing transfer of technology to the requirements of the developing countries and to prevent abuse of the rights of sellers;

(v) to promote international cooperation in research and development in exploration, exploitation, conservation and legitimate utilization of natural resources and all sources of energy.

In taking the above measures, special needs of the least developed land-locked countries should be borne in mind.

(b) As regard regulation of and control over the activities of transnational corporations, all efforts should be made to formulate, adopt and implement an international code of conduct:

(i) to prevent interference in the internal affairs of the countries where they operate and their collaboration with racist regimes and colonial administrations;

(ii) to regulate their activities in host countries, eliminate restrictive business practices and conform to the national development plans and objectives of the developing countries and, in this context, facilitate the review and revision of previously concluded arrangements;

(iii) to bring about assistance in transfer of technology and management skills to developing countries on equitable and favourable terms.

The UN General Assembly on December 12, 1974 adopted a resolution containing the Charter of Economic Rights and Duties of

an effective instrument towards the establishment of a new system of international economic relations based on equity, sovereign equality and inter-dependence of the interests of developed and developing countries"[18]

The Charter was conceived of as 'a kind of basic code' containing fundamental principles in different spheres of international economic relations. Among the areas covered were international trade, transnational corporations, nationalization, international economic cooperation, development of natural resources, industrialization, transfer of technology and exploitation of the resources of the sea bed.

Article 13 of Chapter II of the Charter contains provisions regarding the transfer of technology, which give to every state right to be benefitted from the advances and developments in science and technology for the acceleration of its economic and social development. All states are required to promote international scientific and technological cooperation and the transfer of technology. It especially provides that all states should facilitate the access of developing countries to the achievements of modern science and technology, the transfer of technology and the creation of indigenous technology for the benefit of the developing countries in forms and in accordance with procedures which are suited to their economies and needs.

In this regard, the developed countries are required to cooperate with the developing countries in the establishment, strengthening and development of their scientific and technological infrastructures and their scientific research and technological activities so as to help to expand and transform the economies of developing countries. It further provides that all states should cooperate in exploring with a view to evolving further internationally accepted guidelines or regulations for the transfer of technology, taking fully into account the interests of developing countries.

Code of Conduct for Transnational Corporations

The emergence of transnational corporations as powerful actors on the world economic stage has been followed by a call for their accountability. Transnational corporations' global strategies implemented in individual sovereign states remain beyond the effective reach of governmental authority. Hence a demand had been made in certain quarters for generally accepted international rules regarding the operation of transnational corporations.[19]

Although the idea of a code of conduct for transnational corperations had been put forward by various individuals, organisations or governments, but for the first time this notion was officially promoted

by a group of 20 eminent persons appointed by the UN Secretary General to look into the malpractice of transnational corporations.[20] At the time of creating the Commission on Transnational Corporations, the Economic and Social Council discussed the recommendations of the group of eminent persons and included in the terms of reference of the Commission the preparation of a Code of Conduct on Transnational Corporations.

At the first session of the Commission, the notion of a Code of Conduct attracted much attention. The developing countries maintained that the code should be mandatory and cover only the activities of transnational corporations. The socialist countries of Eastern Europe supported a mandatory code covering privately owned transnational corporations. The major developed countries, on the other hand, were in favour of a voluntary code addressed to both governments and corporations. The issue was again debated at the second session of the Commission, and again the scope of the coverage of the Code could not be decided. However, all agreed that whatever the nature of the Code, it should be an effective instrument. It was left to an Inter-governmental Working Group, appointed to prepare a draft code, to work out not only the substance of the code but also to give suggestions regarding its legal nature, the scope of its coverage, the parties to be addressed and the machinery for its implementation.[21]

At its seventeenth session, which was held in New York from 10 to 21 May 1982, the Working Group adopted a report in which it submitted the results of its work to the eighth session of the Commission on Transnational Corporations. This report contained negotiated texts on all the substantive parts of the code, as well as building blocks for the introductory parts of the code embodying the preamble and the objectives of the code.

The Draft Code of Conduct consists of six main chapters. The first chapter contains a preamble, referring to related resolutions and work in other United Nations' bodies and a statement of objectives. The second Chapter deals with the definitions and the scope of application of the Code. The third chapter is the longest one and deals with the activities of transnational corporations. It contains provisions addressed to the transnational corporations, specifying the kinds of conduct that are deemed permissible and proper by the governments that will eventually adopt the code. The first set of paragraphs covers general and political matters, a second set deals with more specific economic, financial and social issues, and a third set contains an important series of provisions on disclosure of information by transnational corporations. Chapter four

deals with the treatment which the transnational corporations are to receive from the governments of the countries in which they operate and the questions of nationalization, compensation and jurisdiction. Draft Code's fifth chapter addresses the necessary cooperation between governments for the application of the Code-whereas chapter six deals specifically with the action needed, at the national and international levels, for the implementation of the Code.

Article 36 of the Code of Conduct on Transnational Corporations contains provisions regarding the transfer of technology and the transnational corporations.[22] It provides that the transnational corporations shall abide by the transfer of technology laws of the countries in which they operate. They are further required to cooperate with the competent authorities in assessing the impact of international transfer of technology in the host countries' economies. They are further required to consult such countries regarding the various technological options helpful in the attainment of economic and social development of such countries -- specially developing countries.

These provisions prohibit the use of such practices by the transnational corporations in their transfer of technology transactions which adversely affect the international flow of technology or otherwise hinder the economic and technological development of countries, specially developing countries. Transnational corporations have been obliged to contribute to the strengthening of the scientific and technological capacities of developing countries; at the same time they are also required to abide by the science and technology policies and priorities of these countries. It is also provided that the transnational corporations shall undertake substantial research and development activities in developing countries and make full use of local resources and personnel in this process.

Code of Conduct on Transfer of Technology

The initiatives for the establishment of an international code of conduct on transfer of technology have a long history. First of all, the UN General Assembly on 19 December 1961 adopted a resolution to initiate a study of the effects of patents on the economy of developing countries.[23] UNCTAD in its first session in 1964 adopted the recommendation calling for an exploration of possibilities for adoption of legislation concerning the transfer of industrial technology to developing countries. The same need was also re-emphasized by the UNESCO by a resolution adopted in July 1964. Again, in 1965, UN General Assembly adopted a resolution calling for an examination of the adequacy of existing national and international practices for transfer of

patented and unpatented technologies to developing countries.[24]

The need for the elimination of restrictive business practices and a review of international conventions on patents had also been recognised by the International Development Strategy for the Second UN Development Decade.[25] UNCTAD at its third session on 16 May, 1972 adopted a resolution requesting a study of possible basis for new international legislation regulating the transfer of technology. Trade and Development Board of UNCTAD by a resolution requested a study of "the possibility and feasibility of an international code of conduct in the field of transfer of technology"[26] Fourth conference of the heads of states or governments of non-aligned countries, issued a declaration calling for the adoption of an international code of conduct governing the transfer of technology.[27] At the 113th Session the Interparliamentary Council called upon the Parliaments and the governments of all countries of the world to "draw up a new international legislation for the transfer of technology.[28] United Nations Advisory Committee on the Application of Science and Technology, at its 19th session, called for 'moving' rapidly towards the formulation of a Code of Conduct on Transfer of Technology.[29] The Programme of Action adopted on May 1, 1974, as already written above, assigned very high priority to the formulation of an International Code of Conduct for the Transfer of Technology.[30]

Based on the results of the work done on the subject, UNCTAD IV in 1976 adopted a resolution, 89(IV), which established the inter-governmental group of experts on an international code of conduct on transfer of technology to prepare a draft text to be submitted to the UN Conference on an International Code of Conduct in 1978. Inter governmental group of experts, after holding six sessions between November 1976 to June-July 1978, completed the drafting of an International Code of Conduct.[31] The first session of the Conference was held from Oct. 16 to Nov. 11, 1978, and was resumed in February-March 1979. The second, third and fourth sessions were held from Oct. 29 to Nov. 16, 1979; from April 21 to May 6, 1980 and from March 23 to April 10, 1981 respectively. The first three sessions resulted in agreement on various issues, while the fourth session ended in deadlock. As a result, in order to accelerate the finalisation of the Code, the General Assembly established the Interim Committee of the Conference to consider and seek solutions to the outstanding issues and to make proposals thereon to the Conference at its fifth session.[31]

At the fifth session, held in Oct./Nov. 1983, significant progress was made in finding satisfactory solutions to complex issues in chapter 5 of the draft code dealing with rights and obligations of parties to the

transfer of technology transactions. In view of the progress made on the other chapters, the sixth session mainly centred all efforts to resolve the differences between the regional group positions on the two main outstanding issues, i.e. restrictive practices and applicable law on settlement of disputes. Finalised in 1985, the Draft code contained a preamble and nine chapters dealing with (i) definitions and scope (ii) objections and principles, (iii) national regulation of transfer of technology transactions, (iv) restrictive business practices, (vi) special treatment for developing countries, (vii)international collaborations, (viii) international institutional machinery, and (ix) applicable law and settlement of disputes.[32]

V. Conclusion

It is evident from the above discussions that the transfer of technology is one of the currently popular topics in the United Nations. One or the other United Nations agency and its Secretariat took it up long ago, and it has never ceased to appear on the agenda or work programme of one or the other UN agency. At present, at least twelve UN agencies concern themselves with the subject. As we have seen above, international conferences have dealt with it. Many resolutions and several codes and charters have been adopted by the different UN agencies, but none has proved to be effective to protect the interests of the developing countries. Still the developing countries are facing the same problems. Though some of the developing countries have developed technological capabilities to foster their development programmes, yet they are not in a position to compete with developed countries in international markets due to the lack of sophisticated technology which is available in the world markets on very high prices and discriminatory terms and conditions.

Hopes rest upon the final adoption of the Code of Conduct on the Transfer of Technology. Even though consensus in regard to all the chapters of the Code of Conduct could not be reached, yet it cannot be said that the responses of international law to the solution of problems involved in the transfer of technology have been poor.

Despite the tension between the preference for a free market for technology transfers and minimum regulation and protection of technology suppliers, as opposed to the emphasis on regulation and control, there is sufficient common ground to warrant the creation of a global framework of norms and standards for transfer of technology. These norms and standards should seek not only to influence the behaviour of technology suppliers, but also to establish universally acceptable standards by which the conduct of technology suppliers may

acceptable standards by which the conduct of technology suppliers may be judged. Also a common framework should be set up for the transfer or licensing of industrial property rights.

In the context of an interdependent world economy, such a common framework would greatly enhance the stability and predictability needed for the free flow of technology among nations. With an agreed code, the flow of technology transfers to developing countries would be encouraged to the extent that the regulatory standards will be not only harmonized but also reasonable. In this respect there is an increasing tendency on the part of the developing countries themselves towards liberalisation of their national regulatory regimes in order to attract increased investment flow in pursuance of their development objectives.[33]

An effort to balance the various interests is already reflected in the Draft Code of Conduct on the Transfer of Technology. However, this balanced approach will not have its full beneficial effect until the Code is finally adopted.

References

* Written for ISIL's Third Annual Conference 1989-revised in 1994.

1. See Kamal Hossain (ed), *Legal Aspects of the New International Economic Order*, 15 (1980).
2. *Licensing Guide for Developing Countries* [WIPO Publication No.620(E),1977] para 53.
3. *Background Reading Material on Intellectual Property* [WIPO Publication No. 659(E), 1988] p. 268.
4. *National Approaches to the Acquisitin of Technlogy* [UNIDO Development and Transfer of Technology Series NO.1] 12-13 (1977).
5. Supra note 2, para 13.
6. The Indian guidelines under the heading "Instructions to Entrepreneurs" can be seen as illustration of the attempt by developing countries to regulate the terms of comercial transfer of technology. For these guidelines see "Application for Foreign Collaboration", Form F.C. [as per press note No.9(26)/82-FC(2) dated 4th June 1983].
7. See UN General Assembly Resolution 2626 (XXV), 24 October 1970.
8. Resolution 112(V) of June 3, 1979, para 37.
9. See the note by the UNCTAD Secretariat, "*Formulation of A Strategy for the Technological Transformation of Developing Countries:Proposals for An Outline* (TD/B/779).
10. See Board decision 211 (XX) of March 25, 1980.

11. For further details, see Resolution 25(IV) of December 10, 1982 and UNCTAD document TD/277/Rev.1 and TD/B/C.6/90.

12. *A Strategy for the Technological Transformation of Developing Countries*, Report by the UNCTAD Secretariat (TD/277/Rev.1, 1985).

13. Syed Ishtiaq Ahmed, "Restrictive Practices in the Transfer of Technology" in *Legal Aspects of the New International Economic Order : An Asian Perspective* (ed.: Tawfique Nawaz), 70(1980).

14. Syed Muhammad Husain, "Legal Implication of A New International Economic Order" in *Legal Aspects of Economic Order* : in the work cited above at1-2.

15. Eighth Session of Human Rights Commission.

16. UNCTAD Resolution 45 (III) of May 18, 1972.

17. UN General Assembly Resolutions No. 3201 and 3202, May 1, 1974.

18. UN General Assembly Resolution 321(XXIX), December 12, 1974.

19. See "Towards a Code of Conduct" *CTC Reporter*, Vol.1, No.1, 10 (Dec. 1976), [UN Centre on Transnational Corporations, New York].

20. See P.S. Sangal, *National and Multinational Companies : Some Legal Issues*, xxix (1981).

21. An Inter-governental Working Group was established at the second session of the Commision on Transnational Corporations (Lima, March 1976). It composed of at least four members from each regional group, and was asked to prepare an annotated outline of a Code of Conduct on Transnational Corporations. See Report of the Inter-governmental Working Group on Code of Conduct on its 15th, 16th and 17th Sessions (E/c 10/1982/6,5 June 1982). For details of the progress of the Working Group, see *CTC Reporter*, Vol.I: No.2, p.9 (June 1977), Vol.1: No.4, p.6 (April 1978), Vol,I: No.6 pp.8-9 and 31 (Autumn 1979), Vol.I: No.8, p.4 (Spring 1980), Vol.: No.9, I pp. 15-16 (Winter 1979), No.11 pp.3-4 (Spring 1982). For the latest position see *CTC Reporter*, No.29 (Spring 1990).

22. For full text of the Code, see *CTC Reporter*, No.12, pp.3-4 (1982).

23. UN General Assembly Resolution 1713 (XVI) of Dec. 19, 1961.

24. Recommendations contained in paragraph 3 of Annex.A.IV.26 of the final Act adopted by UNCTAD In 1964. UNESCO Resolution 1013 (XXXVII) of July 27, 1964 and 2091 (XX) of Dec. 20,1965.

25. UN General Assembly Resolution 2626 (XXV) of Oct.24,1970.

26. UNCAD Resolutions 39 (III) of May 16,1972 & 104 (XIII) Sep.8 1973.

27. Section IX of the Declaration of Sept.1973.

28. See Inter-Parliamentary Union, 113th Session of Inter-Parliamentary Council, Geneva, Oct. 22-26, 1973.

29. See 11th Report of the Advisory Committe on the Application of Science and Technology Development (E/C.8/24-E/AC.52/4), para 52.

30. UN General Assembly Resolution 3202 (S-VI) of May 1, 1974.

31. UN General Assembly Resolution 36/140 of Dec. 16, 1981.

32. *Draft International Code of Conduct on Transfer of Technology, Report and Notes by Experts on the Outstanding Issues* (TD/Code ToT/52) para 9-11 (August 5,1988).

33. See UNCTAD Document, *The Relevance of Recent Developmemnts in the Area of Technology to the Negotiations on the Draft International Code of Conduct on Transfer of Technology* (TD/Code TOT/55).

GURDIP SINGH
Reader, Faculty of Law, Delhi University

Missile Technology Control Regime — The Case of Adherence by India

I. Introduction

The existing controls placed on nuclear-related exports as a result of the Nuclear Non-Proliferation Treaty (NPT) triggered the desire of the western states to evolve the same type of controls for missile technology. The western states believed that the export controls were the answer to preventing missile proliferation. In 1985 and 1986 the United States worked with six economic partners,--Britain, Canada, France, Italy, Japan and Germany--to develop missile-export controls resulting in the formation of the Missile Technology Control Regime [MTCR] which was formally announced on 16 April 1987. The regime consists of a basic policy statement, a set of guidelines to govern the conditions under which exports might occur, a list of technologies to be controlled, and an informal mechanism for sharing information among the partners. In January 1993, the United States and all the partners in the MTCR have adopted revised guidelines to extend the scope of the regime to missiles capable of delivering biological and chemical weapons as well as nuclear weapons. Earlier the scope of the guidelines was limited to the control of the export of missile equipment and technology that could make a contribution to a missile system capable of delivering nuclear weapons. The strength of the MTCR partners also grew substantially to twenty two, including Australia, Austria, Belgium, Canada, Denmark, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, UK and USA.

The MTCR guidelines are followed by an Annex listing the controlled items. The Annex includes two categories. Category I items are complete rocket systems and unmanned air vehicle systems capable of delivering a 500 kilogram or greater payload to a range of at least 300 kilometers. Production facilities and subsystems for such delivery vehicles are also included. Category II contains a long list of items, including propulsion components, propellants, equipment for making propellants, guidance components, flight control systems, avionics, computers and software.

This paper examines the legal aspects of MTCR, impact of MTCR on development of Indian missiles and the issue of adherence to MTCR by India.

