Delhi Law Review — Volume XVII : 1995

EDITORIAL COMMITTEE

Editor-in-Chief
Prof. M.P. Singh
Dean, Faculty of Law

Editor
Dr. Gurdip Singh

Members

Dr. Suman Gupta — Shri. G.K.V. Prasad
Dr. Kiran Bala — Shri. V.K. Ahuja

© Faculty of Law, University of Delhi.

The *Delhi Law Review* is the publication of the Faculty of Law, University of Delhi, Delhi, India.

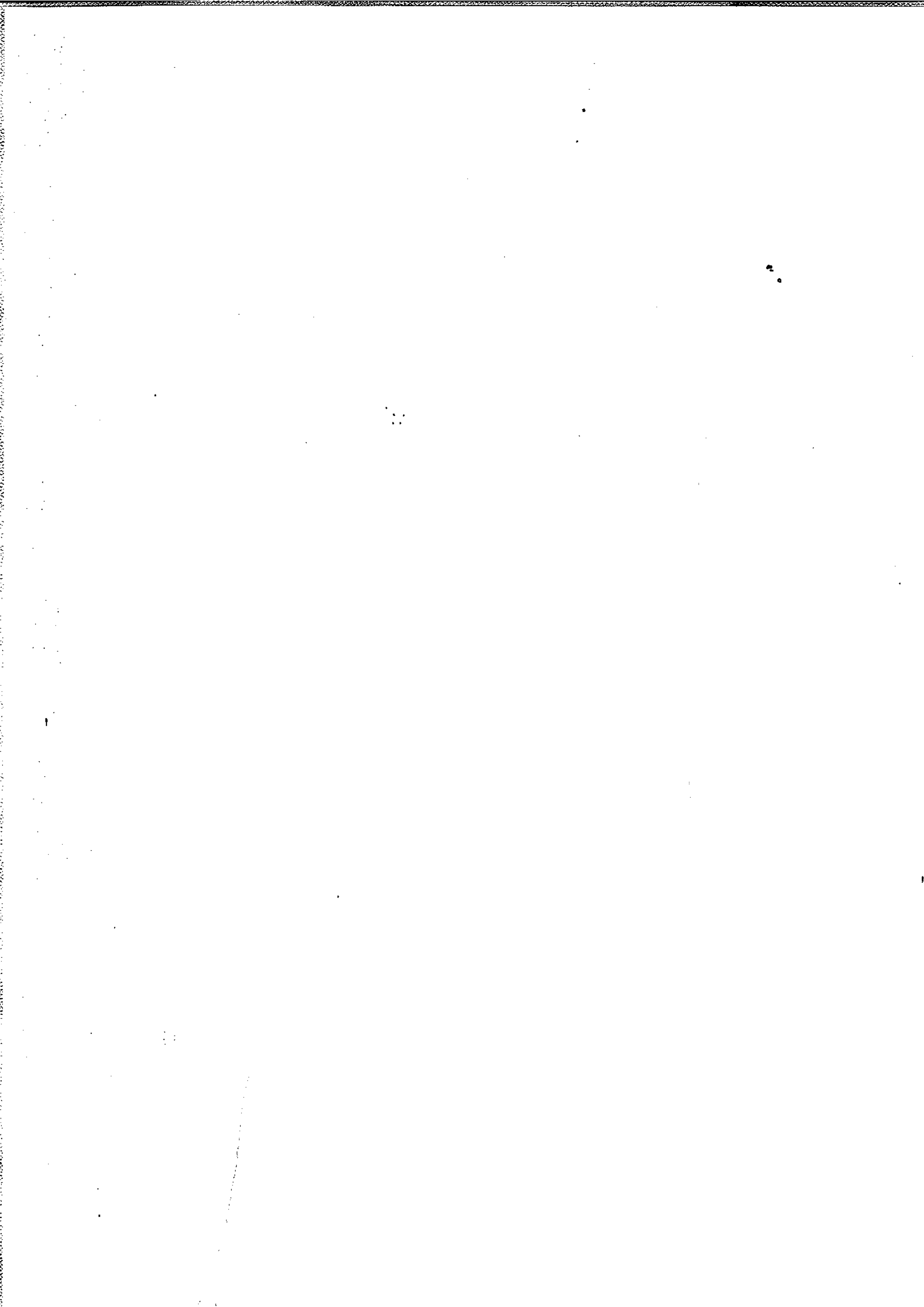
The manuscripts for publication, subscription, books for review and other enquiries about advertisments, etc. should be addressed to the Dean, Faculty of Law, University of Delhi, Delhi-110007,India.
Tel.: 91-11-7257483, 7257725/319, Fax : 91-11-7257049

Annual subscription : Rs. 150 (Domestic)
US$ 20 (Overseas)

Back Volumes of Delhi Law Review from Vol. I (1972) to Vol. XVI (1994) are available @ Rs. 150 (Domestic) and US $ 20 each (subject to availabilty).

Mode of Citation : XVII DLR (1995)

iii- v
ff 1
24
40
Ahuja 62
70
89
95
a & 110
121



DELHI LAW REVIEW
VOLUME XVII :1995

CONTENTS

Editorial Note — iii- v

ARTICLES

Social Security in India — Some Interpersonal and Interregional Features — *Michael von Hauff* — 1

Indian Tort Law : A Historical Inquiry — *Martin Lau* — 24

Human Rights in India : Some Epistemological Questions — *Parmanand Singh* — 40

NOTES AND COMMENTS

Author's Moral Rights in India — A Critical Review — *Virendra Kumar Ahuja* — 62

The Preferential Allotment : Causes, Consequences and Control — *Suman Gupta* — 70

Development of International Law and Sustainable Development — *P.S. Sangal* — 89

Manashanishta Chintanam and *Karma Bigarhitam* The Tenor and the Thrust of the Concepts of *Mens Rea* and *Actus Reus* From Manu to Modern Days — *P.C.Moharana* — 95

Conservation of Wetlands — Legal Perspectives — *Sanjeev Adhlakha & Rajat Sethi* — 110

Legal Aspects of Biodiversity Convention — *Gurdip Singh* — 121

Can There be A Fundamental Right to Die ?	*M.P. Singh*	134
Human Rights and Criminal Justice Administration in India : Rhetoric and Reality	*B.B. Pande*	145
Indian Public Interest Litigation : Locating Justice in State Law	*Aman Hingorani*	159
BOOK REVIEWS		
Avtar Singh, *Law of Arbitration*	*P.P. Singh Alakh*	204
Salil K. Roy Chowdhary, *Dutt on Contract*	*Suman Gupta*	205
Harish Chander, *Contract of Employment and Management Prerogatives*	*Debi S.Saini*	209
V.D. Mahajan, *Constitutional Law of India*	*Surendra Prasad*	215
Gareth Jones, *Nambyar Lectures — First Series — Restitution in Public and Private Law*	*N.K. Rohatgi*	217
A.M. Bhattacharjee, *Hindu Law and the Constitution*	*Sunil Gupta*	218
H.V. Sreenivasa Murthy, *History of India Part — I*	*M.P. Singh*	221
Debi S. Saini (ed.), *Labour Law ; Work and Development*	*M.P. Singh*	223

EDITORIAL NOTE

On behalf of the Faculty of Law and the Editorial Committee, I present this XVII volume of the *Delhi Law Review* to its readers. I am sorry and beg to be excused for the inordinate delay in the production of this volume. The delay was not in any way deliberate; it just occured inspite of the Editorial Committee's resolve and sincere efforts to produce this volume well before the passage of 1995. No new or special reasons were there for the delay. As usual the Committee did not receive good contributions in time. And whatever it got could not be quickly converted into uniform and mistake-free manuscript ready for printing. The Committee itself does not have any continuity and permanency. Occasionally the Committee has had competent editors for more than one volumes. Otherwise a new Committee is constituted for each volume which sets its own editorial policy and workplan. This volume was also no exception in that respect. It took some time for the Committee to lay down and execute its policy. Substantially it has adopted the traditional policy and pattern of the *Review*, yet in some matters it has gone by its own wisdom. It decided to get the entire manuscript set in the computer and get it ready in the final form for printing. It also decided to bring the *Review* closest to the form of standard law reviews in the United States. These two processes took much longer than what the Committee had estimated.

The Editorial Committee has tried to improve the form and the substance of this volume. If in the readers' opinion it has succeeded in doing so it has at least some justification for the delay. But if, in their opinion, it has failed to do so, the delay becomes indefensible. The readers may now form their own opinion and are also requested to give their frank and fair comments as feedback for the future. The Committee will gladly accept their critique and carefully examine their suggestions in the formulation and execution of the policy of the *Review*. I hope they will not mind taking that much trouble for the sake of the *Review*.

Of its own, the Editorial Committee has taken a few decisions to curtail, if not eliminate, delays in the publication of the *Review*. It has decided that at least the convenor of the outgoing Committee shall be an *ex-officio* member of the new or incoming Committee and that the *Review* will have the format of the standard law reviews, i.e. it will have a few articles, a few notes and a few book reviews. It will follow standard uniform system of citations. To ensure timely availability of adequate and suitable contributions and their prompt conversion into publishable form, the Committee has also inducted a few student members. The students have also been inducted with a view to train them in research and writing as well as in editorial skills. Computer facility has also been created in the office and some know-how in its use has also been developed in the process

of preparing the manuscript for the present volume.

These decisions are not novel or unprecedented. They have all been previously discussed at some point or the other and a few of them have also been adopted and followed. I think if we adhere to all of them they may help in the timely and improved production of the *Review*. Therefore, we intend to go by them until we arrive at some better decisions for the improvement of quality and periodicity of the *Review*. Hoping that adherence to these decisions will considerably improve the efficiency of the Editorial Committee, we are also looking forward to make the *Review* biannual with the next volume.

Conversion of all these decisions and hopes into reality demands increased cooperation and love for the *Review* from its readers, particularly from the colleagues in the faculty. They must specially write for the *Review* and contribute their best writings to it. The colleagues may, in addition to writing on issues of common interest, also write on issues of special interest to the students. Needless to say that unless and until the *Review* receives adequate and appropriate contributions, it cannot be brought out howsoever hard and efficiently the Editorial Committee works. From my personal experience of working with the *Review* I can say that most of the time nonavailability of good and adequate contributions in time was the only or dominant reason for delay in the appearance of the *Review*. I wish that the colleagues could change the situation by enthusiastically writing good pieces for the *Review*. I am quite optimistic of their potential and support in this regard. This optimism is the basis of my fond hope of presenting the next issue of the *Review* by the middle of this year.

I should have closed this note with that optimism and fond hope. But before doing so I must express my gratitude to those who have been instrumental in the production of this volume. Among them first of all I thank the contributors of the writings for this volume. Next, in addition to my colleagues on the Editorial Committee, I thank all those colleagues who have helped by their expert opinion in the selection, editing and improvement of the contributions. I must also thank those colleagues and students who, without being in the Editiorial Committee, have helped in the preparation of the manuscript, particularly in its computer setting and corrections. Among them maximum credit goes to my young colleague Ms. Shalini Singh who has ungrudgingly spent hours, days and months staying late at her office or with the computer operators reading, correcting and setting the manuscript and its multiple proofs. I am extremely grateful to her. Among the students I would like to specifically thank Mr. Sadiq Ahmed Jillani Syed, LL.M. II Year and Ms. Poonam Madan, LL.B. III year who have helped in the preparation of the manuscript. Messers 'Akriti Computers' also deserve special thanks

who, notwithstanding the complications of our work, gladly undertook it, willingly carried out all corrections, additions and deletions in the manuscript, produced any number of print outs and met all our demands. Finally, I thank Delhi University Press through its Manager Mr.A.G. Korde for having done the good job of producing this volume with quality print and paper and elegant cover and design.