II. MTCR Framework

Membership

The MTCR does not contain any formal mechanism for becoming a member. There is no organization as such to join and no treaty or document which requires signatures. The original members of MTCR are the seven countries which participated in its formulation. However, the MTCR emphasizes that the adherence by all states to these guidelines in the interest of international peace and security would be welcome. The MTCR neither defines MTCR adherent nor provides for criteria for becoming an MTCR adherent. However, United States National Defence Authorisation Act of November 1990 provides that the term 'MTCR adherent' means a country that participates in the MTCR or that, pursuant to an international understanding to which the United States is a party, controls MTCR equipment or technology in accordance with the criteria and standards set forth in the MTCR. In view of the fact that United States is the mastermind behind the MTCR, this is likely to be the consensus meaning of all the members. To become an MTCR adherent, a state must enter into some sort of understanding with the United States and evolve national export control regime for items in the MTCR Annex in accordance with MTCR guidelines. Thus, a state becomes MTCR adherent after compliance with two conditions : firstly, by entering into an agreement with the United States; and secondly, by applying process of national export licensing to items in the Equipment and Technology Annex attached to the MTCR guidelines.

In October 1989, United States invited India to join the MTCR but India rejected the suggestion arguing that she could not accept such a discriminatory accord any more than it could accept the 1968 Non-Proliferation Treaty.[1] The offer made to India by the United States suggests that India can become MTCR adherent after formulating export control regime for the items mentioned in MTCR Annex. The willingness of the United States to accept India as MTCR adherent leaves the issue of acquisition of MTCR adherent status for India solely to the decision of the Indian government.

Guidelines

The MTCR is neither a treaty nor an executive agreement, and it has no international organisation to administer it. There is no secretariat comparable with, for example, the International Atomic Energy Agency (IAEA) specifically tasked with monitoring compliance or co-ordinating supplier activities. The MTCR is a set of guidelines which signatory countries have agreed to use in their national deliberations concerning

the export of a specified set of items.

The guidelines do not prohibit any exports at all, but require governments to judge whether specified items meet a series of criteria before approving export. Provided that these criteria are met to the satisfaction of the exporting government, any transfer is permissible within the scope of the MTCR. The guidelines for missile technology transfer set out several requirements :

1. all transfers will be considered on a case-by-case basis;
2. governments will implement the guidelines in accordance with their national legislation;
3. the exporting government assumes responsibility for taking all steps necessary to ensure that the item is put only to its stated and use;
4. the decision to transfer remains the sole and sovereign judgement of the individual government.

In evaluating whether to transfer an item contained in the Annex, each MTCR partner according to the guidelines is to take the following factors into account:

1. proliferation of weapons of mass destruction;
2. capability and objectives of the missile and space programmes of the recipient state;
3. significance of the transfer in terms of the potential development of delivery systems other than manned aircraft for weapons of mass destruction;
4. assessment of the end-use of the transfer, including the potential for re-transfer; and
5. applicability of relevant multilateral agreements.

The guidelines make it explicit that in case the transfer could contribute to delivery system for weapons of mass destruction, the government will authorise transfer of items in the Annex only on receipt of appropriate assurances from the government of the recipient state that the items will be used only for the peaceful purposes and will not be re-transferred without the consent of the transferring government.

The Annex listing controlled items includes two categories. Category I items are complete rocket systems and unmanned air vehicle systems capable of delivering a 500 kilograms or grater payload to a range of at least 300 kilometers. Production facilities and subsystems for such delivery vehicles are also included. Category II contains a long list of items, including propulsion components, propellants, equipment for making propellants, guidance components, flight control systems,

avionics, computers and software.

In March 1991 the national delegates to the MTCR group meeting in Tokyo agreed to revise the Equipment and Technology Annex in order to address technical advances made since the first document was prepared and also to define technical parameters so that the industry could be more certain whether or not controls apply to certain technologies. Obviously, Category I items are of greatest sensitivity and accordingly, MTCR provides for the exercise of particular restraint in their transfers. Therefore, there will be strong presumption to deny such transfers.

Not a treaty

The MTCR is not a treaty and does not create legal obligations for member states. It is a diplomatic tool and relies on common understanding among partners that stopping missile proliferation is more important than economic profit. It derives the binding force through national legislations passed to implement it. However, the sanctions provided by the United States National Defence Authorisation Act against those caught in violation of MTCR guidelines undermine and destroy MTCR itself which is not a legally binding document.

The principle underlying MTCR is that the final decision on any export belongs to the sovereign partners. The United States cannot impose its will or its interpretation.[2] The dictatorial imposition of sanctions by the United States against foreign nationals and companies for the acts committed outside the jurisdiction of United States would encourage withdrawls from MTCR. This nullifies Article 7 of MTCR, which loudly proclaims that the adherence of all states to these guidelines in the interest of international peace and security, would be welcome. Such sanctions also invalidate the well-established principle of territoriality which underlines penal jurisdictions. The principle is so well known that it has percolated into a general principle of law recognised by the civilised nations which, according to Article 38 of the Statute of International Court of Justice, is a primary source of international law.

Lotus case

In a landmark case popularly known as *S.S.Lotus*[3], decided in 1927, the Permanent International Court of Justice recognised that the territoriality forms the basis for the assumption of criminal jurisdiction. The concept of extra-territoriality--that is making export activities by other countries subject to US law—renders the 'territoriality' principle meaningless and is violative of international law.

The primary objective of the MTCR is to fight missile proliferation. However, as an instrument of fighting missile proliferation, MTCR does nothing to dampen the motivations of nations seeking ballistic missiles for military purposes. The MTCR is a means of limiting supply but not demand.[4]

The imposition of sanctions by the United States against India for the development and launch of Agni is unjustified and illegal. The allegation of the United States that the development of Agni violates MTCR is unfounded. The MTCR does not prohibit national space programmes.

Interpretation and implementation

Early in the life of MTCR, the US government made an official protest to the French government concerning the sale to Brazil of gyroscopes (a category II item) made by the French company SAGEM. Thereafter, MTCR has been tested by another disagreement between the United States and France concerning the sale of a French rocket motor, the Viking produced by Matra for the Arianespace Consortium, to Brazil. The disagreement quickly moved beyond the question of missile technology transfer to involve charges and counter-charges that the MTCR was being used to interfere in commercial competition between French and US companies.

The Viking is a liquid-fuel rocket motor, which is category I technology in the MTCR Equipment and Technology Annex. The export of these systems is permitted only when France obtains the assurance from Brazil for the peaceful use of the Viking and assumes responsibility for taking all steps necessary to ensure that the Viking is put only to the stated end use. The French President decided in November 1989 that suitable safeguards were available to protect transferred technologies from non-peaceful use or re-export. Therefore, the sale was treated as permissible within the framework of MTCR.

The MTCR depends on national legislations for its legal validity and in national means for its implementation.[5] The MTCR guidelines are very explicit in this regard, stating: 'It is understood that the decision to transfer remains the sole and sovereign judgment of the (exporting) government'. Therefore, the decision on the question of the end use of the technology to be transferred rests with the exporting government. Accordingly, in the Viking case, French President Francois Mitterrand decided that technology transferred to Brazil would be used for peaceful purposes and would not be re-exported.

On 11 May 1992 United States impose sanctions on the Russian Space Organisation, Glavkosmos, and the Indian Space Research

Orgnisation, ISRO, for entering into an agreement for the sale of cryogenic rocket engines allegedly in violation of the MTCR. Cryogenic engines constitute complete rocket systems and fall within category I equipment in the MTCR Annex. Therefore, the MTCR permits the sale of cryogenic engines by Glavkosmos to ISRO only when Russia obtains binding assurance from India that the cryogenic engines will be used for peaceful purposes. The MTCR guidelines specifically state that they are not designed to impede national space programmes or international co-operation in such programmes as long as they could not contribute to delivery systems for the weapons of mass destruction.

India has emphatically asserted that the cryogenic engines were intended for a project to put a salellite in geostationary orbit for remote sensing, telecommunications, weather forecasting and the like. India faces insurmountable problems of illiteracy, informational handicaps and telecommunications, and therefore intends to employ cryogenic engines in projects. Thus, the agreement between Glavkosmos and ISRO for the sale of cryogenic engines does not violate MTCR inasmuch as these engines will be used by India for peaceful purposes to augment her developmental projects.

What authority does United States have to decide the issue of end use of the cryogenic rocket engines? How can United States raise concerns about acquisition by India of ICBM capabilities by using the cryogenic rocket engines? The MTCR does not allow Washington to decide this question. The matter rests with the Russian government which is empowered by the MTCR to decide the issue of the end use of the technology to be transferred to India. It is neither Glavkosmos nor ISRO but Washington which has violated the provisions of MTCR by appointing herself sole arbiter in the matter which concerns Russia and India--none of whom, strictly speaking, is a party to the MTCR which is not even a treaty but merely a diplomatic tool containing a set of guidelines.

The United States, so-called father of the MTCR, has completely bent, twisted and distorted the provisions of the MTCR by arbitrarily deciding an issue which does not fall within her domain. The sanctions imposed by the US under her own national legislation on ISRO and Glavkosmos have extra-territorial effect and are illegal, unjustifiable, and inequitable. In fact the imposition of such inequitable sanctions is even against the interests of the United States. Any efforts to give the MTCR more teeth through unjustifiable sanctions for alleged non-compliance threaten withdrawals from it and would considerably weaken it.

Dual use technologies

There has been substantial disagreement among MTCR participants concerning dual use technologies. The most ambiguous aspect of MTCR is that it does not provide for criteria to distinguish between prescribed assistance for regional ballistic missile programmes and permissible assistance for civilian space launch projects. The MTCR is devoid of transparency in this respect. This ambiguity of MTCR was exposed during the French offer of Viking rocket engine technology to Brazil. The offer drew criticism from the US government as being a potential violation of the MTCR. France responded by arguing that the MTCR explicitly permits transfers to rocket technology for civilian programmes such as the Brazilian space launch programme. France went on to point out that the US complaint was a commercially motivated attempt to win the Brazilian satellite order for McDouglas of the USA. The Brazilian government insisted that the Viking engine technology would not be used for military purposes.[6] On 11 May 1992 the United States imposed sanctions on Russian Space Organisation (Glavkosmos) and the Indian Space Research Organisation (ISRO), involved in the sale of rocket engines to India, for violating the guidelines of the Missile Technology Control Regime. Notwithstanding the assurances by the Indian government that the rocket engines were to be used to put communication satellites into orbit, the United States pointed out that regardless of how they were to be used, the MTCR forbids their sale. Obviously, United States has misused MTCR due to commercial motivations by holding that since there is no way to draw the line between peaceful and non-peaceful purposes, such a line must be drawn on the basis of technology involved. The rocket technology is inherently dual purpose technology and there is no clear distinction between military and civilian rocket technology. To prevent the misuse of the missile proliferation control regime, safeguards must be developed to ensure that the dual use technology is used exclusively for civilian purposes. The MTCR does not provide for any safeguard to ensure the peaceful end use of the transferred technology. It relegates the task of the determination of the end use of transferred technology to the exclusive judgment of the exporting state. The MTCR permits the transfer of dual use technology only after the exporting state obtains binding assurances from the recipient state that the technology shall be used for peaceful purposes and shall not be re-exported.

III. Developing Safeguards

NPT model

Unlike the MTCR, the Nuclear Nonproliferation Treaty (NPT) of

1968 contains international safeguards to ensure the peaceful uses of the nuclear energy. The fundamental objective of the NPT is to prevent the spread of nuclear weapons to states that do not possess them.[7] The obligation of states parties to the NPT are designed to ensure the realization of this objective. Articles I and II contain three different sets of prohibitions. First, Nuclear Weapon States (NWSs) undertake not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices, or the control over such weapons or nuclear devices, directly or indirectly. On the other hand, Non-Nuclear Weapon States (NNWSs) undertake not to receive from any state the transfer of nuclear weapons or other nuclear explosive devices, or the control over such weapons or nuclear devices, directly or indirectly. Second, only NNWSs undertake not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices. And, third, nuclear states undertake not in any way to assist, encourage, or induce any non-nuclear state to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or control over such weapons or explosive devices; and non-nuclear states undertake not to seek or receive any assistance in the manufacture of nuclear weapons or other explosive devices. Article III of NPT contains safeguards and provides that each NNWS party to the NPT is to accept international safeguards, as set forth in agreements to be negotiated with the International Atomic Energy Agency (IAEA), to be applied to all source or special fissionable material in all peaceful nuclear activities within its control anywhere, for the purpose of verifying treaty obligations, with a view to preventing the diversion of nuclear energy from peaceful uses to nuclear weapons or other nuclear explosive devices.

MTCR institutionalization

Undoubtedly, NPT safeguards ipso facto cannot be applied to MTCR. To avoid the misuse of MTCR and imposition of arbitrary and unilateral sanctions by any of the MTCR members as US has done in the past, the MTCR guidelines must be institutionalized. The suggestion for the institutionalization of MTCR is based on contemporary international jurisprudential trends. In 1970 General Assembly unanimously adopted a resolution concerning Declaration of Principles Governing the seabed and Ocean Floor[8]. The Assembly, inter alia, declared that the seabed beyond national jurisdiction was not subject to national appropriation or sovereignty but was the common heritage of mankind and must be exploited for the benefit of making as a whole, and taking into particular consideration the interests and needs of the developing countries. The General Assembly also resolved to render institutional infrastructure to

the concept of common heritage of mankind. To implement the resolution, the Third United Nations Conference on the Law of the Sea (UNCLOS III) witnessed a grim political battle of the states fought at the political battle field. The UNCLOS III continued for about a decade and held various sessions at different places. Finally, UN Convention on the Law of the Sea emerged in December 1982. The Convention institutionalized the concept of common heritage of mankind by providing for the creation of International Seabed Authority having Assembly, Council, Enterprise and Secretariat as its various organs. Enterprise is the mining arm of the Authority and shall mine the resources of International Seabed Area parallel to the mining activities of states and multinational corporations.[9] The decision-making procedure of the organs of International Seabed Authority makes no place for the doctrine of weighted voting which has in the past paralysed United Nations Security Council. The UN Convention on the Law of the Sea further institutionalized the dispute settlement machinery by providing for the establishment of International Tribunal for the Law of the Sea for resolving the maritime disputes[10] in addition to the existing international conflict resolution mechanisms.

The idea of institutionalization of international environmental law was emphatically hammered much before the beginning of the UN Conference on Environment and Development.[11] It was suggested that international environmental institutional machinery must be evolved in the form of International Environmental Authority to ensure compliance with the international environmental standards. The need for an International Environmental Court was also stressed for the adjudication of the international environmental disputes. It is heartening to mention that at the recently concluded Rio Conference on Environment and Development, states have arrived at consensus to establish an International Environmental Commission.

To monitor compliance with MTCR, the MTCR Authority must be established which would be entrusted the responsibility of decision-making on crucial issues like determination of the end use of the transferred technology. The MTCR Authority must also be vested with the powers to make recommendations to the MTCR partners the issue of imposition of sanctions against the recalcitrant states or persons. In compliance with the recommendations of the MTCR Authority, the sanctions could then be imposed by the MTCR partners under their respective national legislations. This would obviate legal problem of extra-territorial effect of the sanctions.

The MTCR Authority must be responsible for co-ordinating the task

of information sharing and development of technology among the MTCR partners for developmental purposes. Such a provision would induce the developing countries to adhere to MTCR. The developing countries would welcome technological informational sharing assistance rendered by the developed MTCR partners in their technology development programmes. This would go a long way in furthering the goal of globalisation of the MTCR.

The institutionalization of MTCR must be accompanied with the development of safeguards to ensure missile non-proliferation which is primary goal of the MTCR. The MTCR Authority must occupy pivotal role in the operation of the safeguard mechanisms so developed. The MTCR partners as well as adherents must be required to furnish periodic reports to the MTCR Authority on the issue of technology development in progress within their territorial jurisdiction and control. Such reports must be examined by the MTCR Authority and thereafter circulated by the Authority alongwith observations and comments to all the MTCR partners and adherents. The reporting procedure mechanism exists in the Human Rights Covenants of 1966, namely, International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights.[12] Under both the covenants, the states parties are obligated to furnish their reports. Under the Covenant on Economic, Social and Cultural Rights, the reports shall be transmitted to Economic and Social Council[13] whereas under the Covenant on Civil and Political Rights, the reports shall be transmitted to Human Rights Committee for consideration[14]. The reports shall deal with the measures taken by the reporting state to protect and promote human rights within its national boundaries. The adoption of the reporting mechanism to monitor MTCR compliance would mitigate the element of arbitrariness in the MTCR.

The International Covenant on Civil and Political Rights provides for inter-state communication procedure.[15] A state party can make a communication to the Human Rights Committee alleging that another state party is not fulfilling its obligation under the present Covenant. However, reference to Human Rights Committee shall be preceded by the communication by the communicating state to another state party which is alleged to have not given effect to the provisions of the Covenant. Within three months of the receipt of the communication, the receiving state shall afford the state which sent the communication an explanation clarifying the matter. If the matter is not adjusted six months after the initial communication, either state shall have the right to refer the matter to the committee. However, the Covenant obligates the committee to ascertain before dealing with the matter that all domestic

remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law.[16] The rule of exhaustion of domestic remedies is, however, not applicable in a case where application of the remedies is unreasonably prolonged. Thus, two conditions must be fulfilled before the committee acquires competence to deal with the matter : firstly, the condition of inter-state communication; and secondly, the condition of exhaustion of local remedies. The main function of the Human Rights Committee is to make available its good offices to the states parties concerned with a view to friendly solution of the matter. The committee shall submit its report within twelve months of the receipt of notification for reference of the matter to it. The report shall be confined to the brief statement of the facts and the solution reached, and the brief statement of the facts, written submissions and record of the oral submissions made by the state parties if solution is not reached. The report shall be communicated to the state parties.