Faculty of Law
University of Delhi
Delhi - 110 007

March, 1996

Professor M.P. Singh
Editor-in-Chief

SOCIAL SECURITY IN INDIA
SOME INTERPERSONAL AND INTERREGIONAL FEATURES

*Michael von Hauff**

1. Introduction

Like almost all the countries of Africa, Asia and Latin America, India has its own specific forms of social security. However, social security has a wide variety of forms in southern countries, both qualitatively and quantitatively. Social security in India, therefore, must be analysed and interpreted in the context of specific economic framework conditions and structural properties. But this is not sufficient in order to explain social security systems, either in India or in other developing countries. It is also relevant that, for example, countries which were subject to British colonial rule in Africa, Asia and the Caribbean have similar systems of social security and that the legacy of colonial rule continues to exist, at least in part.[1] On the other hand there are, for example qualitative and quantitative differences between Latin American and Asian countries, as Mesa-Lago shows in a comparative study.[2]

What is striking is the increase in topical interest in the subject of social security in the southern countries in the past few years. Indeed there has been interest in the scientific aspects of the subject and in the aspects of development policy and application since the 1950s. Although the state of knowledge has undergone differentiation, there are some deficits and special features especially in the Indian context, of which we may cite some examples.

Theoretical foundations: in their paper on 'Social Security in Developing Countries: What, Why, Who and How?' Burgess and Stern provide a differentiated foundation to the central theoretical issue 'Why should governments involve themselves in social security?' Against the background of structural causes of poverty they begin with a critical analysis of welfare economics, which they say negates market failure and just distribution, and they ultimately demand and substantiate interventions by governments, among other things by using the argument of democracy (improvement and assertion of the rights of the poor population in particular).

The theoretical analysis and substantiation of social security as a precondition for the clear demarcation and formulation of social policy principles

---

* Professor, Institute For Economics and Economic Policy, University of Kaiserlautern, Germany. Visiting Fellow (April-May 1995), Faculty of Law, University of Delhi, Delhi.

1. M. Fuchs, *Soziale Sicherheit in D. Welt. - Bestandsaufnahme und Perspektiven*, in M. v. Hauff, B. Pfister-Gaspary (eds.), Entwickungspolitik 91-98 (1984).

2. C. Mesa-Lago, *Comparative Analyses of Asian and Latin American Social Security Systems*, in I.P. Getubig, S. Schmidt (eds.), Rethinking Social Security - Reaching Out to the Poor 64-105 (1992).

is primarily the concern of 'western' economists. It hardly takes place in India, as in many other southern countries. One of the rare exceptions is Siddiqui, who adapts well known theoretical approaches and ends up by examining what explanatory value they have for the Indian context.[3] His theoretical analysis of welfare is very broad-based, however, and goes far beyond the subject of 'social security'.

The relevance of socio-political principles: The formulation of the content of socio-political principles is an important precondition for designing the state system of social security. What is at issue are the classical principles of individual freedom and social security, social justice and solidarity and subsidiarity.

Individual freedom and social security: individual freedom and social security are often seen in direct connection with each other. The individual freedom of a person, according to Hayek, is given if he is not subject to the arbitrary coercion of the will of another person or other persons.[4] Individual freedom must be protected by the legal system and control of the individual power of disposal over people. Here the central problem becomes clear: control is only possible to a certain extent and thus the realization of freedom is only possible by degrees.

Social security is one of the central human needs. Social security, however, moves within a conflict between sufficient guarantees through state policies of social security on the one hand and the individual responsibility through risk sharing on the other. Therefore there is an ambivalence in the goal of security. The antagonism often emphasized by neoliberalism between individual freedom and social security does not necessarily have to be present, however. A potential restriction of the personal freedom of the individual does not arise until there is a crucial restriction through social security policy regarding his responsibility and his power of decision. As a rule - and this applies mainly to highly developed industrial societies - the material freedom of the individual is reinforced by the system of social security in wide areas.

A. Social Justice

Social justice is often cited as the highest or superordinate goal of social security. In recent times there has been a broad academic discussion which

3. H.Y.Siddiqui, *Social Welfare: Theories, Concepts and Functions*, in H.Y.Siddiqui (ed.), SOCIAL WELFARE IN INDIA 1 - 21 (1990).

4. F.A.v. Hayek, DIE VERFASSUNG DER FREIHEIT 14 (1971).

was reinforced in the 1970s among other things by the book by Rawls.[5] While the classical-liberal model was still based on the equality of all people, the concern for equal treatment is often at the centre of interest today. The question then arises, which fundamental position one proceeds from and going on from there how equal treatment can be applied or realized. Based on the differing potential of human abilities and performance, differences in the distribution of material freedom and economic power arise in every existing economic system, this distribution being uneven to a greater or lesser extent. To that extent justice under such conditions will always be an unattainable ideal state. In general, however, one will be able to assume that particularly extreme and conspicuous inequalities will be regarded as unjust.

B. Solidarity And Subsidiarity

Both these principles have a great tradition and have a broad framework of interpretation. The principles of solidarity and subsidiarity are based on fundamental positions which are derived from concepts of values and lie in between individuality and collectivity. Solidarity may be defined as joint self-help or mutual help and is thus based on altruism or collective consciousness. It commits society, organizations and groups to help disadvantaged individuals. Furthermore the consciousness of belonging together should lead to a willingness on the part of social groups to help the socially weak, even if this entails an effective redistribution between social groups.

The subsidiarity principle proceeds in general from the freedom and the self-responsibility of the individual and from individual or collective self-help. It explains under what conditions the state or society should guarantee help to the individual through social policy measures. However, help should be fundamentally subsidiary: it is only when the problem is too much for the individual that he should receive support in the appropriate form from the next higher social unit, such as the family, the neighbourhood and ultimately the state. Recent discussion of the subsidiarity principle does, however, demand that the state should not only intervene when the individual or groups of people are overstretched regarding their psychological and/or physical possibilities. The social and economic conditions should rather be organized or changed in such a way that each person should find the preconditions present and thus has the chance to develop according to his abilities.[6]

5. J.A.Rawls, A THEORY OF JUSTICE (1971).

6. M.v. Hauff, NEUE SELBSTHILFEBEWEGUNG UND STAATLICHE SOZIALPOLITIK 87 (1989).

C. Consistency Of Social Security

Systems of social security, in accordance with the understanding of western industrial countries, imply

(a) social insurance (public and/or private) and state payments,

(b) which are matched (degree of consistency) and

(c) cover a large part of the population by protecting the life situation of the individual (microeconomic situation) against life contingencies which threaten the individual's existence (degree of protection of the population by social security).

Seen in this way, there must be reservations about the success in developing a consistent concept of social security in particular in southern countries with a high degree of heterogeneity of economic structure, such as India. It is necessary to take into account here, though, that on the one hand a consistent concept of social security and on the other hand the fact of strongly diverging levels of sectoral and regional development in southern countries is in principle an antagonism. Rather, we have to assume that different forms of social security exist side-by-side which under certain circumstances may be in conflict with each other.

In this context we may proceed from the certain knowledge that, for example, formal systems of social security in most countries have contributed little if anything to eliminating absolute poverty.[7] This set of problems already became clear in connection with the programme of social security worked out at the beginning of the 1950s in the framework of technical aid from the United Nations for Egypt. In 1950 the newly elected Egyptian government regarded a bill introduced before its term of office, which envisaged the introduction of social security for urban workers, as unjust in a country like Egypt, in which three quarters of the population lives in rural regions and works in agriculture.[8]

D. Asserting And Realizing Social Security

In countries where the elites in effect have almost unlimited power a well developed lobby in favour of building up and developing social security as a countervailing power is of central importance. That is an important lesson from the historical development of social security in industrial countries, which

7. C. Mesa-Lago, *Seguridad Social y Pobreza*, CEPAL/PNUD. SE PUEDE SUPERAR LA POBREZA 162 (1980).

8. UN-Doc. St/TAA/6/Egypt/R1, 17 May 1951

can be particularly clearly understood if Germany is taken as an example.[9] What is relevant is both the power of the trade unions and the power distribution among the political parties or other protagonists in a country.[10] It should be noted critically that trade unionism in India is marked by the principle of trade unions having party affiliations, which means that trade unions are partly in political competition with each other.

Furthermore, it is established by economic development that existing power structures for example in rural districts with a high proportion of marginalized population can only be changed through goal-directed promotion of self-help.[11] So the organization of the poor population in the informal sector or in the subsistence economy is a particularly important precondition for laying claim to existing social benefits or the building up of social security systems.

Asserting and realizing social security is one of the central goals of the International Labour Organization (ILO). We may therefore briefly pay tribute to its efforts. The right to social security which the ILO has been claiming for decades in southern countries, is based on Article 22, Clause 1 of the Universal Declaration on Human Rights of the United Nations of 10 December 1948: 'Every person as a member of society has a right to social security.' The concrete formulation of the systems of social security has not seldom been influenced by the ideas of Agreement No. 102 on the minimum standards of social security of 28 July 1952. It was adopted at the 34th and 35th International Working Conference.[12]

In the 1960s the ILO was strongly marked by the modernization theory paradigm on specifications and standards in fields of labour economics. This was aimed at an equalization of living conditions on the international level. It was not until the end of the 1960s that it changed its strategy. Although the ILO recognized the existence and relevance of the informal sector in the majority of developing countries, it adhered to the standards concept of formal social security until the end of the 70s.[13] The resistance and/or longevity of the informal sector, which is of extreme importance in India too, shows that in most of the southern countries the system of social security must be extended in accordance with Agreement No. 102 by complementary measures

9. M.v. Hauff, *The Relevance of the German Social Security System for India*, in R.K.A. Subrahamanya (ed.), SOCIAL SECURITY IN DEVELOPING COUNTRIES 163-185 (1994).

10. P. Bernholz, F.Breyer, GRUNDLAGEN DER POLITISCHEN OEKONOMIE (2 ed. 1984).

11. M.v. Hauff, DIE ENTWICKLUNGSPOLITISCHE BEDEUTUNG DER SELBSTHILFE-FORDERUNG IM LAENDLICHEN RAUM — DAS BEISPIEL INDIEN, FORSCHUNGSBERICHT 15 (1993).

12. J.J. Dupeyroux, DROIT DE LA SECURITE SOCIALE (8 ed. 1980), avec mise a jour, Paris 79 (1982).

13. S.Schmidt, *Soziale Sicherung in Entwicklungslaendern* in ARCHIV FUER WISSENSCHAFT UND PRAXIS DER SOZIALEN ARBEIT 117 - 137 (1993).

or concepts of social benefits. Since there are no contractual labour relations in the informal sector or in the subsistence economy, classical systems of social security in this context are obviously not suitable. So the question arises, how the prevention and/or reduction of economic and existence-threatening life contingencies of different population groups in India can be carried out.