To further avoid the misuse of MTCR, the MTCR Authority must be vested with the power to receive petitions of the MTCR members and adherents on the issue and to play conciliatory role and make attempts to arrive at friendly adjustment of the matter. If friendly adjustment is not possible, the MTCR authority must draw a report and transmit it to all the MTCR partners and adherents. If the matter still stands unresolved, the MTCR authority shall make recommendations on the issue of sanctions to be imposed for enforcing missile non-proliferation on the recalcitrant state.

Moreover, the MTCR authority must also be vested with verification powers which must be carefully worked out so as to ensure that MTCR members and adherents fulfil their obligations assumed under MTCR.

IV. Indian Adherence to MTCR

Should India adhere to the MTCR? Should India ignore the MTCR? Should India strive to undermine or destroy the MTCR, or to replace it with alternative regime that could better serve Indian interests? Such questions have become significant in view of India's entry into the exclusive club of six nations possessing the IRBM technology, the imposition of sanctions by United States against ISRO and the development and launch of Agni. The overseas observers perceive the Indian government's resistance to the Nuclear Non-Proliferation Treaty (NPT), periodic threats to go nuclear, and non-adherence to the MTCR as a hawkish posture.[17] India has always viewed the NPT as structurally discriminatory because it distinguishes between nuclear and non nuclear

states on the basis of whether they had manufactured or exploded a nuclear weapon or other nuclear explosive device before 1st January 1967. The NPT effectively freezes the status quo of "nuclear haves" and "nuclear have-nots" and provides for differing obligations on the part of each group, relegating the have-nots to permanent international inferiority. The NPT addresses to only one dimension of the proliferation problem--horizontal proliferation or spread of these weapons to non--nuclear states. India has always supported the policy of non-proliferation--non-proliferation of a different order which contributes to collective security. To contribute to the collective security, the proliferation issue must be addressed in all its dimensions including the continued retention by states that possess these weapons, their ongoing research and development efforts to further refine them (vertical proliferation) and their deployment in different parts of the world, whether on land, sea, air or outer space (spatial proliferation). The narrow focus of the NPT confined merely to horizontal proliferation has not brought about the much wanted "collective security" that it was supposed to usher in. India's resistance to the NPT is justified until its scope is broadened at the forthcoming 1995 review conference to cover proliferation in all dimensions--horizontal , vertical as well as spatial. In the mean time, India must exercise her nuclear option before 1995 review conference. The exercise of nuclear option is necessary in view of the fact that India is flanked by her two nuclear neighbours, China and Pakistan, and India has unresolved territorial problems with both these. However, the MTCR does not suffer from the discriminatory features which have plagued the NPT. There is no line or bond joining the two nonproliferation regimes--the NPT and MTCR. Therefore, MTCR should not be viewed as discriminatory because the NPT is discriminatory. The issue of MTCR adherence by India should be examined on the basis of the effect of the MTCR guidelines on the security of India.

The MTCR is missile proliferation control regime. It does not prohibit the indigenous development of either category I or category II systems, subsystems and items. It does not prohibit even the transfer of proscribed equipment if the recipient state gives binding assurances to the exporting state that the transferred equipment will be used for peaceful purposes and will not be re-exported without the consent of the exporting state. Therefore, India's Integrated Guided Missile Development Programme (IGMDP) is not inconsistent with the MTCR. Even the indigenous development of Agni having range of 2500 km. with payload of 1000 kg. does not contravene the guidelines of the

MTCR. The future indigenous development of Indian ICBM would also not conflict with the MTCR guidelines. The transfer by India of proscribed technology falling in category I or category II equipment will also not fall within the injunction of the MTCR if the end user of the transferred technology is peaceful. therefore, India's MTCR adherence does not compromise her security interests. On the contrary, India's international stature would be considerably enhanced in case India expresses her adherence to MTCR. However, Indian adherence to MTCR must be preceded by formulating of Indian missile technology export controls. By adhering to the MTCR, India shall not become the target of the United States export control sanctions. Section 11B(b) (2) of the United States National Defence Authorisation Act makes the sanctions inapplicable with respect to :

1. any export, transfer, or trading activity that is authorized by the laws of an MTCR adherent, if such authorization is not obtained by misrepresentation or fraud;
2. any export, transfer, or trade of an item to an end user in a country that is an MTCR adherent.

Moreover, section 11B(b)(3) of the National Defence Authorisation Act provides that the sanctions would not apply to a person if an MTCR adherent is taking judicial or other enforcement action against that person with respect to such acts, or that person has been found by the government of an MTCR adherent to be innocent of wrong--doing with respect to such acts. Thus, MTCR adherence shall take India out of the operation of sanctions mechanism of the United States for carrying out her IGMDP and even export of her technology provided such export is permitted by her export control regime. Yet another benefit of MTCR adherence for India would be that India would be able to share information on missile proliferation which is vital for national security.

India's national interests are in no way compromised by adhering to the MTCR. Nevertheless, India would derive three-fold benefits by adhering to MTCR. Firstly, her international stature would be considerably enhanced and she would not be accused of hawkish posture Secondly, India would be outside the purview of US sanctions ; and thirdly, India would be able to share vital intelligence information on missile proliferation. By equating MTCR with NPT and treating even MTCR as discriminatory, Indian government is doing what it does best--undertaking no action when bold action is required. The Indian government faces a big challenge to come out of the shell, shed strategic ambiguity policy and extend acceptance to the MTCR. It is time for India to take stark realities into account and develop national strategy in terms of joining the MTCR.

References

1. Former Indian Defence Minister K.C. Pant, in *Pacific Defence Reporter*, p. 26 (Oct. 1989) ; *Regulations* (SIPRI,1991) p. 220.
2. Gurdip Singh, 'Rocket Deal-U.S. Sanctions Illegal', *The Hindustan Times*, pp. 13, 14[20 May 1992].
3. S.S. Lotus (*France v. Turkey*), P.C.I.J. Ser. A., No. 10
4. Gurdip Singh, 'MTCR Not Binding on India', *The Hindustan Times*, p. 11 (22 June 1992).
5. Thomas G. Mahnken, 'The Arrow and the Shield : U.S. Responses to Ballistic Missile Proliferation,' *Washington Quarterly* 189-203 (1991); Uzi Rubin, 'How Much Does Missile Proliferation Matter?', 35 Orbis, 29-39 (1991)
6. B.Davis, Ariansespace Offer to Brazil Raises US Ire, *Wall Street Journal*, 2(18 July 1989, European edn.) ; D. Silverberg, 'French Proposal May Violate Pact on Proliferation, *Defence News*, 4(17July 1989) ; M. R. Gordon, 'U.S. Seeks to Stop Brazil's Missile-Technology Deal', *New York Times*, 6(19 October 1989) quoted in Aaron Karp, 'Ballistic Missile Proliferation,' in *SIPRI Yearbook* (1990)— World Armaments and Disarmanents, p. 376.
7. Joseph F. Pilat and Robert E. Pendley (ed.), *Beyond 1995-The Future of the NPT Regime*, 1-5 (Plenum Press, New York 1990).
8. General Assembly Resolution No. 2749 ; see Gurdip Singh, *International Law* 229-230 (1992).
9. Id at 298.
10. Gurdip Singh, *UN Convention on the Law of the Sea Dispute Settlement Mechanisms* 54-100 (1985).
11. Gurdip Singh, *Global Environmental Change and International Law* 168-176 (1991).
12. Gurdip Singh, 'International and National Measures of Implementation of Human Rightss'[18], *Indian Journal of International Law*, 187 (1978).
13. International Covenant on Economic, Social and Cultural Rights, Article 16.
14. International Covenant on Civil and Political Rights, Article 40(2).
15. Ibid., Article 41.
16. Gurdip Singh, 'The Local Remedies Rule in Relation to State Responsibility for Injuries to Aliens', X-XI *Delhi Law Review*, 118-141 (1981-82).
17. Supra note 11 at 137.

P.C. MOHARANA -- 'SEXPEER'
Lecturer, Faculty of Law, Delhi University

Ode on Code :
Crimes : Causes and Cure

SPIRITUAL malnutrition crime spurs,
Mind meditates how to enlarge the purse.
Criminals are never born, they are made,
By company bad or wrongs inflicted.

NO ONE ever is a criminal born,
Trapped by society, one does outlaw turn.
Values spiritual alone, can crimes cure,
Values materialist to crimes lure.

FOR, crimes in mind exist, ere in the field,
Sense spiritual there, can get them killed.
Not a fly-by-night rule, but eternal,
Vedic knowledge cures illness criminal

WITH Vedic insights, rising greed bridle,
Crimes shall wane and men shalln't try to diddle,
Thousand studies made, but crimes ever rise,
The Vedic verity, they didn't recognise.

THOUSAND studies can no remedy provide,
Unless *"Veda Vani"* they take as a guide.
Until spiritual ideas, minds impregnate,
Punishment cannot, crimes eradicate.

MINDS, when men, in prison of meanness, keep
Penal servitude can't in bud, crimes nip.
So long materialism man deforms,
Crime rates shalln't fall only by law reforms.

MIND is the place right, where crimes must be fought,
People must so, higher values be taught.
Love for wealth can't be ousted, but be curbed,
By moral teaching, this end is well served.

SCHOLARLY research can, best results yield,
If it does not brush off, this basic field.
When tides of materialism, world sweep,
God's words can them restrain and limits keep.

MATERIAL pursuits can't yield their best,
Unless tempered with spiritual quest.
Despiritualized learning, wrongs breeds,
And the learners to selfishness leads.

IF you want lawless acts never to rise,
Learning ambience spiritualize.
Amicus humani generis role must,
Of all higher learning, be the main thrust.

OUR acts must to God, an offering be,
We must not tinker or act shabby.
God we cannot cheat by our artifice,
Pious in temple, wicked in office.

JEALOUSY is a knife that stabs the self,
The wise shun it, therefore, but not the elf.
From every passion, man's manumission,
Manu's mission is our next discussion.

WHAT Manu did in his age, we in ours,
Verse the laws, with speech figures and flowers.
Unattempted yet, in English language,
Versed laws, Indians ruled, from ancient age.

THE more ancient a nation's culture is,
The closer, with religion are law's ties.
Golden versed laws may, now archaic seem,
But when made, we were world's *creme de la creme.*

[SWEETEST form is, rhyming pentameter,
English has no other metre, sweeter.
No land is as verseful as India is,
Where verse blooms like lotuses and lilies].

Bibliography

Books of Delhi University Law Faculty Teachers*

Nomita AGGARWAL	1978	*Introduction to Legal Theory and Comparative Law* [textbook] (ALA: Allahabad)--reprint 1993
T.S. BATRA	1977	*UN Security Council: Snapping the Snare* (Metropolitan : Delhi)
	1978	*Criminal Law: Principles of Liability* (Metropolitan: Delhi)--2nd ed 1983
	1979	*Security Council and the Veto* (Metropolitan: Delhi)
		Human Rights: A Critique (Metropolitan: Delhi)
	1981	*Criminal Law in India* [textbook] (Metropolitan: Delhi)
	1982	*International Institutions* [textbook] (Bookhive: Delhi) 3rd ed 1987
		Administrative Law [textbook] (Bookhive: Delhi)
	1985	*Indian Penal Code* [textbook] (Bookhive: Delhi)
		International Law [textbook] (Bookhive: Delhi) 2nd ed. 1986

*Prepared by Research Assistants to Professor Tahir Mahmood.

The bibliography—arranged in the alphabetical order of surnames—may not be exhaustive, author-wise or work-wise. It covers only those books (English only) of which the present Faculty teachers are exclusive authors or editors. It does not list either books of former teachers of the Faculty or those of which which a teacher may be co-author or co-editor with others. Student textbooks among the works listed are so marked.

Upendra BAXI:	1980	*Indian Supreme Court and Politics* (EBC: Lucknow)
	1982	*The Crisis of Indian Legal System* (Vikas: Delhi)
	1985	*Courage, Craft and Contention: The Indian Supreme Court in the 80s* (Tripathi: Bombay)
	1986	*Towards A Sociology of Indian Law* (Satvahan: Delhi)
		Inconvenient Forum and Convenient Catastrophe: The Bhopal Case (Tripathi: Bombay)
	1987	*Environmental Protection Act: An Agenda for Implementation* (ILI: Delhi)
	1988	*Law and Poverty: Critical Essays* (EBC: Lucknow)
	1993	*Marx, Law and Justice* (Tripathi: Bombay)
	1994	*Inhuman Wrongs and Human Rights: Unconventional Essays* (Har-Anand : Delhi)
		Membrino's Helmet: Human Rights for A Changing World (Har-Anand : Delhi)
edited	: 1987	*Right To Be Human* (Lancer : Delhi)

S.L. BHALLA	1989	*Elements of Indian Legal System* (textbook) [Docta-Shelf: Delhi]
	1990	*Fundamentals of International Law* [textbook] (Docta-Shelf: Delhi)
		Family Law [textbook] (Docta-Shelf: Delhi)
	1991	*Human Rights: An Institutional Framework for Implementation* (Docta-Shelf: Delhi)
Gyan CHAND	1983	*Judicial Control of Labour Tribunal* (Tripathi: Bombay)
Harish CHANDER	1993	*Contracts of Employment and Management Prerogatives* (Vijaya : NOIDA)
Mata DIN	1984	*State Monopoly of Road Transport in India* (Kamlesh: Delhi)
	1986	*Provincial Insolvency Act* [textbook] (Kamlesh: Delhi)
		Law of Passing Off and Infringement of Trademarks [textbook] (Kamlesh: Delhi)
	1988	*Supreme Court on Reservation* (Kamlesh: Delhi)
		Negotiable Intruments and Banking [textbook] (Kamlesh:Delhi)

Mata DIN *(contd)*	1989	*Compensation under Motor Vehicles Act* (Kamlesh: Delhi)
	1990	*Motor Vehicles Act 1988* [textbook] (Kamlesh: Delhi)
B.ERRABBI	1986	*Right to Travel under the Constitution* (EBC: Lucknow)
Suman GUPTA	1992	*Shareholder Dmocracy: Fact or Fiction* (DU:Delhi)
V.K. GUPTA	1987	*Kautilyan Jurisprudence* (Gupta: Delhi)
S.C. KHARE	1977	*Human Rights and United Nations* (Metropolitan: Delhi)
	1985	*Use of Force under UN Charter* (Metropolitan: Delhi)
A.K. KOUL	1977	*Legal Framework of UNCTAD in World Trade* (Tripathi: Bombay)
Arun KUMAR	1985	*Cultural and Educational Rights of Minorities under the Indian Constitution* (Deep: Delhi)
Ved KUMARI	1993	*Treatise on Juvenile Justice Act 1986* (ILI: Delhi)
Tahir MAHMOOD	1972	*Family Law Reform in the Muslim World* (ILI: Delhi)
	1975	*Civil Marriage Law: Perspectives and Prospects* (ILI: Delhi)

Tahir MAHMOOD *(contd)*	1976	*An Indian Civil Code and Islamic Law* (ICPS: Delhi)
	1977	*Family Planning: The Muslim Viewpoint* (Vikas: Delhi)--reprinted 1981,1984
		Muslim Personal Law: Role of the State in the Indian Subcontinent (Vikas: Delhi) —2nd ed AIR, Nagpur 1983
	1980	*The Muslim Law of India* (LBC: Allahabad) —2nd ed 1982
	1981	*Studies in Hindu Law* (LBC: Allahabad) --2nd ed 1986 also published in four separate parts (1981/1986)
	1986	*Personal Laws in Crisis* [P.B. Gajendragadkar Endowment Lectures, Bombay University] (Metropolitan: Delhi)
		A Study of Indian Succession Act 1925 (AIR: Nagpur)
	1987	*Personal Law in Islamic Countries* (ALR: Delhi)
edited :	1972	*Islamic Law in Modern India* (ILI: Delhi)
	1975	*Family Law and Social Change* [Festschrift for A.A.A. Fyzee] (Tripathi : Bombay)
	1991	*Minorities and State at Indian Law* (IOS: Delhi)

Tahir MAHMOOD *(contd)*	1992	*Pressing Issues Facing the Nation* (IOS: Delhi)
	1993	*Human Rights in Islamic Law* (IOS: Delhi)
K.K. NIGAM	1975	*Constitutional Law: A Study of Indian Federalism Through Cases* (ALA: Allahabad)
Hoti PRASAD	1977	*Companies' Winding Up: Law and Procedure* (Concept: Delhi)
P.S. SANGAL	1981	*National and Multi-National Companies : Some Legal Issues* (Tripathi: Bombay)
Gurdip SINGH	1985	*UN Convention on Sea Disputes Settlement Mechanism* (Academic: Delhi)
	1986	*New Dimensions in International Law* (Pioneer: Delhi)
	1991	*Global Environmental Change and International Law* (Aditya : Delhi)
	1992	*International Law* [textbook] (Aditya: Delhi)
S.P.SINGH	1986	*Law of Torts* [textbook] (Singhal: Delhi)
Ahmed SIDDIQUE	1976	*Criminology: Problems and Perspectives* (EBC: Lucknow) -- 3rd ed 1993
S.S. VATS	1975	*Control of Evictions and Rent* [textbook] (Dhanwantra: Delhi) --2nd ed. 1979

Checklist

Research Work in Delhi University Law Faculty :1991-94 **

A. Ph.D. topics registered since July 1991

(for Ph.D. work–theses completed and topics registered–till June 1991 see *Delhi Law Review*, Volume XIII:1991)

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Aggarwal, Renu	Aftermath of divorce : comparative and critical study of Indian matrimonial laws
Chandra, Trilok	Choice-of-law rules as interpreted and applied by courts in matrimonial cases in India
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Siddiqui, Iqbal A.	Discretionary powers of police and rule of law — enforcement of welfare laws relating to women and children

(b) 1992

Asmar, Salah, S *	Legal protection of trademarks — comparative study of Indian and Jordanian laws

** Prepared by Research Assistants to Professor Tahir Mahmood.
* foreign student.

Chopra, R.K.	Telecommunicaion revolution and its implications in Indian context
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Saxena, O.P.	Police commissioner system in Delhi vis a vis rule of law

Shoogufan, A.M. *	Right to self-determinatin and evolving international order
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(d) 1994

Ahuja, Virendra K.	Intellectual property, public interest & emerging technologies
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Manocha, S.K.	Judicial law-making : courts as third chambers of legislatures
Nair, Asha	Problems of girls and women in family and society : reforming social norms and attitudes through penal legal measures
Sahoo, Sudarshan	Legal control of industrial pollution in India

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Ahuja, V.K.	Remedies for infringement of intellectual-property rights : a critique
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April 1994	*seminar* "Impact of the Uruguay Round of Multilateral Trade Negotiations on India "
August 1994	*seminar* "IReligion and the Law in Modern India "
November 1994	8th R.V. Kelkar Memorial Lecture *area :* criminal law & procedure

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Editor
Tahir Mahmood
Professor of Law, Delhi University

assistance

Poonam Passi
Personal Research Assistant to Editor

Arshad Ahmed
Personal Secretary to Editor

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

Contents

Editors's Note

The *Delhi Law Review* did not appear from 1983 to 1989. An attempt is being made to fill the gap through this slender volume.