The following observations are intended to address some selected and topical economic framework conditions for social security in India. Then structural features of social security in India will be identified and shown. It will, in particular, be a question of interpersonal and interregional peculiarities. The distribution and redistribution effects relevant in this context are not subjected to any closer analysis. For the following remarks it is perhaps useful to specify more closely what social security is.

Following the definition current in the industrial countries it is a question of preventing or reducing economic and social contingencies of the population. However, in the southern countries, in contrast to the advanced industrial countries, it should not only be the formal security systems that are taken into account. This would largely exclude especially the people in absolute poverty in southern countries living in existential insecurity and without even a minimum of social protection. For them, 'adapted social security concepts or measures' must be developed.[14] From this follows the need to extend the definition of social security systems.[15] We have to include all the arrangements and measures which are aimed, by meeting the formal and informal demands of other members of society, at 1) guaranteeing the physical survival in a humane way, 2) guaranteeing a healthy level of consumption, 3) providing protection against a deterioration of the life situation through contingencies whose effects cannot be overcome by those affected without help. This reflects the relevance of social policy principles.

II. The Economic Framework Conditions for Social Security in India

The social security of the Indian population is currently determined to a large extent by

— a high degree of heterogeneity in the economic structure and in the development of the economy as a whole

— the relatively high poverty index, the size of the debt and

— the transformation process of the Indian economy from a more socialist

14. M.v.Hauff, *Soziale Sicherung in Laendern der Dritten Welt - Das Beispiel Indien,* in J.Wahl (ed.), Sozialpolitik in der Oekonomischen Diskussion 297 - 313 (1994).

15. H. Gsanger, Soziale Sicherungssysteme Fuer Arme Bevolkerungsgruppen 23 (1993).

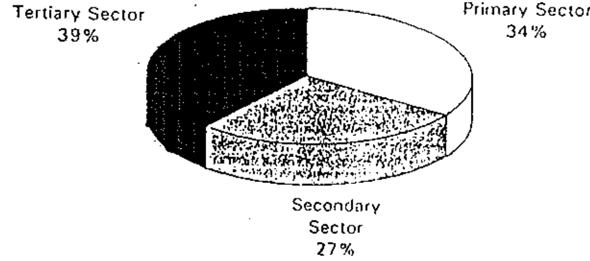
planned economy system to a market economy system.

The Indian economy is very prone to risk and harbours a large number of risk potentials. For example the high hidden unemployment, especially in the public enterprises, and the high rate of underemployment are of direct relevance to social security in India. In the following remarks not all the relevant framework conditions can be shown and their importance specified. Our analysis is therefore confined to selected determinants.

A. Economic Structure

The relative share of the three economic sectors has changed radically since India's independence. The share of manufacturing industry has almost doubled since 1950. But in 1991/1992 the share of the GDP was only 27%. While the share of the services sector in the GDP was about 39%, the primary sector shows a share of 34%. Indian economic policy, especially industrial policy, since the 1950s has aimed at significantly increasing the share of the secondary sector. However, development remained far behind expectations, which also diminished the absorbing capacity of the workforce. This led in the 1970s to first thoughts about reforms, leading to in the mid 1980s to the course of liberalization.

Fig. 1: The Relative Share of the Three Sectors in the Gross Domestic Product



Source: Government of India (ed.), Economic Survey 1991-92, Part II Sectoral Developments, Delhi 1992, p. S-4

While the added value of the primary sector has been sharply reduced since 1965, agriculture employs 2/3 of the workforce. The increasing growth rates of the past few years, especially in the agricultural sector (approx. 2.5% in 1992/93) and in the producing sector (approx. 4% in 1992/93), do not allow any conclusions to be drawn regarding the living conditions or the social security of the working population. For this it would be important whether and to what extent economic growth creates extra jobs in the formal sector and for which sections of the population and to what extent this improves social security. All in all we may note that the strategy of the mixed economy

was able to achieve neither the intersectoral nor the intrasectoral goals.

B. Structure Of The Population And Of The Manpower Resources

India's population structure, both in general and specifically in connection with the labour market, has some special features which we may briefly highlight here. The 8th Five-Year Plan envisages a population growth rate of 1.78% per year, so that for the period from 1991 to 1996 a rise in population to 925.13 million is forecast and from 1996 to 2001 a rise to 1006.2 million. The age structure will develop over this period as in Table 1.[16]

Table 1: Projection of Age Structure of the Population (in %)

Year / Age	1990	1992	1995	1997	2000
0-4	13.30	12.77	12.13	11.71	11.14
5-14	23.22	22.89	22.49	22.09	21.58
15-59	57.07	57.69	58.43	59.06	59.78
60 +	6.41	6.65	6.95.	7.14	7.50

What is striking in Table 1 are the growth rates of the population groups 15-59 and 60+, which are particularly relevant to the labour market. The forecast for the manpower resources may be seen from the picture given in Table 2, which shows that the manpower resources in the period from 1992 to 2007, both absolutely and relatively, will rise significantly.

Table 2: Projection of Manpower Resources (in millions)

Year / Age	1992	1997	2002	2007	1992-97	1997-02	2002-07
5 +	328.94	364.31	400.75	440.74	35.37	36.44	39.99
15 +	316.65	351.61	387.92	427.87	34.96	36.31	39.95
15-59	294.60	325.87	357.82	393.02	31.27	31.95	35.20

This fundamentally requires a corresponding absorbing capacity on the part of the labour market. Since this is at present not visible, it may be expected that the concealed unemployment and underemployment will rise significantly. The problems become particularly clear from the breakdown of the persons

16. General Secretariat of Social Security Association of India, *Social Security in India*, in R.K.A. Subrahmanya (ed.), SOCIAL SECURITY IN DEVELOPING COUNTRIES 248 - 271 (1994).

of employable age in Table 3.