The volume contains texts of two very important documents to which the Delhi University Law Faculty owes most of its present rules, regulations, curriculum and syllabi. While the first of these — the Gajendragadkar Committee Report of 1964 — had a dissenting note by the then Dean, the other—Deshpande Committee Report of 1987 — was unanimous. Each of these Reports is a valuable historical document of an academic nature. Both are being reproduced here. Both, I hope, will be found useful by legal researchers, legal educationists and teachers and students of law.

The two Committee Reports are followed by a note, prepared under my guidance, on the administrative system of the Faculty. This must be of great help to all those having dealings with the Faculty, and also of interest otherwise to educational administrators.

The Faculty syllabus, at Bachelor and Master's levels, is reproduced next. This too must help all those interested in legal education and its reform in the country.

The backlog volume--though slender and quite belated--will, I am sure, be welcome by all readers of the *Delhi Law Review*.

Professor Tahir Mahmood

Gajendragadkar Committee Report on Reorganization of Legal Education in Delhi University --1964

In April 1963 Vice-Chancellor C.D. Deshmukh had constituted a committee "to sudy the problem of reorganization of legal education in Delhi University". Chaired by Justice P.B. Gajendragadkar, the committee had as its members P.N Sapru, S.V. Gupte, Arthur von Meheren of USA, Anandjee, M.P. Jain (added later) and Dean M. Ramaswami (convenor). Report of the committee, was published in November 1964. Full text of this important document is, after necessary editing, being reproduced below .

-- Editor

I. Introduction

As we start drafting our report, we must confess that we are deeply disturbed by the thought that the problem of legal education has not been tackled effectively over so many years, though several Enquiry Committees and high-powered Commissions have loudly complained that the conditions in law colleges generally in our country are at a low ebb and the quality of education imparted to our students of law is deplorably poor. The problem of legal education in India has been considered by the Calcutta University Commission of 1917-19 ; the University Education Commission of 1948-49 ; the Bombay Legal Education Committee of 1949; the All-India Bar Committee of 1953 ; the Rajasthan Legal Education Committee of 1955; and the Law Commission of India of 1955-58. The reports made by all these committees and Commission have emphasised the need to reform legal education and to place it on a more satisfactory basis ; and yet, the position of legal education in this country, by and large, continues to be as unsatisfactory as before. This is a very distressing feature of the problem which we are called upon to consider ; and so, when we make our report setting forth our recommendations for improving legal education which is imparted by the Faculty of Law in the Delhi University, we wish to express the hope that this Report will not merely add to the number of reports which have already been made in this matter and take its place on the shelf along with its predecessors. We trust that the problem which we have been asked to consider will receive the prompt attention of the Delhi University and our recommendations will be examined and implemented without unnecessary delay.

II. Function of Law in Democratic India

The problem of improving legal education has become urgent and of paramount importance particularly in the context of the dynamic role that law is called upon to play after our country adopted its Constitution on the 26th January, 1950. The Constitution has guaranteed to its citizens justice--social, economic and political--and it has placed before the country the ideal of welfare state. It is obvious that in democratic country the achievement of the ideal of the welfare state is substantially assisted by the process of law, and in that sense, law becomes a mighty weapon in the armory of democracy by which socio-economic revolution is brought about. As observed by Davis in *Society and the Law,* the lawyer has emerged as the architect of modern economy and governmental, organisational and regulatory processes. In this context, law has ceased to be merely a command of the legislature or the monarch. Its functional aspect has assumed significance and it seeks to work as a flexible instrument of socio-economic revolution. It is a social institution, democratically evolved for achieving the object of making social adjustments to meet the challenge which incessantly flows from unsatisfied legitimate human desires and ambitions. As observed by Morris Cohen, law is a science of social adjustment, its main object being to establish socio-economic justice and remove the existing imbalance in the socio-economic structure. It is this aspect of law that is emphasised by sociological jurisprudence, and it is in the light of this aspect of law that the problem of legal education has to be faced. If the function and role of law in a democratic state have now become dynamic and they represent a radical departure from the conservative analytical concept of law, it follows that the nature and scope of the education of law must correspondingly change. If law is a science of social engineering, education of law must attempt to produce social engineers who by their legal philosophy and ideology will guide the efforts of democratic legislatures to give effect to the proclaimed ideal of achieving socio-economic justice.

In ancient India, these different aspects of law appear to have been noticed. What was presumably meant was that law is the command of the king, and that would approximate to the view which analytical jurisprudence takes about the nature of law. On the other hand it was also said that the function of law was to preserve, guide and advance the social values of the community with a view to sustain liberty, achieve justice and advance the good of the community. These notions which were vaguely

indicated in some of the ancient Indian texts dealing with the philosophy of law, have now taken a concrete form and shape in all democratic countries which seek to achieve socio-economic justice by democratic process. As observed by Dean Pound:

> "This sociological view of law emphasises the importance of the study of the legal system functionally as a social instrument, as a part of social control and study of its institutions, doctrines and precepts with respect to the social ends to be served. In other words, it pre-supposses that law is a specialised agency of social control."[1]

When law proceeds to discharge its function as a flexible and efficient instrument of socio-economic justice, it has necessarily to seek the co-operation of other social sciences. That is another aspect of the function of law which must be emphasised. This aspect has been eloquently described by Dean Pound when he observed that:

> "All the social sciences must be co-workers and, emphatically, all must be co-workers with jurisprudence."[2]

A lawyer has thus to play a major role in a democratic country, and that necessarily means that society would no longer be content with having merely professional lawyers. As Lord Sankey observed, what a democratic country needs is not merely professional lawyers, but lawyers who have the vision of the true function and role of law in discharging the state's obligations to society. The same idea has been expressed by Friedmann when he discussed the scope and content of rule of law. Friedmann said:

"The fact that the content of the rule of law cannot be determined for all times and all circumstances is a matter not for lament but for rejoicing. It would be tragic if the law were so petrified as to be unable to respond to the unending challenge of evolutionary or revolutionary changes in society. To the lawyer, this challenge means that he cannot be content to be a craftsman. His technical knowledge will supply the tools; but it is his sense of responsibility for the society in which he lives that must inspire him to be jurist as well as lawyer."[3]

It cannot be disputed that India has produced many eminent lawyers as well as eminent judges who by their professional skill and excellence can compare favourably with the best lawyers and judges all over the world. But it is also beyond dispute that India has not produced many legal thinkers, philosophers or jurists; and the extent and the quality of juristic literature produced in this country is not very promising. The fact that eminent lawyers and judges have been produced in India cannot be taken as evidence of the soundness of legal education that they received. It may

well be that this country produced eminent lawyers and eminent judges not because of the legal education they received at our universities, but may be, in spite of it. The fact, however, remains that juristic thought and juristic learning have yet to be developed in this country, and in the context of today, the problem of guiding democratic endeavour by juristic ideology and philosophy is of such importance that the need to improve our legal education can be literally described as the crying need of the hour. It is in the light of this background that we propose to consider the problem which has been referred to us by the Delhi University.

III. Aim of Legal Education

Before we address ourselves to the question about the content of legal education and the methodology of imparting such education it is necessary to clear our minds as to the true aim of legal education. There can be little doubt that the aim of legal education will decide the content of such education and its methodology. Is the aim of legal education to impart to our students general education of law as a matter of liberal, cultural education, or is the aim of legal education to prepare students for the legal profession? It is said that in the present set up of our country it is necessary that citizens should receive general education in law, because such education has inherent cultural value and it also makes citizens more conscious of their rights and their obligations. On this view, the education of law which the universities impart should be content to teach the students general principles of law in a broad way and leave the practical training of law to the professional bodies, like the Bar Councils in the country. Stated broadly, the pattern of legal education which prevails generally in many of our universities seems to proceed on the basis that the aim of university legal education is no more than to give the students general cultural legal education in a broad way. It is on this hypothesis alone that the existing pattern of part-time legal education can be explained and perhaps justified; but is this view correct?

We are inclined to answer this question in the negative. In our opinion, the aim of the legal education which universities impart to students in not merely to make our citizens more cultured and liberally educated in the broad features of law, but also to produce citizens who will follow the profession of law. We must, however, hasten to add that when we refer to the legal profession as the objective which legal education must have in view, we are referring to the legal profession in a very wide sense. The legal profession in this broad sense is a comprehensive concept and it includes not merely practice in courts, but also covers law teaching, law research, administration in different branches where law plays a role; and in fact commercial and industrial employments and all other activities

which postulate and require the use of legal knowledge and skill and which adopt legal process also fall within its scope. The legal education with which we are dealing is intended to be given to students who expect to follow one or another branch of legal profession, and its aim would be to make the students of law good lawyers who have absorbed and mastered the theory of law, its philosophy, its function and its role in a democratic society. Once this position is accepted, the question about the content of legal education and the method to be adopted in imparting it, as well as other related questions to which we will presently refer, can be consistently answered. Indeed, we would like to make it clear at this stage that all the recommendations which we prepose to make in our report are in, a sense , integrated and they proceed on the main and basic assumption that law has to play a dynamic role and those who follow the profession of law must be intellectually equipped with a proper concept of its function and role. Today, the basic difficulty which is experienced in the public life of the country is an absence of proper intellectual conception and attitude towards the function of law. The old notion that the law is static has now yielded place to the progressive notion that law is dynamic; and so the failure to approach the problems of law functionally introduces a serious weakness in the body politic of India. Sound legal education will thus contribute to help the growth and development of an effective legal order and thus make the legal process more effective and powerful. This result can be achieved only if the true function of legal education is emphasised and the frustrating attempt of combining legal education with general education is given up. It is in the light of this conclusion that we will now proceed to deal with the several relevant problems in regard to legal education.

IV. Degree Course in Law

The first question to consider is about the requisite academic qualifications which should be prescribed for admission to a law course in the university. Two views are current amongst the educationists on this point. According to one view, education in law may begin at the end of the post-intermediate stage, while according to the other, it ought to begin at the end of the stage of graduation. The University Education Commission had recommended that a three-year degree course in pre-legal and general studies be required for admission to law courses. According to the commission, a degree course either in arts or science should be a pre-requisite and that this should be followed by three years' study for the Bachelor of Laws, the last year being given over to practical applications, such as reading in advocates' chambers and acquiring the art of and familiarity with court room procedures, and the like. The Bombay Legal

Education Committee took a contrary view. It recommended a three-year scheme of legal studies which should comprise the study of law for two years at the university for a law degree, followed by a third year spent in the study of vocational subjects ending with a professional examination conducted either by the Bar Council or by the Council of Legal Education, the establishment of which it had proposed. According to the majority opinion of the said committee, the law college was to be thrown open to students who had passed the intermediate examination, also, because a full-time law college was recommended to be simultaneously established. This committee appears to have accepted the view that if a law course is properly organised, admission to it may be thrown open at the end of the post-intermediate stage.

The All-India Bar Committee of 1951, which also considered this problem, was clearly of the opinion that the uniform minimum qualification for admission to the roll of advocates should be a law degree obtained after at least a two year study of law in the university after having first graduated in arts, science, or commerce and a further apprentice course of study for one year in practical subjects after attending a certain percentage of lectures arranged for imparting instruction during this apprentice course. Thus, according to this committee the essential pre-requisite for admission to a law course in regard to students who wanted to enroll themselves as advocates was graduation either in arts, science or commerce; the duration was two years followed by one year's apprenticeship with a senior at the Bar.

The Law Commission of India, which examined this question again, has recommended that only graduates should be allowed to take the degree course in law. In its opinion, the duration of the course should be two years and it should be followed by one year's apprentiship. In coming to the conclusion about the duration of the law course the commission emphasised the fact that it was recommending the establishment of full-time law colleges which would mean more intensive education than was being given in part-time law colleges. It also referred to the fact that it was recommending that certain procedural subjects and branches of law which were not directly concerned with the theory of law should be left over for study during the year of apprenticeship and that, in its opinion, this would reduce the burden of the curriculum which the Faculty of Law may have to teach. It appears from the report that the commission was inclined to take the view that the university should not teach procedural laws, taxation and other laws as well as other cognate subjects which may, with advantage, be left to be taught later to those who intend to take a professional career, in a course where teaching will be imparted by professional men. That, broadly

stated, is the position of the recommendations made by some of the committees which have considered this problem in the past.

So far as the pre-requisite for admission to the law course is concerned, there appears to be a consensus of opinion amongst academic people that graduation in arts, science or commerce should be treated as an essential condition. General education up to the stage of graduation in humanities and social sciences appears to be universally recognised as a necessary postulate for a student who wants to receive education in law. We are satisfied that this view is sound and graduation in the subjects just indicated should be treated as a condition precedent for admission to a degree course in the University of Delhi.

The question of duration needs to be more carefully examined, because the All-India Bar Committee, as well as the Law Commission' have expressed their views in favour of a two-year course in the universities followed by one year's apprenticeship with a senior at the Bar. We have naturally taken into account the views expressed by eminent members who constituted these committees; but we are not prepared to accept their conclusion that a two year course in the universities would meet adequately the requirements of a proper legal education which would justify the conferment of a degree of the Bachelor of Laws. The question about the content of the syllabus will be considered by us later. At this stage, it is enough to point out that the boundary line between the theory and science of law on the one hand, and its practice and art in court on the other, is rather thin. Some of the areas may indeed overlap, and so academic opinion is not unanimous in holding that the subjects which the Law Commission wanted to be left to the period of apprenticeship need not be the concern of the university education at all. Even as to procedural laws, it may be pertinent to point out that without reference to judicial process altogether, instruction in the theory or science of law may tend to become purely academic and, in a sense, unrealistic. In a proper exposition of the theory or science of law, sometimes a teacher may well have to take his students to procedural questions, and in that sense, it would be difficult to accept the proposition that one can draw a sharp line of distinction between the theory and science of law on the one hand, and its practice on the other. Professional skills, court-room procedures, and the other requirements of the pursuit of the profession of law can, no doubt, be properly taught to the student during his period of apprenticeship; but the teaching of law even in its theoretical aspect, cannot be completely isolated from questions of procedure; such isolation may lead the teacher to give his exposition sometime in vacuum and that must necessarily be avoided if the aim of university education is, as it ought to be, to give to the student a

comprehensive view of law. Therefore, we have no hesitation in recommending that a student should undergo three years' legal education in a faculty of law before he is entitled to secure a degree of Bachelor of Laws.

This conclusion necessarily raises the question about students who want to earn while they learn. We have already emphasised that the legal education should be placed on the same footing as education of social sciences or engineering. Even so, we do not think we would be justified in ignoring the claims of students coming from the poorer classes to receive legal education; and if the claim of these students has to be recognised, evening colleges for imparting legal education ought to be allowed to function. In the present social conditions in this country, a large number of young men and women coming from a poor or even a middle class have to take employment as soon as they can, and yet even while in employment they are keen to pursue their further education. Experience has shown that such students who earn while they learn are generally more mature in intelligence and outlook and are far more serious about their studies; and so in fairness to this large class of young promising students, the university ought to allow evening colleges, even though they may not satisfy the test of full-time colleges and in that sense may, to some extent, not meet the requirements of proper collegiate institutions authorised to impart legal education. While recognising the necessity to allow such part-time colleges for the benefit of students coming from middle class we ought, however, to take care to see that these part-time colleges do not produce second-class lawyers. That is why we think the duration of the course for students who learn in such part-time colleges ought to be four years instead of three. We are satisfied that if the curriculum which may ultimately be prescribed for full-time colleges for three years, as well as the extra-curricular activities which would be prescribed for them, are reasonably spread over four years, students learning their law even in part-time colleges would be able to cover the same curriculum and to participate in the same extra curricular activities. That is why we recommend that part-time colleges should be allowed to function; but for a degree course the duration in such colleges should be four years.