Table 3: Distribution of Employed Persons in the Formal Sector

	No. of Employees
1) Government Sector	Σ 12,4 Mio.
a) Central	3,4 Mio.
b) State	6,8 Mio.
c) Local Authorities	2,2 Mio.
2) Public Sector (Statutory Corporations, Government Companies, co-operatives with more than 50% government share)	Σ 5,4 Mio.
a) Central Gov.	3,2 Mio.
b) State Gov.	2,2 Mio.
3) Private Sector	Σ 7,4 Mio.
Total No. of Employees in the Organised Sector	25,2 Mio.

Source: General Secretariat of Social Security Association of India, Social Security in India, in R.K.A. Subrahmanya (ed.), Social Security in Developing Countries, op. cit., p. 263 ff

As Table 3 shows, 67% of those working in the organized sector can be classified as belonging to the government sector or public sector and only 33% work in the private sector. It is also significant that a total of 10% of the workforce are employed in the formal sector, while 90% work in the informal sector. Among women, the proportion of those working in the informal sector is even 95%.

C. Poverty

The poor population in the Third World is unequally distributed among the regions. While the population of South Asia is 30% of the total population of the Third World, the proportion of the poor population within this region is about 46%. As Table 4 indicates, India has the highest index regarding both the absolute figures and the poverty index.

Table 4: Poverty Indicators: the situation in 1985

Region	extremly poor			poor			social indicators		
	No. (millions)	Poverty Index (%)	Poverty gap	No. (millions)	Poverty Index (%)	Poverty gap	Mortality upto 5 yrs.	Life expectancy (years)	School beginners quota (%)
Africa south of Sahara	120	30	4	180	47	11	196	50	56
E. Asia	120	9	0,4	280	20	1	96	67	96
China	80	8	1	210	20	3	58	69	93
S. E. Asia	300	29	3	520	51	10	172	56	74
India	250	33	4	420	55	12	199	57	81
E. Europe	3	4	0,2	6	8	0,5	23	71	90
Middle East and N. Africa	40	21	1	60	31	2	148	61	75
Latin America and Caribbean	50	12	1	70	19	1	75	66	92
All developing countries	633	18	1	1.116	33	3	121	62	83

Note: The poverty line for the extremely poor is $ 275 and for the poor $ 370 per capital per year in KKP dollars of 1985. The poverty index is defined as the difference of the aggregate income of the poor as a percentage of the aggregate consumption. The mortality figure until age five refers to 1980/85, in the case of China and South East Asia 1975/80.

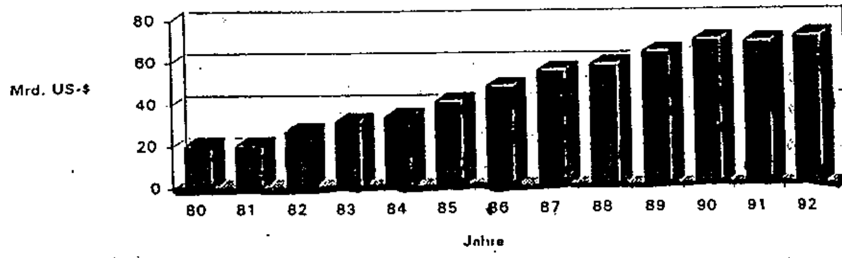
Source: Hill and Pebley 1988, and figures from the United Nations and the World Bank of 1989

Table 4 shows clearly the town-country gap regarding the poor population. The rural population accounts for 77%, while 79% of the poor population as a whole live in the countryside. Even taking account of the extreme land distribution and other factors (e.g. debt servitude) the countryside in India harbours a great structural potential for poverty. Even indicators relevant to poverty, such as infant mortality and access to clean water, show significantly worse figures for the rural population. The great poverty potential, as one of the central development policy challenges for India, is located mainly in the informal sector. Therefore, it remains to be settled what contribution social security can make in this context.

D. Debt

India's debt situation has worsened drastically since the mid 1980s. The external debt is at present about US $ 80 thousand million. This means that India is the third largest debtor nation in the Third World after Mexico and Brazil.

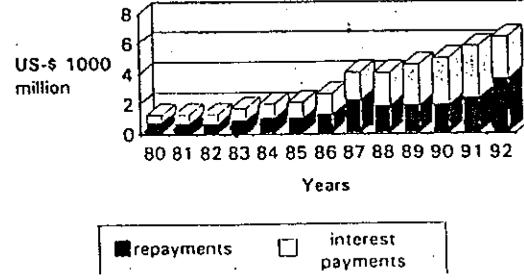
Fig. 2 : Development of India's Foreign Debt



Source: World Bank, World Debt Tables (for various years)

The increasing encumbrance is having a corresponding negative effect. The development of the debt service payments which India has had to make in freely convertible currency since 1980 to foreign creditors is shown in Fig3.