V. Method of Teaching

Having thus considered the question about the admission to a law course and its duration, the next question which calls for an answer is in relation to the method of teaching. It is well-known that in the law colleges in our country the lecture method is generally adopted. In fact, Indian law schools and colleges have borrowed this method from England. In America, on the other hand, the case-book method is more popular and

more generally adopted. The lecture method, if it is properly used, has many points in its favour. It gives the student a comprehensive coverage of the necessary topics of law, and it enables the teacher to initiate the student properly in the theory of law and its philosophy. Well-organised lectures can give the students a connected account of the development of law, its function and its purpose, and in that sense, it may be claimed that lecture method is more suitable to teach theory of law.

On the other hand, there are certain inevitable infirmities in the lecture method as it is practised today which we cannot ignore. In a large majority of cases, lectures are delivered by teachers on an *ad hoc*,, unplanned and unpremeditated basis. As they are delivered in classes, they amount merely to an exercise in dictation. The students participate in the process not actively but passively inasmuch as they tend to take down whatever falls from the lips of the teacher. The lecture method generally tends to become informative and does not throw any challenge to the curiosity or the reasoning power of the student. It encourages reliance on his memory. There is no dialogue in this method of teaching. It is purely a monologue; the teacher speaks and the students listen and take down. It is true that the lecture method is pre-eminently suitable to teach statutory law; but, on the whole, the participation of the students in learning law under this method is almost nil; and that is a very serious infirmity in this method.

The case-book method which was started by Dean Langdell in Harward in 1870 was subsequently modified and perfected by Dean Ames. In 1871, Langdell's book of *Cases on Contract* was published and since then American law schools have generally adopted the case-book method. Langdell, who introduced a new philosophy of legal education, thought that:

> "A teacher of law should know expertly not so much the content of law as the method of studying it."

Langdell's method of teaching law introduces a dialogue between the teacher and his students conducted in a Socratic form. The facts in the decided cases are stated to the students and they are asked to find out the solution and the conclusion. This process of presenting a problem to the student's mind throws a challenge to his power of reasoning and analysis. In this process, both the teacher and the student are alert and are participating in giving and receiving education. Memory is not called into service so much as the power of reasoning and analysis, and when this process is carried on from day-to-day, ratiocination plays a major role, and so the teacher and the taught alike enjoy the rewarding experience of teaching and learning every day. Unlike the lecture method, the case-book

method necessarily requires the student to do a certain amount of home work himself before he joins the dialogue in the class-room. That is why this method has become very popular in America and it has found many exponents amongst our young teachers of law who have had the benefit of legal education in some of the leading American law schools

It must, however, be recognised that even this case-book method suffers from some infirmities. It is plain that this method, as usually practised though not inevitably, proceeds on the basis that the best way to learn law is to trace its development in the light of the decisions of the appellate courts, and so it poses before the students facts taken from different appellate decisions and asks them to find answers to the problems raised by the said facts; but the method thus adopted tends to be less comprehensive in its coverage than the lecture method can be. In one of his letters to Dean Pound, Morris R. Cohen, the great liberal American philosopher, complained that:

> "The introduction of the case system in this country has been distinctly unfavourable to the growth of any philosophy of law, primarily because it tended to emphasise precedent above social reasons. It is of course true that the doctrine of *stare decisis* is fundamental to the common law, and that all common law lawyers must argue from past decisions where the continental lawyer can argue from principles. But the case system of instruction has tended to unduly emphasise empiricism in the law."
>
> Referring to the great work done by Dean Ames in improving the case-book method, Cohen added in his letter that:
>
> "A professional philosopher may be pardoned for thinking it unfortunate that a man of Dean Ames' power could not have given us general treatises on such topics as the theory of criminal law, torts, or even on such topics as master and servant.[5]"

In fairness, we ought to add that Dean Pound did not accept Cohen's criticism against the case-book method. Said Dean Pound to Cohen:

> "After all, judicial justice is not justice of the cloister. If you know many judges, you will soon perceive that, on the whole, they see more and know more of life than almost any other class of men. The jurist, rather than the judge, is the man of the cloister. You must be careful not to let your reading of the continental literature on this subject mislead you."

It would thus be noticed that the two giants who have played such a decisive role in the development of the liberal legal philosophy in America differed on this point, and that indicates how academic opinion is sharply

divided on this issue. It must, be added that, stated broadly, American academic opinion today seems to agree largely with Dean Pound's position.

However, in our opinion, there is considerable force in the criticism made by Cohen. The decisional development of law which is the foundation of the case-book method itself introduces some infirmities in the comprehensive study of law. It is true that decisions of appellate courts do contribute to the development of law; but judicial process imposes upon the judge certain inevitable limitations. As a judge pronounces his judgments in cases brought before him in appeal, he has first to determine facts, then formulate the question of law which arises from proved facts, and then find an answer to the said point of law. In this process, wise judges generally avoid to make obiter observations, and attention is naturally concentrated on the specified narrow points of law which are raised by facts proved or admitted in a given case. That being the nature of the judicial process, it is not surprising that even appellate decisions do not and cannot always contain an exhaustive discussion of all the pros and cons of the legal problems raised before the judges, and in a sense it may be said that the judicial vision in dealing with specific points raised before it must function in blinkers. That is one inevitable infirmity in treating decisional development of law as the main source for the study of the theory and philosophy of law. Of course, in discussing appellate decisions with his students, an experienced and skilled teacher tries to bring out the limitations within which the judiciary works and discusses other aspects of the problem that might be relevant if the matter were not being handled by the courts but, for example, by the legislature. Nonetheless, one must be clear as to the limitations and possible dangers in using the decisional development of law. Besides, if the teacher and the students under any method of legal education--lecture, discussion or other--concentrate merely on the decisional development of law, the social basis of the development of law may not be present to their minds as prominently as it ought to be. The development of law from the point of view of sociological jurisprudence presents a fascinating story of adjustment of human relations and, as such, law partakes of the character of a social institution. This aspect of law is apt to be overlooked if the teacher and the students concentrate merely on the decisional development of law. In this connection, it is also relevant to remember that though the decisional development of law may afford a very valuable guidance in the study of the problems raised by common law, its value may not be as great in dealing with the problems raised by statutory law. Critics of the case-book method sometimes contend that students who learn merely by case-book

method are apt to miss the wood for the trees. We do not think it would be possible to say that there is no substance in this criticism at all.

In this connection, it would be pertinent to state that even in America, teachers of law are having second thoughts on the question of the adequacy or appropriateness of the exclusive use of the case-book method. For instance, some American lawyers seem to take the view that:

> "An over-emphasis of the case method has led to an unbalanced mental diet for law students and to the image of the lawyer as a technician, as one whose function was to serve rather than to counsel his clients."

It must, however, be added that in America where the techniques and goals of legal education are a topic of continuing discussion and reflection, teachers of law have sought in many ways to improve existing case-books and other teaching materials and to develop teaching techniques which would supplement, though not replace, the established discussion method. Harlan Fiske Stone, both as Dean of Columbia Law School and as a judge of the Supreme Court, was fully conscious of the real problem which legal education has to face, and so he used to criticise the legal education of his time on the ground that it did not give "balance to the student's mental diet and persistently delved into the past and there was little or no reflection upon the relationship to law of the social and economic forces which produce it."[6]

The criticisms of Stone and others have produced in the last two decades important changes in both the style and content of American legal education; materials drawn from many sources other than appellate decisions are now included in so-called 'case books' and in class discussion the teacher seeks to give the student far more than a doctrinal understanding of a legal rule or principle, leading him to an appreciation of the forces—social, economic and institutional--that produced the rule or principle and against which rules or principles' continuing validity for the given society must be tested.

That being the true position with regard to the strong and weak points of the two competing methods of education in law, we think it would be worthwhile if our teachers of law attempted to combine both the methods in accordance with the subjects which they teach and having regard to the stage at which the subjects are taught. If the lecture method is practised on an enlightened basis and the teacher plans his lectures and prepares them beforehand, infirmities which creep into the lecture method where lectures are delivered in a casual, adhoc way may be cured; and the notes prepared by the teacher in advance may be so prepared as to take in important cases

for the purpose of clarifying to the students the application of the theory of law which he is discussing.

In general, the committee does not seek to prescribe methods of legal scholarship but emphasizes the need to improve existing methods and the importance of experimentation by law teachers with a view to devising the method or methods most suited to the kind of legal education to which the committee believes the University of Delhi should aspire--one that challenges the best student's minds and retains their interest and rather than concentrating on the imparting of information for its own sake, presents law in the context of society and as a dynamic process of change and development.

Since we are recommending that a radical change should be made in the education of law, we wish to emphasis that our recommendations can succeed only if teachers of law whole-heartedly co-operate in implementing our recommendations. A radical change in the method of education would inevitably involve a sustained effort on the part of the teachers. Teachers will have to recognise that teaching and scholarship must go together and are, in a sense, inseparable. Indeed, new teaching methods may well require new forms of scholarship—for example, the development of teaching materials to be studied before class as the basis for class consideration and discussion. Moreover, a teacher who does not improve his own knowledge from day to day and has stopped his own individual process of thinking and questioning in respect of legal problems will not be able to introduce any radical change in the method of teaching. It is not unknown that teachers carry on the work of teaching throughout their lives without making a substantial addition to their knowledge of law from day to day; and unless this approach is abandoned, it would be futile to suggest that radical changes should be made in teaching law. An old English couplet contains profound truth :

> "He who learns from one occupied in teaching,
> he drinks of a running stream;
> He who learns from one who has learnt all he is to teach,
> he drinks the green mantle of a stagnant pool."

We are, however, satisfied that the young teachers of law are very keen on starting a new experiment in a more efficient and adequate teaching of law, and so we have no hesitation in recommending that a radical change should be made in the method of teaching law, for example, by attempting a harmonious combination of the lecture method and the case-book method. How soon and how best such a plan of combination can be achieved, and other desirable experiments conducted— for

example, moot-court work and various forms of tutorial programme--are matters of detail on which we are unable to express any definite opinion. This matter will have to be carefully scrutinised by the teachers themselves and provisional condusions will have to be reached and put into force from time to time. The process of experimentation is a continuous process and it is time that this process began in the matter of legal education.

VI. Method of Examination

Integrally connected with the method of teaching is the question about the method of examination. We have already noticed that the lecture method sub-consciously, but inevitably, encourages memorising on the part of the students and our experience in regard to the examinations of law conducted by Indian universities invariably has been that the nature of questions set at these examinations usually tend to test the memory of the student rather than his power of reasoning or analysis. One inherent vice in this method is obvious. Throughout the year, the students merely take down whatever is spoken by the teacher and they start intensive work of memorising a couple of months before the date of the examination. In our opinion, true legal education cannot be imparted to the students and absorbed by them unless this situation is radically altered. So, there are two suggestions that we would like to make consistently with the recommendations we have already made about the method of teaching.

Generally, convention seems to require that a teacher who teaches a particular subject in law should not be appointed examiner for that subject, and that obviously proceeds on the distrust of the teacher. Similarly, convention also requires that a certain percentage of external examiners should be appointed at law examinations, and that also, to some extent, may prima facie seem to proceed on the distrust of teachers working in the university. The question which we have to consider is should we conduct our examinations in future on this distrust of teachers?

In considering this question, we cannot overlook the fact that complaints are often heard against teachers that in their dealings with the students, and in the matter of giving marks at examinations they sometimes show a lack of ethical feeling and of a sense of propriety. It will be recalled that in its report the Law Commission has recorded the fact that "a grave condition of affairs at some of the universities in regard to the conduct of examinations was also revealed in the course of evidence—the existence of nepotism and a total lack of standards in the examiners" and so it would not be easy to recommend that the present method of appointing examiners should be radically changed all at once. But, on the

whole, we think that if legal education proposes to enter a new era by making radical alterations which are necessary to make the teaching of law more adequate in the context of today, it is necessary that some risk must be taken and we should adopt measures which, in principle, are educationally sound; though in some cases the adoption of such measures may conceivably lead to abuses. Considering the question from this point of view, it seems to us difficult to support the convention that a teacher who teaches a particular subject of law should not be appointed an examiner in that subject. This conventional requirement would invariably cramp the style of teaching which the teacher has to adopt. His freedom to teach the subject in the best manner that he can think of would be controlled by his apprehension that at the examination questions may be put which may not correspond with the process adopted by him in teaching the particular subject during the year. His teaching technique would be subordinated to the considerations of expediency and he would look up the question-papers set in the past and address his lectures accordingly. Considered as a purely academic proposition, it seems to us that a teacher should be given complete freedom to teach his subject in the best manner he can conceive of and, having given him this freedom, he should be allowed to assess the progress made by students whenever examinations are held, and so we think the time has come when this conventional requirement may be suitably modified stage by stage and subject by subject.

Then again, in assessing the progress of the students it is, we think, necessary to start the practice of assigning marks to them for their sessional work during the term and for the part that they play in moot courts and seminars. This will also be open to the criticism that a teacher may practice nepotism but, for the reasons which we have already given in suggesting the modification of the convention that a teacher should not examine the students in the subject in which he teaches, we are inclined to recommend that this experiment of assigning marks for sessional work of the students during the course of the term should also be commenced. We realize that the experiment of assigning marks for sessional work and the holding of tutorials, seminars and moot courts may mean the regulation of the number of students and their ratio to the teachers; but that is a problem which has to be faced if the quality of legal education is to improve.

Arising out of the same question is the problem of holding examination at the end of each term. On this problem again, there is a difference of opinion in the academic world. But we found that a large majority of teachers whom we met favoured the idea of holding

examinations at the end of each term. The justification for this departure is that if a student is taught particular subjects during each term and is examined at the end of the term, memorising will be discarded and a rational analytical and synthetical study of law would be encouraged. Which subjects should be taught to fit in with the scheme is a matter of detail which must be left to be decided by the teachers themselves in due course. If the new method of holding terminal examinations is introduced, it will mean that the students will have to work from day to day and may and should have to face examinations without any period for the preparation of their examinations as such. It will be noticed that our recommendations under this heading are all integrally connected and are consistent with the new concept of the scope and nature of legal education. We are satisfied that if these recommendations are adopted and properly implemented, they will help to make legal education more purposeful and more efficient.

There are, however, some difficulties which the university may have to face in implementing these recommendations. The size of the classes and the number of teachers is one difficulty and the university may have to appoint a larger number of teachers. Holding terminal examinations and requiring the assignment of marks for sessional work and for tutorials, seminars and moot courts may also present administrative difficulties. The appointment of external examiners may conceivably be serving a useful purpose and if that element is reduced or eliminated, perhaps objection may be taken that the standards of examinations may fall. More important than these objections, however, is the difficulty which the university may have to face in regard to the impact of these recommendations on the other faculties which are run by it. It may well be said that if the new concept of legal education needs such radical changes to be made, not only in teaching but also in holding examinations, why not consider the adoption of the same methods in other faculties as well; and that is a problem which it may not be easy for the university to solve. However, we would recommend that having regard to the importance of making a new experiment in the teaching of law, the university may start the experimentation in the Faculty of Law, watch its progress, assess its success or failure in course of time and then decide whether similar experiments should be started in other faculties or not. If the administrative, financial, or educational difficulties which may arise in attempting to implement our recommendations make it difficult for the university to accept our recommendations, it may become necessary to consider whether the new experiment should not be started by an independent body like the National Law School to which we will advert later.

VII. Medium of Instruction

The next point to consider is the medium of instruction. This problem has been the subject-matter of heated and even acrimonious debate in our country ever since 1947. The University Education Commission expressed the opinion that "both from the point of view of education and of general welfare of a democratic community it is essential that their (students') study should be through the instrumentality of their regional language. Education in the regional language will not only be necessary for their provincial activities, it will enable them to enrich their literature and to develop their culture". This conclusion was based on the assumption that "English cannot continue to occupy the place of state language as in the past. Use of English as such divides the people into two nations, the few who govern and the many who are governed, the one unable to talk the language of the other, and mutually uncomprehending. This is a negation of democracy". It would be noticed that this view has been expressed by the commission in very emphatic language and must be taken to be the considered opinion of the distinguished members who constituted the said commission. As such, it is entitled to great respect.

The same view has been vigorously supported by the advocates of regional languages and the advocacy of this view naturally seeks to derive strength and a sort of irresistible appeal from a feeling of national sentiment and pride. It is said that if all countries in the world educate their children through their national language, why should India not follow the same course? Some educationists also lend the weight of their authority to this view on the ground that eduction is most effectively imparted through the medium of the student's mother-tongue and that would be necessarily the regional language of the student. It must be conceded that there is considerable force in these pleas, and if we do not agree with this line of thought, it is because we think there are other considerations which are very important and significant and which, in our opinion, make it obligatory for us to adopt a very cautious and circumspect approach on this issue. As in many other issues of public importance, the choice is not between good and bad, but between good and better; and the process of determining which is better and which is just good is very difficult and sometimes a very agonizing process. That makes it all the more necessary to discuss this question fairly and dispassionately and without introducing heat or attributing motives to any party. Having bestowed our most anxious consideration on this problem, we have come to the conclusion that it is our duty to express our dissent from the recommendations made by the University Education Commission.

We are prepared to concede that ultimately education in law like education in other branches of learning should be given in a language other than English. But in our opinion, the higher university education like the higher administration of justice should be carried on not in the regional language of the states constituting the Union of India, but in Hindi which is recognised as the national language of the Union. If that is the ultimate aim and goal of our educational and cultural activities, it is obviously necessary that active steps should be taken to translate the relevant books and literature in Hindi. We are, however, clearly of the opinion that higher university education and higher administration of law should not be carried on in the regional languages of the states, and that is where we think intellectuals of the country should give a correct lead to guide the educational thought and policies of our universities and our governments. As we have already observed, the debate on this question has been going on unceasingly in our country for several years past but, dispassionately considered, it appears to partake of the character of an unrealistic discussion. Sentiments and emotions are valuable and valid in human and national affairs; but where questions of educational or other public policies are concerned, cold logic, objective analysis and a rational approach must be given their place of honour. Take the case of text-books in law; as in medicine, engineering, and sciences, so in law too it would be thoroughly impracticable to assume that law can be taught to our students today in Hindi, much less in regional languages of the states. It is true that if text-books have to be prepared, some incentive must be available for the writing of books and unless we switch on to Hindi, books may not be written in Hindi. But, in our opinion, without adequate teaching material, it would be disastrous to switch over to Hindi in the matter of teaching law to the students in our universities. As it is, educationists feel concerned by the thought that the standards of education are falling and the quality of our graduates is on the decline. In such a case, it is of utmost importance that no precipitate or hasty action should be taken in changing the present recognised medium of instruction which is English. Grave errors committed in the formulation or implementation of educational policies would lead to incalculable harm, because the students who are learning in the universities today are going to be the citizens and leaders of tomorrow, and so it is the duty of the country to assure education of the highest quality to our students. That is why, with respect, we are not prepared to accept the conclusion recorded by the University Education Commission on the question of medium of instruction in regard to the higher level of university education.

In respect of law there are some additional considerations which

support out conclusion. Statutory law, with which students of law have to be familiar, and which as lawyers they have to interpret, consists of the laws made by the Parliament and the state legislatures; and the laws made by Parliament would inevitably be in English for some years to come and then in Hindi. It is no difficult to realize that teaching law to the students would suffer in quality if the medium of instruction is other than English, or later in due course, other than Hindi. The Supreme Court which is the highest court in the country is bound to function in English for many years and thereafter in Hindi; and it would be irrational to assume that even in the Supreme Court proceedings should be conducted in the regional languages of the different states. That is another aspect of the question which cannot be ignored.

The administration of law today conforms not only to the same legal philosophy and adopts the same judicial principles and approach, but it speaks in English which is understood by all the lawyers, judges and intellectuals in this country, and that inevitably develops a unity of legal and judicial thought and uniformity of judicial procedure and practice. If the administration of law were to be conducted in the regional languages of the states, community of ideas, free commerce of thought, unity of purpose and uniformity of the pattern of judicial procedure would be exposed to grave risk, and that in the context of today would seriously prejudice the unity of the country which law seeks to build up and sustain. Sometimes we are apt to forget or under-estimate the great contribution which administration of law imperceptibly but irresistibly makes to build up and sustain the unity of this country.

It may sound paradoxical but, nevertheless, it is true that if the appeal to introduce regional languages in he higher administration of law and the higher branches of university education were to succeed, the dream of national integration and national unity, on the achievement of which all of us have set our hearts, may suffer a severe set-back; and that is a consideration of a very great significance in dealing with the question of medium of instruction for legal education. It would be noticed that the main point we are making is that the high education in the universities and the higher administration of law should be conducted in one language; for some years to come, English inevitably would have to be the said language. In due course, Hindi may and should take its place; but care must be taken not to allow the regional languages to take the place of English in the two spheres which we have just indicated. Let us not forget that after political independence was achieved, feelings of narrow territorial loyalties supported by a sense of loyalty to the regional languages have grown in a large measure, and that, in a sense, was

inevitable; but with the upsurge of such regional feelings, the problem of integrating smaller loyalties of that type with the primary loyalty to the Union of India has become delicate and difficult. Nevertheless, it is a very urgent task, and so we are inclined to take the view that during the ensuing decade when democracy will seek to stabilize itself in India and when all of us will learn to treat it as an article of faith that we are Indians first and residents of different states afterwards, nothing should be done either in the higher administration of law or in the higher branches of university education which would retard the process of national or emotional integration. This may sound as a political consideration, and it is no doubt a political consideration; but when the advocates of regional languages base their case partly on a feeling of regional or national pride and suggest that their viewpoint is legitimate and natural, we would only put in a caveat and say that though the said consideration is legitimate, its validity and strength should be balanced and weighed against other political considerations to which we have just referred. During the present stage of our national development, all of us must watch our steps carefully and no action should be taken which may unwittingly lead to consequences prejudicial to the interests of the nation as a whole.

In this connection, we would like to refer to another consideration which has weighed in our minds. As our report indicates, we are inclined to take the view that if the task of bringing about a radical change in the legal eduction in this country cannot be carried out successfully within the exiting law faculties, it may be advisable to start some other institutions in a few representative cities in India. The whole object of making this suggestion would be to gather together eminent teachers from all over the country and give them full scope and freedom to make healthy experiments for improving legal education. If legal education were to be conducted in the regional languages, such an experiment would become impossible. What we have said about legal education would be equally true about other branches of higher university education. Free exchange of ideas between university teachers in different states would be retarded if higher university education is imparted in the regional languages. We are aware that the advocates of regional languages insist, and genuinely insist, upon the teaching of Hindi as a compalsury subject, but we appelent that teaching Hindi as a necessary subject is the university students will not make Hindi a language of intellectual communication between the university teachers of tomorrow. The idea of an All India Educational Service which is sometimes debated in public is a very attractive idea and, we think, it will help the unity of intellectual life in this country to a very large extent. Now, it is plain that such an idea would be unworkable if

higher university education were to be given in the regional languages of the states. This is another aspect of the question which should be properly considered before a final decision is reached on this vexed problem.

We have done our best to consider all the pros and cons of the question about the medium of instruction in legal education in this country and we have unhesitatingly come to the conclusion that for some years law should be taught to our students in English, and in due course in Hindi. Our present proposal, therefore, is that the University of Delhi should proceed to make the necessary changes in the content and methodology of legal education on the basis that in the foreseeable future English will continue to be the medium of instruction as it will be the language in which higher administration of law will be carried on in this country.

VIII. Teachers

That takes us to the question of teachers. In our opinion, teaching of law should be left almost entirely to full-time teachers who are dedicated to the work of teaching, are progressive and forward-looking in their approach and are fully conscious of the radical change which is required to be made in the content and methodology of legal education in our country today. Part-time teachers may be invited to join in the task of teaching law only in respect of some subjects which can be usefully left to them. In order to attract first rate educationists to do the work of teaching, it is necessary to provide sufficiently attractive terms of service to them. The work-load of teaching should be rationally regulated and the present position should be radically altered. It appears that in the Delhi University, lecturers are expected to teach 16 period a week (12 periods of class and 4 of tutorial); Readers are expected to work 12 periods in a week (8 of class and 4 of tutorial), while the Professors have to teach 6 periods a week (4 in class and 2 of tutorial). We are satisfied that in no case should the workload be more than 8 to 10 hours per week. We are making these recommendations because we are inclined to believe that teachers should be given less workload and more leisure to devise newer and newer methods of making their teaching effective.

The composition of the Faculty of Law also seems to require some modification. The present composition is in form pyramidical. At present, in the Faculty of Law in the Delhi University there are two Professors, though the sanctioned strength of this cadre is three. Then follow 10 Readers, while there are 15 full-time lecturers and 4 part-time lecturers. This pyramidical composition of the Faculty of Law seem to place too much burden on the Professors and does not encourage participation in the affairs of the Faculty by the entire group of teachers. One

recommendation we would like to make in this connection is that the number of Professorships should be increased from 3 to 5, subject to this important proviso that these posts should not be filled unless properly qualified, experienced, suitable teachers are available. In this connection, we would strongly recommend that in making appointments in the Faculty and in determining the question of the promotion of persons appointed, importance should be attached to the extent and quality of the published work of the persons concerned. The research carried on by a teacher can, on the ultimate analysis, be judged only by examining the quality of his published work in that behalf. In order that the Faculty would function effectively and efficiently, it is essential that all the members of the teaching group should experience a sense of participation in the affairs of the Faculty. The settlement of the syllabus and the appointment of new members to the Faculty are matters in which the whole teaching staff is vitally interested, and so we suggest that some steps should be taken which would relieve the Professors of the unduly heavy burden which they have to bear today, and would enable all the members of the staff to share in the management and conduct of the affairs of the Faculty. The main idea in reorganising the Faculty would be to create an atmosphere in the Faculty which would be conducive to co-operation between all the members of Faculty and which will inspire a sustained effort on their part to improve the content and methodology of legal education.

At present, the syllabus is ultimately determined by the Committee of Courses and Studies, Faculty and the Academic Council; and in the Committee of Courses and Studies as well as in the Faculty of Law, some distinguished outsiders are co-opted. We do not propose to suggest any radical alteration in the composition of these bodies; but we desire that in the formulation of courses, steps should be taken which would give more initiative to all the members of the teaching staff. How this could be done consistently with the structure of the Committee of Courses and Studies and the Faculty of Law are matters of detail which may have to be decided in cousultation with the members of the teaching staff. We would hesitate to make any definite recommendation in this behalf at this stage.

Similarly, we desire that the members of the teaching staff should be allowed to take more interest and should be given an opportunity in participating in the new appointments to the Faculty. Under the existing system, before appointments are made, applications are invited by advertisements and, after they are received, they are screened through the selection committees which are assisted by outside experts. Even in respect of these appointments, ways could be devised to give the members of the teaching staff an opportunity to express their views. After all, in the matter

of appointment, the Faculty as a whole is deeply interested and it would not be unreasonable to make a change if these members are allowed a voice in that matter. That, again, is a matter of detail on which we refrain from making any definite recommendation, We are contenting ourselves with indicating broadly the manner in which we think the present arrangements may be suitably changed without making a violent departure in that behalf.

IX. Students

We have already indicated that students desiring to be admitted in the Faculty of Law should be graduates either in arts, science, commerce or allied subjects. Unfortunately, experience in the past has disclosed that brilliant students do not choose the career of law and, by and large, it is only when students fail to secure admission in more attractive and promising branches of studies that they apply for admission in the Faculty of Law. This position is very deplorable and must be immediately remedied, if law has to play its destined role in the affairs of this country. Education of law is not properly conducted, students of the requisite quality do not seek for admission to the course of law, and law graduates do not secure tempting or promising appointments by way of career ; that is how the vicious circle goes on. In our opinion, the time has come when promising students should be encouraged to join the course of law and, in that connection, we would recommend that a sufficiently large number of scholarships should be created to attract good students which would enable them to maintain themselves during the course of their education. Such scholarships would serve another function that the committee considers of great importance--making legal education at Delhi available to students who come from other parts of the country. Development of law faculties at Delhi and elsewhere which draw students on a nation-wide basis would be an important contribution to national integration. These scholarships should be continued subject to the scholars showing satisfactory results in their examinations and by their work throughout the term. The problem of securing adequate and sufficient employment to law graduates will not be solved immediately or easily, but we venture to think that if the quality of the education of law is radically improved and our law graduates are better equipped to face the problems which they will be called upon to solve, then chances of openings for law graduates will also increase. It is indeed in that hope that we are making all the recommendations in our presents report.

In our opinion, the size of the student body must be controlled if the education of law has to be effective and adequate. We would, therefore, recommend that the enrollment for the first year class should be limited to

approximately 200 students. If necessary, an admission test should be prescribed and only deserving students who satisfactorily pass the said test should be admitted. We have already indicated the present position in regard to the composition of student world in the Faculty of Law discloses the unfortunate position that good students are attracted to other Faculties which hold more promising and alluring careers. We are satisfied that one of the measures which should be adopted to make legal education more effective and fruitful is to control the admission of students by prescribing the suitable tests. Even if this experiment initially reduces the number of students admitted to the Faculty of Law, ultimately the process of selection of students at the stage of admission will benefit the students and will make legal education worthy of its name.

Making rough calculation as to the progress and success of 200 students who will be admitted in the first year, it may be permissible to anticipate that about 150 students would reach the second year and about 100 students would reach the third year. Approximately, therefore, our planning should proceed on the basis that the Faculty of Law would be dealing with 400 to 500 students in a full-time college and about the same number in the part-time evening college. The main object of recommending a reduction in the number of students is to enable the teachers to establish personal contact with their students.

We have already emphasised that the teachers should adopt a new method of teaching and that would inevitably mean that the students will be required to do much more home work in future than they do at present. Stated generally, the home work should be at least for as much time as is spent in class work. Unless the student does intensive home work from day to day, the whole object of introducing a radically altered method of instruction will fail. It is of utmost importance that examinations should cease to be a source of terror to the students and should serve as welcome tests whereby the work done by the students from day to day is asssesed by the teachers. In our opinion, in order that the scheme should succeed, the strength of the class should normally be between 50 to 75 and that of the tutorial between 10 to 15 students. This recommendation may mean addition to the strength of the teaching staff, because we ar strongly of the opinion that a proper ratio must be maintained between the students and the teacher if the new scheme of education of law has to succeed.

X. Library

In this connection, we ought to emphasise that in the new intended scheme of education a well-furnished library will play a decisive role. The library should be equipped with all the necessary legal literature and should be able to accommodate 75% of the students at a time. Having

regard to the fact that most of our students would not be able to purchase individually all the books, periodicals and journals which it will be necessary for them to read and study, it is important that library facilities on a very generous scale should be made available to them. In order that the library facilities should really serve its purpose, it is also necessary that the teachers should make it a point to remain present in the premises for their own work nearabout the library, so that it would help to create a serious and studious atmosphere which will inspire the daily work of the students. The picture of the daily work of the Faculty of Law which we have in mind has been very eloquently described by Justice Robert H. Jackson of the Supreme Court of the United States when he spoke at the dedication of the Stanford University Law School's Building in 1950. Said Justice Jackson:

> "May the buildings we dedicate be peopled with consecrated men--men to whom the law is the first and last interest in life, to which they are single-minded in devotion, and to which they bring intellectual boldness, integrity and courage."

XI. Syllabus

The question about the content of legal education still remains to be considered. Unfortunately, the syllabus prescribed by a majority of the faculties of law in India continues to be substantially the same as was prescribed nearly 60 years ago, and so it is time that our faculties of law examined the problem of syllabus rationally and carefully. In determining the syllabus for the three-year course, care must be taken not to overburden the student with too many subjects. Subjects prescribed for study should also be rationalised and regrouped and rearranged--and in choosing subjects from term to term, care must be taken to have a synthetic view of the ultimate aim and object of legal education and subjects chosen term by term on that basis. It is clear that the choice of subjects year-wise may differ according as it is decided to hold examinations at the end of each term or at the end of each year. It is also clear that in finally choosing the subjects for legal training in our universities, it may be necessary to decide whether any subjects should be left out of the curriculum on the ground that they should form exclusively the subject-matter of practical training. On the importance of subjects also, there may be a difference of opinion and this difference can be resolved by placing certain subjects in the list of optional subjects, liberty being left to the students to choose any one or more of them. We have already indicated that the areas covered by the theory and science of law and, by its practice respectively, may sometimes

overlap. Some teachers take the view--and we feel with some force--that teaching of the theory of law without any reference to the law of procedure, for instance, may tend to develop sometimes into an idle intellectual exercise. On the other hand, there are some laws like the Court Fees Act, or the Suits Valuation Act, which need not find a place in the university education of law. We have carefully considered several proposals made to us in the matter of fixing the syllabus and we have ultimately decided to make as annexures to our report two different types of syllabus prepared.

In our opinion, this is a matter which needs further exploration and study in consultation with the teachers of law before it is finally resolved. Besides, it may even become necessary to consult the Committee on Legal Education which, we understand, has been recently appointed by the Bar Council of India, because if a decision in the matter of syllabus is finally reached in consultation with this latter body, it may afford guidance to all the faculties of law in this country.

XII. Practical Training

Section 24 of the Advocates Act 1961 prescribes the qualifications which persons who claim to be admitted as advocates on a state roll must satisfy. Amongst the qualifications thus prescribed is the qualification specified by section 24 (i) (b). This provision requires that the person should have undergone a course of training in law and passed an examination after such training both of which shall be prescribed by the State Bar Council. The scheme of section 24(i) seems to contemplate that after a student has obtained a degree in law, he has to undergo a course of training in law by way of an apprentice working with a senior and pass an examination after such training. The terms of apprenticeship, the course of studies which an apprentice has to undergo, and the nature and the method of the examination which he has to pass, have all to be determined by the State Bar Council. It is clear that after the Committee on Legal Education appointed by the Bar Council of India makes its report, the Bar Council of India may reach its own decisions on those points, and that will give guidance to the different State Bar Councils in India. That is why we have already indicated that it would be appropriate if the question of syllabus is finally determined in consultation with the Bar Council of India.

In our opinion, there can be no difference of opinion as to the necessity for practical training for any person who wants to enter courts for pursuing the profession of law. The three-year course which we have recommended is intended to qualify the student for the pursuit of the profession of law in a broad and comprehensive sense. If, after obtaining

legal education in this manner, Bachelors of Law desire to joint the practice of law in courts, they ought to undergo some special technical practical training prescribed by the Bar Council in that behalf. Rules of court procedure, provisions of procedural laws pertaining to the filing of plaints, written statements, appeal memos and other documents of a similar type, provisions of technical laws which are material and relevant only for the purpose of practice in courts, professional ethics and etiquette, these and other matters in which a young Bachelor of Law must be trained before he is admitted to the roll of advocates, must necessarily be left to the period of apprenticeship. Just as in suggesting radical changes in the methodology of education we are assuming that our teachers of law will whole-heartedly co-operate with the experiment and will be true to the mission with which they are entrusted, so in recognising the utitity and the significance of the period of apprenticeship the legislature has assumed, in enacting section 24(1)(d), that the senior members of the Bar with whom the young intending lawyers will devil as apprentices will realize the significance of the mission entrusted to them and will do their best to train their juniors. The Bar Councils also, it is hoped, will play their part seriously and solemnly and take appropriate steps to educate the apprentices in the different subjects which are prescribed for the Bar Council examination, and the apprentices in their turn will do their best to learn as much as they can during the period of their apprenticeship. The question which may ultimately have to be decided is the division of areas between the university education entrusted to the faculties of law and the practical or technical education which is entrusted to the Bar Councils of the states. We would, therefore, refrain from making any positive recommendation in this behalf and would suggest that the university should take up this matter with the Bar Council of India before finalising its own syllabus in the Faculty of Law.