Fig. 3 : Development of India's Debt Service

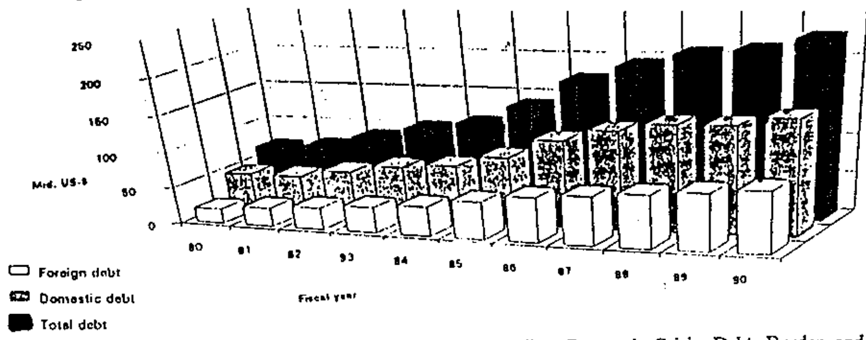


Source: World Debt Tables (for various years)

While the foreign debt attracted considerable notice nationally and internationally, far less attention was paid to the domestic debt. It is less spectacular, though its relevance to the social security of the population is no less important. Buchanan,[17] for example, calls to mind that the public debt both internally and externally is a considerable burden on the living conditions of both the present and the future generation, since the country's social budget has been cut in some key areas such as education.

17. F.M. Buchanan, *Budgetary Bias in Postkeynesian Politics: The Erosion and Potential Replacement of Fiscal Norms*, in J.M.Buchanan, C.R. Rowelex, R.D. Tollison (eds.), DEFICITS (1986).

Fig. 4 : The Development of India's Total Debt



Source: For the domestic debt B. B. Bhattacharya, India's Economic Crisis, Debt, Burden and Stabilisation (1992)

Fig. 4 shows that since the middle of the 1980s, analogously to the external debt, there has been a sharp rise in the domestic debt. In order to judge the domestic debt in the framework of our topic, the factors of gross domestic debt/GDP and net interest payment/tax revenues are important :

— In the years from 1980 to 1990 the gross domestic debt/GDP rose from about 33% to more than 60%.

— The net interest payment/ tax revenues increased during the period 1980 to 1988 from about 9% to over 21%.

The dramatic increase in India's foreign debt led in 1991 to the use of loans from the IMF and the World Bank, which are linked to a comprehensive structural adjustment programme. There is clear evidence that state transfers in this context in the areas of health and education for the poor population have decreased or at least stagnated in the past few years.[18]

E. Transformation Process

The Indian economy is undergoing a process of transformation from a more planned-type economy to a market economy system. The process of transformation is promoted both by the self-initiated liberalization course and by the structural adjustment programme. But so far any clear contours for one of the alternative market economy models are missing. In this context Feser cautions that despite all economic constraints in countries like India which are undergoing transformation processes the empirically evident abortive social developments of advanced western market economies should be avoided.[19]

18. C.Upendranadh, *Union Budget 1995-96: What's in Store for the Poor,* 2 Exchanges / Actionaid (June 1995).

In India the question also arises, how frictions and obstacles in connection with the transformation process can be lessened or even eliminated. The relevance is to be explained especially from the individual and general economic transformation costs arising for example through the temporary friction unemployment. Furthermore, the price decontrol is giving rise to massive price inflation, the effects of which, especially for low-income households, should be eased by supportive measures. The Social Safety Net Programme of the World Bank of November 1992 is intended to contribute to the general cushioning of the negative effects of the transformation process.[20]

This programme is provided with an IDA loan of US $ 500 m and is intended to help mitigate the varied and partly serious social problems including those in the areas of health, education, family and incomes or even those of safeguarding livelihoods.[21] The large number of key social programmes demanded in India, however owing to the bureaucratic structure of the sponsoring authorities, will not reach the target groups envisaged and contribute significantly to cushioning the effect of the extra burden brought about by the transformation process. At present the forecasts on the further course of the transformation process in India and the consequences for social security of the population are difficult. What is of central importance is, for example, whether additional jobs are created in the formal sector in the framework of privatization and whether, parallel to privatization, an adequate system of social security for the area of private enterprise will be set up or elaborated.

The trend in the economic framework conditions for social security in India is negative. The low growth rate of the secondary sector and the associated low absorbing capacity of the workforce and the growth rate of the population relevant to the labour market will sharply increase unemployment and underemployment. This worsened or at least consolidated the unsatisfactory relationship between the workforces of the formal and the informal sector. The drastic increase in debt servicing for domestic and foreign borrowing narrows the scope for organizing the state system of social security. Finally, the structural adjustment programme of the World Bank and the liberalization course can be shown to burden the lower income groups, and this cannot

19. H.D.Feser, *Alternative Strategien einer. Modernisierung Oest-Europaeischer Laender,* M.v. Hauff (ed.), Die Modernisierung der Oest-Europaeischen Laender und die Entwicklung der Dritten Welt 20 - 33 (1993).

20. World Bank, India - Social Safety Net Sector Adjustment Program (1992).

21. M.v. Hauff, *The Transformation Process and the Structural Adjustment Program in India - A Few Ecological Consequences,* Voelkswirtschaftliche Diskussionsbeitraege Universitaet Kaeiserslautern 4(1994).

be compensated for by the Social Safety net Programme.[22]

III. The Structural Features of Social Security in India

Following independence in 1947, India was conceived in principle by the founders Nehru and Mahalanobis as a welfare state. But the strategy of the mixed economy and that strategy of import substitution were intended to lead to social security or welfare for the population. This gave rise, in the formal sector, i.e. in the public sector and in the modern industrial and service sector, to a subtly differentiated system of social security. The framework conditions of social security in India, such as the structure of the labour pool, nevertheless show that it has only been possible to put into practice a system of social security for a small minority of the population, i.e. for those who have a firm employment relationship in the formal sector.