There is, however, one aspect of this question to which we must refer before we part with this topic. In some universities, education of law has already been placed on a more rational and systematic basis and three-year course and curriculam have been adopted, If the period of one year's appenticeship prescribed by the Act is made applicable to the graduates of law who take their degrees after completing three-year course in the same way as it is applied to graduates of law who have taken their degrees after two-year course and that too on a part-time basis, it may work injustice, and conceivably it may incidentally retard the success of the new scheme which has been adopted by some universities. If the Bar Council of India ultimately agrees that before a person can be admitted as an Advocate on

the state roll he must have taken a degree after three year course, that will immediately help the proper solution of the problem. All faculties will then switch on the three-year course and the period of apprenticeship, whatever its duration, will be common to all the law graduates who have received three years' training in different universities. But until that stage is reached, the Bar Council of India may consider whether any special concession could be given to the students of law who have taken a law degree at the end of three-year course, particularly if the curriculum prescribed for this three-year course includes some of the subjects which may be covered by the practical training intended by section 24(1)(d).

XIII. National Law Schools

We have already indicated that the recommendations which we have made in our report are all integrally connected and they proceed on the basis that in order that law may discharge its proper function in the context of today in India, legal education needs to be radically reoriented. We are aware that the University of Delhi may have to consider the impact of our recommendations on the other faculties under its charge. If the University of Delhi is able to give effect to our recommendations and make suitable changes in the curriculum of law and in the structure of the Faculty of Law, our main object in making the recommendations will no doubt succeed. In this connection, we would like to mention another aspect of the question, though it is strictly not within the terms of our reference. As we were holding deliberations at the meetings of the committee, some of us felt that it would perhaps be a good idea if three or four model national law schools are instituted in our country in some chosen representative places. It is our hope that the Delhi Faculty of Law will, while carrying out the recommendations of our report, develop into one such national law school. These national law schools, each of which should be an integral part of a university community, would be able to attract eminent law teachers who believe in the significance and importance of reorienting legal education in India and who would be prepared to dedicate themselves to that task. It would also be possible to institute a sufficiently large number of national scholarships which would attract bright and promising students to the study of law; and what is more important is that these national-law schools would enjoy more freedom of action in trying newer and newer experimentation in improving legal education. We are satisfied that experimentation in newer and newer methods of education is essential for the progress of education and we feel confidant that if senior, well-qualified and experienced teachers are attracted to such national law schools and are offered appropriate remuneration and are vouchsafed other

essential facilities, it would be possible to revolutionise legal education on healthy lines without delay. Like law itself, the teaching of law would make progress by experimentation and the method of trial and error which can be adopted in national law schools without external hindrance or impediment will ultimately serve the purpose of bringing about a new pattern of legal education in this country. That, however, is a matter of national concern which will have to be considered by the state governments and the government of India.

In this connection, we would like to add that if the Delhi University or other universities are able to implement all our recommendations in the law schools conducted by themselves, then many of the points which we have in mind in suggesting the starting of separate institutions will have been met and in that case the new experiment of legal education can be carried on by the faculties working as integral parts of the universities.

XIV. Council of Legal Education

In conclusion, there is one more point to which we would like to refer. We think it would be very useful if an institution like the Council of Legal Education is statutorily established in this country. It is true that under the Advocates Act the state Bar Councils are authorised to prescribe conditions for enrolling members on the advocates' roll and we have already referred to section 24(1)(d) in that behalf. The result of this provision is that the theoretical or scientific legal education would be in charge of the faculties of law working under the different universities in India and the practical or technical legal education would be in charge of the state Bar Councils. We have indicated that this dual control can be harmonised if the Bar Council of India and the universities act in concert and agree upon evolving suitable syllabi for both categories of education-theoretical and practical. In our opinion it would, however, be more satisfactory if a statutory body like the Council of Legal Education is constituted and is given supervisory control over legal education in our country in both its aspects, theoretical and practical. This council may be constituted on a high-power basis and may be composed of some judges, some teachers of law, some members of the Bar, and if necessary, some representatives of industry as well. How exactly the council should be constituted and in what proportion the professional lawyers, the teachers, the academic lawyers and the judges should be represented on this council, are matters of detail which the Parliament can appropriately determine. This council would take the place of the existing Committee on Legal Education and be in charge of the whole problem of legal education in all the universities. What powers should be entrusted to this council and how the functions of the faculties of law in different Indian universities as well

as those entrusted to the Bar Council should be co-related are matters of detail and we wish to make no specific recommendations in respect of them. The Parliament can decide these matters of detail in consultation with all the interests concerned. We venture to think that the progress of legal education on healthy lines would be facilitated if such a council is instituted without any delay.

Annexure - A

syllabus of 3-year (six terms) LL.B. course

[*proposed by M.P.Jain and Anandjee*]

I.
1. Indian Legal History
2. Contracts-I
3. Torts
4. Family Law-I
5. Crimes-I

II.
1. Indian Constitutional History
2. Contracts-II
3. Constitution-I
4. Crimes-II
5. Family Law-II (including gifts & presentations).

III.
1. Legal Theory-I
2. Property-I
3. Constitution-II
4. Criminal Procedure Code
5. Evidence

IV.
1. Legal Theory-II
2. Property-II
3. Administrative Law
4. Civil Procedure & Limitation
5. Arbitration and Bankruptcy

V.
1. Interpretation of Statutes and Principles of Legislation
2. Pleadings & Conveyancing
3. Public International Law
4. Company Law

5. Comparative Law *or* Private International Law

VI.
1. Land Law
2. Legal Remedies
3. Any three of the following--
   - (a) Labour Law
   - (b) Taxation
   - (c) International Organisations
   - (d) International Trade & Carriage of Goods (national & international)
   - (e) Public Control of Trade & Commerce
   - (f) Legal Problems of Foreign investment
   - (g) Military Law
   - (h) Insurance, Banking & Negotiable Instruments
   - (i) Trusts, Charitable Endowments & Waqfs
   - (j) Trade Marks, Patents & Copyright
   - (k) Law of Cooperation

Legal writing [during V & VI Terms]

Annexure 'B'

syllabus for 3-year (non-semester) LL.B. course

[*proposed by M.Ramaswami*]

LL.B. Previous:
1. Hindu Law
2. Muslim Law
3. Indian Legal and Constitutional History
4. Constitutional Law of India
5. Law of Contracts
6. Law of Torts

LL.B. Intermediate:
1. Mercantile Law-I
2. Criminal Law and Procedure
3. Legal Theroy
4. Law of Evidence
5. Equity, Trusts, Specific Performance, Injunctions and Mortagages

6. Transfer of Property (excluding chapter on mortgages)

LL.B. Final:

1. Civil Procedure and Limitation
2. Constitutional Law of England [including Commonwealth Relations]
3. Mercantile Law-II
4. Administrative Law
5. Public International Law
6. One of the following elective subjects:
   - (a) Private International Law
   - (b) Indian Succession Act and the Law relating to Marriage and Divorce applicable to Non-Hindus and Non-Muslims
   - (c) Taxation
   - (d) Labour Law
   - (e) Interpretation of Statutes and Principles of Legislation

References

1. Roscoe Pound, *Jurisprudence*, I: 17.
2. Roscoe Pound, *Law and Morals* ,115.
3. W. Friedmann, *Law in A Changing Society*, 503.
4. Davis & others, *Society and the Law*,374.
5. Morris R. Cohen, `Portrait of A Philosopher', in *Life and Letters*, pp. 298, 300.
6. Supra note 4 at 8 474, fn.86.

[The Dissenting Minute appended to the Committee's Report by M. Ramaswami, Dean of the Faculty and Convenor of the Committee, is not being reproduced here---*Ed.*]

Faculty Reformation-II

Deshpande Committee Report on Admission Procedure, Course Structure and Evaluation System in Delhi University Law Faculty --1987

In December 1986 Vice-Chancellor Moonis Raza constituted a committee "to critically assesss admission procedure, course structure and evaluation system in the Faculty of Law and to suggest improvements therein." Chaired by Justice V.S. Deshpande, the committee had as it members Alice Jacob, Rahmatullah Khan, P.K. Tripathi, K.B. Rohatgi, Upendra Baxi, Professors-in-Charge of the three Centres of the Faculty (ex officio) and Dean of the Faculty (convenor). The committee submitted a brief report in 1987.

Full text of substantive parts of the report, after necessary editing, is reproduced below.

--Editor

I. Admission Procedure

The present procedure of admission to the LL.B. course in the three Law Centres and its drawbacks were discussed by the committee in detail. After a careful consideration of the merits and demerits of the present rules of admission, the committee recommends as under:

(i) Admission to LL.B. I-year course in all the three Law Centres should be on the basis of a written admission test.

(ii) Eligibility requirement for admission to LL.B. Ist year course should be a Bachelor's degree in any discipline with at least 50% marks in the aggregate, if a person has obtained the Bachelor's degree under the 10+2+3 (i.e., 15 years) pattern of education, and 55% marks under the 10+2+3 (i.e., 14 years) pattern of education.

(iii) All graduates in various disciplines may be treated at par for the purpose of admission test. There should be no preference given on the basis of discipline in which a candidate might have pursued his/her pre-legal studies, i.e. among the graduates of arts/social science/science/ education/engineering, etc. Similarly, no preference be given to postgraduates as against undergraduate degree-

holders for seeking admission to the LL.B. course.

(iv) A certain percentage of seats, say upto 70%, may be reserved exclusively for those who are graduates from Delhi University and may be admitted on the basis of admission test. The rest of the seats may be available for open competition, where Delhi University graduates will also compete with graduates from other universities.

(v) Except for scheduled caste/scheduled tribe candidates there should be no other reserved category whatsoever.

(vi) The test may be an objective type test—something of a very general nature since students from all disciples seek admission to LL.B. course.

(vii) The Faculty may appoint an LL.B. admission test committee which may formulate the guidelines for conducting the test in consultation with the examination units of I.I.T./C.S.I.R./I.C.S.S.R./A.I.U., etc, and see methods and procedure of the admission test.

II. Examination Pattern

After a careful consideration of the examination pattern in the three Law Centres, the committee unanimously recommends under:

(i) The Law Faculty may continue with the semester system as at present.

(ii) The University may continue to hold separate examinations for each Law Centre. This was thought appropriate since the conditions and the category of study in the day centre, i.e. Campus Law Centre, and that in Law Centre-I and Law Centre II are somewhat different. Keeping in view these conditions, it is thought desirable that each Law Centre should have some sort of coordination in this regard for the purpose of maintaining uniformity of standard.

(iii) The committee's main recommendation in this regard is to abolish the supplementary examinations. After a careful consideration it is recommended that the supplementary examinations should be abolished for good. However, this recommendation can be implemented step by step starting with those who would hereafter seek admission to Ist year, In this way the supplementary examinations can be fully abolished within a period of two to three years.

This recommendation is made to save more time for teaching in the Law Centres. It was felt that the Law Centres should not be only

examining bodies, but primarily teaching institutions. The results of supplementary examinations in law are declared very late. The teaching of one semester is almost over by the time the results of both the supplementary examinations of I/III/V and II/IV/VI terms are delcared. A significant number of students seek admission in LL.B. II and III year on the basis of result of these supplementary examinations, with the results that they are unable to seek any study, and they appear in examinations for the relevant semester without practically getting any course instruction. This is totally unacademic and leads to disastrous consequences. As one member said, for some students the LL.B. course practically turns out to be a 2-year (4 terms) course instead of 3-year (6 terms) course. Such a student does not receive any instruction for the III and V terms, and he appears in the examinations of these terms, i.e. III and V terms, as if he was a private (or external) candidate. This situation is deplorable and must be rectified without any loss of time. It has, therefore, become absolutely necessary to abolish the system of supplementary examinations.

Looking at the same problem from a different angle, the committee took a serious view of the fact that at least 86 days are lost/consumed only in holding examinations--annual and supplementary--for the two semesters in any academic year of LL.B. course. There are 43 compulsory and optional papers prescribed for 3 years (6 terms) of LL.B. course. Examination in each course is to be held twice a year, once as annual and second time as supplementary examination. Since the Law Faculty has sememster system of teaching and examination, there are two annual examinations -- one in December for I/III/V terms, and second in May/June for II/IV/VI terms--and two supplementary examinations, one immediately after the second annual (May/June) examinations for I/III/V terms, and another which begins 15 days after the declaration of results of second annual examinations of II/IV/VI terms. Of late it has been observed that second supplementary examinations go on right upto the 3rd or 4th week of semester and results of these are declared sometime by the middle of November or so. It is only after the results of both the annual and both the supplementary examinations are declared that a student knows whether he can be promoted to the next higher working class or not. This leads to horrible results. Very few working days in a year are left for teaching as such. In the Law Faculty examinations go on for the entire academic year, and in fact supplementary examination of one academic year spills into the next academic year. This kind of situation must not be allowed to continue at any cost if the Law Centres of Delhi University,

Faculty of Law, have to be called teaching institutions in the real sense of the term, instead of being called mere examination centres.

To remedy these defects it is recommended that:

(1) One set of examinations, viz. the two supplementary examinations should be abolished.

(ii) The Faculty of Law may consider abolishing a few optional courses where the number of students opting these courses has not exceeded 20 over the years. Even otherwise it would be advisable for each Law Centre not to fritter away its manpower resources by offering a large number of optional courses which a significant number of students are not interested in offering.

(iii) The Faculty may also consider giving only the compulsory courses in the I and II year of LL.B. course and may offer only a few optional courses along with compulsory courses only in the III year of LL.B. course.

(iv) The LL.B examinations for each Law Centre should be so scheduled that all the examinations pertaining to one academic year should be over by 31st May and the results declared latest by 30th June of each year.

(v) All these students who are to be promoted to the next higher class must seek their admission to the higher class before teaching for that class in the new academic year begins. No student should be allowed to appear in the examination of any subject/paper of the term unless he has received full instruction in that subject/paper for the entire term.

(vi) The Faculty, so long as it continues to follow the semester system for the law courses, may consider enforcing the requirement of prescribed attendance in classes on semester basis instead of yearly basis as it is being done presently.

III. Promotion Rules

Since the committee has unanimously recommended to abolish the system of supplementary examinations for LL.B. course, the promotion rules were carefully considered and some liberalization to these rules has been recommended. In the committee's view, given thought to the semester system, no student should be allowed to carry the load of more than one semester in addition to the load of the current semester. The committee therefore recommends that:

(i) Students who clear 5 papers out of 10 [present rule is 8 out

10] in Ist year may be allowed promotion to II year, allowing them to carry the load of five papers for which examination is held in one semester. A student who is unable to pass 5 out of 10 papers in the LL.B. I year should be deemed to have failed in the I year and may be declared as having failed.

(ii) Students who clear 15 papers out of 20 during the I and II years of their study [present rule is 18 out of 20] may be allowed promotion to III year, thus allowing them similarly to carry the load of just 5 papers.Those who fail to pass 15 out 20 papers in the LLB. II year should be deemed to have failed in the II year and may be declared as having failed.

(iii) Since it is recommended to abolish supplementary examinations, it is suggested that the University may, if it is found necessary, consider the extension of span period for LL.B. course for bonafide reasons in a few suitable cases where a student in spite of his best efforts is unable to pass in all the 30 papers in the span period of six years due to certain grave and exceptional hardships.

It is also suggested that such students who carry over the examination of previous semester must register themselves in the respective Law Centres from the beginning of the academic year itself. Some kind of remedial or supervisory instruction may be provided for such students for at least one period in a week per paper/subject in those papers/subjects which they have still to clear, in addition to the instruction which they receive in other papers/subjects in the normal course. The attendance for these instructions may be made compulsory.

IV. Evaluation System

Demand for revaluation in the LL.B. course has been made from time to time since the introduction of revaluation in some other courses in the University. The question of making revaluation available in the LL.B. course was discussed in detail by the committee and it was decided that generally revaluation should not be allowed in the law courses. But if in an individual case, evidence discloses a strong prima facie case of injustice, the extraordinary power of the Vice-Chancellor may be invoked to order revaluation in an individual paper of an individual student.

The present evaluation system was also carefully examined and the committee recommends that, if possible, joint evaluation centrally at the Examination Branch, be introduced in LL.B. course in place of the

present system. Thus, for example, if there are five questions to be answered in a paper, 5 teachers may sit together in a hall/room in the examination branch and each one may examine only one particular question of all the scripts in a subject for which he is the examiner. If one teacher will examine only one question of all the scripts, it will be more efficient, and evaluation will be genuinely based on comparative merits. Moreover, where there will be more than one examiner for one answer script, the problem of revaluation will be automatically solved since in these circumstances revaluation will neither be required nor justified.

V. Miscellaneous

The committee is of the opinion that law course being a professional course, the rules relating to eligibility condition for admission and for promotion from I year to II year and from II year to III year may not be disturbed in an individual case under any of the Ordinances of the University. The committee noted that in the past exemption/relaxation given to some students of LL.B. course in the matter of promotion to higher classes by the application of an Ordinance has had disastrous consequences for the Faculty as a whole. It opened a flood gate of applications for relaxation in the promotion rules with the result that those who had been declared failed were allowed promotion. Application for relaxation of promotion rules were sometimes received even till the end of the academic year and the students who were thus promoted did not attend a single class in the entire academic year, but were allowed to appear in the examination, which was wholly unacademic. This must be stopped if academic standards in the Law Faculty are to be maintained.

Faculty Organization

Administrative System of the Delhi University Law Faculty —An Explanatory Note*

I. The University

The University of Delhi is governed by the following:

(i) Delhi University Act 1922 — as amended by Acts XXIV of 1943, V of 1952, LXI of 1961, XXXV of 1970, XLVIII of 1972 and XXVII of 1981.

(ii) Statutes of the University as set out initially in the Schedule to the Act and later amended and supplemented from time to time by the Executive Council of the University under powers conferred by the Act in that behalf (sections 28-29);

(iii) Ordinances of the University as amended and supplemented from time to time by the Executive Council in accordance with the provisions of the Act (sections 30-31); and

(iv) Regulations made from time to time by the Authorities as provided in the Act (section 32).

"Authorities" of the University, as per section 17 of the Act, are:

(a) Court;
(b) Excutive Council;
(c) Academic Council;
(d) Finance Committee; and
(e) Faculties.

According to section 8 of the Act "Officers" of the University are:

(a) Chancellor;
(b) Pro-Chancellor;
(c) Vice-Chancellor;
(d) Pro-Vice-Chancellor;
(e) Treasurer;
(f) Registrar; and
(g) Deans of Faculties.

*Prepared by Research Assistants to Professor Tahir Mahmood.

II. Faculty, and Department, of Law

According to the Act, Statutes and Ordinances, the University can have a prescribed number of Faculties with a prescribed number of Departments placed under each Faculty.

The Faculties in the University are basically governed by Statutes 9, 9A, 9-B and 10. Each Faculty has Departments as assigned by the Ordinances.

According to Ordinance XIV-A, the Faculty of Law consists of only one Department—the Department of Law. The Campus Law Centre, Law Centre I and Law Centre II are integral parts and sub-departmental units of the Faculty--cum-Department of Law.

The Faculty-cum-Department of Law and its three units are governed by the relevant provisions of the Statutes and Ordinances of the University and by the Regulations made and decisions taken by the Faculty itself in its capacity as one of the `Authorities' of the University as provided by section 17 of the Delhi University Act.

III. Head and Dean

As per Statute 9(2)(d), the Department of Law has a Professor as its Head. Under Ordinance XXIII the position rotates by seniority among all the Professors of the Department of Law [including all the three Centres] and is held by each incumbent for three years subject to the rules of retirement [no one who attains the age of sixty can hold it].

In terms of Statute 12 the Head of the Department of Law is also the Dean of the Faculty of Law. Since the Faculty has only a single Department, terms of the Head and Dean are co-terminus [three years from the date of appointment or till attaining the age of sixty whichever is earlier].

As provided for by section 8 of the Delhi University Act, Dean of the Faculty of Law is an "Officer" of the University. According to Statute 12, the Dean of the Faculty of Law:

(a) is the "Executive Officer" of this Faculty;
(b) is "responsible for the conduct of teaching" in the Faculty;
(c) presides over its meetings, and
(d) has " a right to be present and to speak at any meeting of any committee" of the Faculty.

The Dean is also the chairperson of all statutory bodies of the Faculty — including the Committee of Courses and Studies, the Law Courses Admission Committee, the Board of Research Studies in Law and the Departmental Committee.

All postgraduate and research programs of the Faculty, including LL.M., M.C.L., Ph.D. and D.C.L., are managed directly by the Dean.

As Head of the Department the Dean has all the powers and authority conferred on heads of departments by the Statutes and Ordinances of the University. He is also a statutory member of all selection committees for the academic positions in all units of the Faculty.

IV. Professors-in-Charge

The Campus Law Centre, Law Centre I and Law Centre II have their own Professors-in-Charge. The powers and position of the Professor-in-Charge are not defined by the Statutes and Ordinances. But by convention he acts as the academic and administrative head of the Centre, controls all the activities of the Centre, issues lecture lists and administers the Centre in all respects. The Professor-in-Charge of a Centre also sits on the selection or evaluation committee and Faculty Departmental Committee when such committees meet to make recommendation for teaching posts at that Centre.

Since 1984 the position of Professor-in-Charge in each Centre rotates by seniority, the term of each incumbent being three years (subject to rules of retirement). The position may be held also by a Reader who will be designated as Reader-in-Charge and will have all the powers of the Professor-in-Charge except the right to sit on a selection committee.

V. Committees

Faculty

The supreme administrative body of the Department is the Faculty Committee which functions under Statute 9(3). Its members are:

(1) Dean & Head of the Department;
(ii) all Professors of the Faculty;
(iii) one Reader [by rotation in order of seniority];
(iv) one Lecturer [by rotation in order of seniority]
(v) five external members nominated by the Academic Council on Vice-Chancellor's recommendation.

All members [other than Dean and Professors] hold office for a three-year term.

The Faculty is an "Authority" of the University under section 17 of the Delhi University Act. It constitutes the Committee of Courses and Studies and approves examiners for LL.M. and LL.B. courses on its recommendation.

The Faculty ordinarily meets once in each academic term.

Committee of Courses & Studies

According to Ordinance XIV-B, this is a sub-committee of the Faculty and its constitution is to be determined by the Faculty itself.

This Committee considers matters relating to syllabus, approves synopses of subjects and recommends examiners for LL.M. and LL.B. courses. It also recommends to the Board of Research Studies in Law examiners for theses submitted by Ph.D. students.

The Committee ordinarily meets once in each academic term.

Law Courses Admission Committee

This Committee is constituted and functions under Ordinance II. Its members are:-

(i) Dean;

(ii) all Professors;

(iii) all Readers; and

(iv) two external members appointed by the Academic Council.

This Committee recommends to the Academic Council policies, criteria and processes for admission to LL.B., LL.M. and M.C.L. courses. It meets at least once in each academic year.

Board of Research Studies in Law

The Board is constituted and functions under Ordinance VI-B. Its members are:

(i) Dean & Head; and

(ii) three members nominated by the Academic Council (generally external).

The Dean may, in his discretion, invite to a particular meeting of the Board any teacher of the Faculty as a special invitee.

The Board approves subjects for Ph.D. research work, interviews applicants for the same, and recommends examiners for the theses notified for supplication.

Departmental Committee

Constituted in terms of an Executive Council Resolution [No. 305 of 22 July 1980], this committee is chaired by the Dean and has the four seniormost Professors of he Faculty as its members.

This Committee recommends candidates for ad hoc appointment against short-term temporary vacancies of teachers.

Informal committees

At the Faculty level the Dean may constitute informal administrative or academic committees for specific purposes as he may deem fit. Among these, generally, are:

(i) a Legal Aid Committee, and

(ii) a Journal Committee [for the *Delhi Law Review*].

These are not statutory or E.C.-approved committees. Their constitution, terms, membership and functions are fully in the Dean's discretion.

The Dean may appoint a director and joint/deputy/assistant directors for the Legal Aid Clinic of the Faculty, as also an editor and joint/assistant editors for the *Delhi Law Review*.

All of them function under the overall authority of the Dean.

In each Centre usually teachers' committees are constituted by its staff, on year to year basis, for various academic and administrative purposes. Among these are, generally, subject-allocation committee, seminar committee and building/room-allocation committee.

VI. Teaching & Administrative Staff

The Faculty has teachers in the following cadres:

(i) Professors,

(ii) Readers,

(iii) Lecturers, and

(iv) Part-Time Lecturers,

All these are teachers of the Department of which the Dean is the Head. At the same time, each teacher is attached to one or another of the three Centres of the Faculty. Ph.D. supervisors and LL.M. and M.C.L. teachers are derived from t the Faculty as a whole; while LL.B. classes are taught by the teachers at their respective Centres.

Professors, Readers and Lecturers are permanent members of the Faculty. Part-time teachers are appointed for a maximum period of five years, within which their appointment is to be periodically renewed.

There is no formal staff council in the Faculty. Each Centre of the Faculty holds separate meetings of its teaching staff.

Against leave vacancies or posts waiting to be filled by the regular selection-committee process--both full-time and part-time — ad hoc

lecturers may be appointed on the recommendation of the Departmental Committee of the Faculty.

As regards administrative staff, at the Faculty level the highest official is the Administrative Officer. He and other members of the Faculty office work under the Dean. Each Centre had its own administrative staff working under its Professor-in-Charge.

The administrative staff of the Faculty and its three Centres is not permanent. The incumbants come and go under the transfer rules of the University.

VIII. Libraries

The main Law Library is housed in a portion of the Faculty building in Chhatra Marg. The Dean of the Faculty is its Administrative Head. Under his chairmanship a Library Committee, including teachers from all the three Centres of the Faculty, decides the policy matters relating to its functioning. This library is available to all teachers of the Faculty as a whole and to all Ph.D., LL.M. and M.C.L. students. At the same time, it is available also to the LL.B. students of the Campus Law Centre.

Law Centres I and II have their own smaller libraries situate on their respective premises. Each of these is available to teachers of all the three Centres and to LL.B. students of the respective Centres,

VIII. Students and Their Unions

LL.B. students are admitted to any one of the three Centres of the Faculty. Their migration from one to anothor Centre is permissible only in very special circumstances. LL.M. M.C.L., and Ph. D. students are admitted to the Department of Law.

There is a Postgraduate Law Students' Union at the Faculty level, while each of the three Centres has its own Students' Union. The P.G. Law Union functions under the guidance of a Staff Advisor appointed by the Dean. Staff Advisors to Students' Union of each Centre is appointed by its teaching staff. Each Union elects its office-bearers and executives by annual elections.

Ph.D. students of the Faculty may seek membership of the DURA (Delhi University Researchers' Association).

Faculty Syllabi

Courses of Study at Master's and Bachelor's Levels in D.U. Law Faculty

I. LL.M. & M.C.L.

(a) compulsory courses:

A : Comparative Jurisprudence

B : Legal and Social Science Research Methods

(b) elective courses:

I : Adminstrative Process

II : Federalism

III : Law of International Organizations and Human Rights

IV : Corporate Management

V : Juvenile Delinquency

VI : Marriage and Divorce in Conflict of Laws

VII : Comparative Study of Law relating to Employer--Employee Relations

VIII : Intellectual and Industrial Property Laws-I [copyright, neighbouring rights, industrial designs]

IX : Civil Liberties

X : Air and Space Law

IX : Law of Corporate Finance and Securities Regulations

XII : Monopolies and Restrictive Trade Practices

XIII : Social and Economic Offences

XIV : Law relating to Wages and Monetary Benefits

XV : Intellectual and Industrial Property Laws-II [patents & their role in transfer of technology, trade marks, unfair competition

XVI : Law of Specific Torts

XVII : Administrative Discretion and Judicial Review

XVIII : Law and Practice of Treaties

XIX : Law of the Sea

XX : Tax Policies and Reforms

XXI : International Economic Institutions

XXII : Comparative Criminal Procedure and Evidence
XXIII : Laws of Testamentary & Intestate Succession
XXIV : Law and Society
XXV : Environmental Law
XXVI : Techniques of Judicial Control
XXVII : Reabilitative Techniques and Correctional Administration
XXVIII: Religious and Charitable Endowments
XXIX : Hindu Jurisprudence
XXX : Islamic Jurisprudence
XXXI : Law of International Water Resources

break-up of courses

(i) two-year LL.M.

term	*compulsory*	*electives required*	*electives available*
Ist	–	3	I to VIII
2nd	'A'	2	IX to XVI
3rd	'B'	3	XVII to XXV
4th	dissertation	1	XXVI to XXXI
total	3	9	31

(ii) three-year LL.M.

term	*compulsory*	*electives required*	*electives available*
1st	–	2	I,II,III,V,VII,VIII
2nd	'A'	1	IX,XI,XIII,XIV,XV
3rd		2	XVII, XVIII,XX,XXII, XXIII, XXV
4th	–	2	X,XII,XVI,XXVI, XXVII,XXVIII,XXIX, XXX,XXXI
5th	'B'	2	IV,VI,XIX,XXI,XXIV
6th	dissertation		
total	3	9	31

B. LL. B.

(a) *compulsory courses* :

I : Elements of Indian Legal System
II : Principles of Contract
III : Law of Torts
IV : Criminal Law - I [specific crimes]
V : Family Law - I [domestic relations]
VI : Law of Evidence
VII : Family Law - II [law of property]
VIII : Criminal law - II [general principles & procedure]
IX : Property Law
X : Public International Law [general principles]
XI : Constitutional law-I [distribution of powers, trade & commerce, governmental system, judiciary, emergency]
XII : Laws of Limitation & Arbiration
XVI : Constitutional Law - II [fundamental rights, directive principles, civil servants, amending procedure]
XVII : Administrative Law
XXI : Jurisprudence - II [legal concepts]
XXII : Civil Procedure
XXVI : Professional Ethics, Pleadings & Conveyancing
XXVII : Juriprudence-II [theories of law]
XXVIII: Minor Acts and Supreme Court Rules

(b) *elective courses :*

XIII, XIV, XV:

A-1 : Business Associations-I [partnership & agency]
A-2 : Labour Law-I [trade unions, industrial disputes, fixation of wages]
A-3 : Tax Laws-I [income tax]
A-4 : Private International Law
A-5 : Laws on Land, Sea & Air Carrige; Motor Vehicles
A-6 : International Law on Settlement of Disputes, War & Neutrality

XVIII, XIX,XX:

B-1 : Business Associations-II [domestic & foreign companies]

B-2 : Labour Law - II [labour welfare legislation]

B-3 : Tax Laws-II [git tax & wealth tax)

B-4 : Law and Poverty

B-5 : Commercial Transactions [sale of goods, hire purchase & bailments]

B-6 : Criminology

XXIII,XXIV,XV:

C-1 : Military Law

C-2 : Public Control of Business

C-3 : Lease, License, Rent Control, Slum Clearance

C-4 : Trade Marks, Copgright & Patents

C-5 : International Institutions

C-6 : International Trade

C-7 : Environmental Law

XXIX,XXX :

D-1 : Interpretation of Statutes

D-2 : Negotiable Instruments, Banking & Insurance

D-3 : Legislative Drafting

D-4 : Law of Elections

D-5 : Comparative Law

D-6 : Law of Insolvency

D-7 : Clinical Legal Education and Professional Training

break - up of courses

terms	*compulsory*	*electives required*	*electives available*
Ist.	I to V	—	—
2nd.	VI to X	—	—
3rd.	XI & XII	3	A-1 to A-6
4th.	XVI & XVII	3	B-1 to B-6
5th.	XXI & XXII	3	C-1 to C-7
6th.	XXVI to XXVIII	2	D-1 to D-7
total	19	11	26

D.U. Faculty of Law : 1994

Dean, Faculty of Law & Head of the Department
Dr. Tahir Mahmood

Campus Law Centre	*Law Centre I*	*Law Centre II*
	(a) Professors-in-Charge	
Dr. Mata Din	S.S.Rathore	Balbir Singh
	(b) Professors	
Upendra BAXI JSD	S.L. BHALLA Ph D	Baldev KOHLI LL M
Mata DIN Ph D	Gyan CHAND Ph D	A.K. KOUL Ph D
B.ERRABBI Ph D	K.K.NIGAM LL M	Tahir MAHMOOD Ph D
B.B.PANDE LL M	Hoti PRASAD Ph D	K. PONNUSWAMI D C L
P.S.SANGAL Ph D	Surendra PRASAD Ph D	Balbir SINGH LL M
M.P. SINGH LL D	S.S.RATHORE LL M	S.S.VATS LL M
P.N.SINGH Ph D	M.C.SHARMA SJ D	
B.P.SRIVASTAVA LL M	S.P.SINGH LL M	
S.K.VERMA SJ D		
	(c) Readers	
Nomita AGGARWAL Ph D	S.K.AGGARWAL LL M	N.S.BAWA LL M
T.S.BATRA LL M	P.P.S.ALAKH LL M	Harish CHANDER Ph D
S.S.BHUMRA LL M	A.K.BATRA LL M	P.M.DHAR LL M
U.M.DESHMUKH LL M	V.K.DIXIT Ph D	A.K.GUPTA LL M
Rajiv KHANNA LL M	Veena JAGGI, LL M	V.K.GUPTA LL M
Arun KUMAR Ph D	Lakshmi JAMBHOLKAR M L	B.T.KAUL LL M
Govind MISHRA Ph D	O.P.KHADARIA LL M	S.C.KHARE LL D
N.K.ROHATGI LL M	Ashwani KUMAR Ph D	M.S.SHUKLA LL M
	S.L.MAINI LL M	S.N.SINGH Ph D
	Chitra REKHA, Ph D	
	P.S.SAHNI LL M	
	Ahmed SIDDIQUE LL M	
	Gurdip SINGH Ph D	
	(d) Lecturers	
Suman GUPTA Ph D	D.S.BEDI LL M	Kiran GUPTA Ph D
Sunil GUPTA LL M	N.K.KHETRAPAL Ph D	O.B.LAL LL M
T.D.SETHI LL M	Ved KUMARI LL M	O.P.SHARMA LL M
K.R.SHARMA LL M	S.K.MINOCHA LL M	
	S.L.MIRASHI LL M	
	Poonam SAXENA Ph D	

Research Associates
Virendra K.Ahuja LL M ; G.K.V. Prasad LL M

Administrative Officer
R.L. Vaid LL B