Subrahmanya, one of the most profound experts on social security in India, therefore arrives at an on the whole negative appraisal of the situation: 'The situation in India, so far as social security is concerned, is characterized by lack of policy. There are a variety of schemes providing social security type of benefits or protection. But they have been framed piecemeal and do not conform to any overall plan or design.'[23] In India, as in most of the southern countries, it is possible to distinguish the three typical forms or levels of social security: the system of social security in the formal sector, traditional and informal social security. The following remarks are confined, however, to the system of social security in the formal sector and to forms of social security in the informal sector. Guhan speaks in this connection of a dualistic approach to social security, since they have different points of emphasis.[24] The aim is to highlight interpersonal and interregional differences as far as current knowledge will permit.

A. Social Security In The Formal Sector

The systems of social security legislated for may be divided into two major categories: the contributory and the non-contributory social benefits. The

22. J.E. Mooij, *Public Distribution System as Safety Net— Who is Saved?*, Economic and Political Weekly 119 - 126 (1994).

23. R.K.A.Subrahmanya, *Comprehensive and Integrated System of Social Security — Some Suggestions*, in R.K.A. Subrahmanya, S.K.Wadhawen (eds), Social Security in India (1994).

24. S.Guhan, *Social Security for the Poor in the Unorganised Sector: A Feasible Blueprint for India*, in K.S. Parikh, R. Sudarshan (eds.), Human Development and Structural Adjustment 204 (1994).

contributory social benefits are financed according to legal requirements by contributions from the employee and the employer.[25] Some social benefits are still supplemented by state subsidies. The employees have a right to non-contributory social benefits without having to pay any contribution for these benefits. Such benefits can therefore be called state payments. The system of social security in the formal sector includes non-cash and cash benefits in case of illness, industrial accident and occupational disease, and old-age and dependants' benefits in the form of provident funds and family pensions.

The modern system of social security goes back essentially to a report by Adarkar, who was commissioned in March 1943 to present a concept of a system of health insurance for employees in the textile industry, in machine building, ore mining and metal processing. In August 1944 he presented his report, in which he had developed a comprehensive social insurance system. He explained this much more comprehensive social insurance system by saying that health insurance should not be overloaded with other areas relevant to social insurance. Adarkar's system of social insurance includes unemployment insurance, old age pensions, measures like wage settlements, the sustained assertion of the factory laws, health education and improvement of environmental health.[26] Beyond that, he recommended that maternity and accident insurance should be integrated with sickness insurance. On the basis of this report the Employees State Insurance Act 1948 was passed in April 1984. Besides a series of laws there are many welfare funds which are often placed between the formal and the informal sector.[27]

The system of social security for the formal sector cannot be given due attention here. It is striking, however, that especially in the public sector the right to claim social benefits or payments is strongly graded: there is a sharp division between public servants on the central government level and those on the level of local government. The various areas of employment show the following differences:

(a) Employees of the central government have a claim to medical attendant treatment, sickness benefit, maternity benefit, disability benefit, old age benefit, provident fund, family allowance, child allowance and insurance benefit. This gives this group of employees the most comprehensive social insurance, quantitatively and qualitatively.

(b) Employees of the governments of the individual federal states have

25. B.D.Rawat, Labour Welfarism in India (1988).

26. A.K.Bhattarai, *Systeme der Sozialen Sicherheit in Indien*, Internationale Revue fuer Soziale Sicherheit 530 - 540 (1989).

27. S.K. Wadhawan, Social Security for Workers in the Informal Sector in India (1989).

a similar claim to benefits. But these do vary relatively widely between the various states. This is regulated in detail by payment commissions or payment committees appointed by each government.

(c) The right of employees in local government and universities etc. differ relatively strongly from institution to institution and also between the federal states. In addition, educational institutions like universities have their own funds.

(d) Public enterprises on the federal level or those of the individual states in which the government has at least a 50% share have special features of their own, but there tend to be fewer rights in these enterprises than in public administration. For public and private enterprises there are partly the same legal arrangements and rights.

Besides the social security measures for employees on various government levels and in publicly owned enterprises and educational establishments there are a number of central government and state government measures and programmes for social insurance. However, the individual states differ widely as to the quality and quantity of social benefits. While all the states have an old age pension scheme, only West Bengal, Punjab, Mahrashtra, Kerala, Tamil Nadu, Assam, Bihar and Gujarat have introduced unemployment benefits for skilled and unskilled workers.[28] There are first integrative approaches to social security for workers in the formal and informal sectors. We may point out critically that even Indian experts have established shortcomings in the social security system in the formal sector such as a lack of system and transparency, negative distributive effects and too low material benefits in cases of hardship or risk. It is also undisputed that the transformation process of the Indian economy, and within it especially the new industrial policy, makes it necessary to rethink social security in India. 'The present rethinking is the outcome of the apprehensions that with the upgrading of technology, globalization and cost reduction, a certain amount of retrenchment or to call it in pleasant terms redeployment/retraining of the workforce would be essential'.[29] An unemployment insurance scheme and other measures such as wage guarantee funds are particularly relevant in this context.

To an ever-increasing extent the criticism is being raised that in India, as in many other developing countries, it is primarily wage earners with firm employment relationships in the public sector or in the urban industrial sector

28. J. Hirway, *Social Security for the Poor: Some Issues Pertaining to Policy and Performance in India*, in B.B. Patel (ed), SOCIAL SECURITY FOR UNORGANISED LABOUR 80 (1993).

29. P.W. Duggal, *Social Security in India - A new Profile*, in R.K.A.Subrahamanya (ed.), SOCIAL SECURITY IN DEVELOPING COUNTRIES 306 (1994).

who are protected by social insurance. On the other hand the large number of workers in rural areas are for the most part unprotected. There is also increasing discussion of the working population in 'tiny and small industrial units', also working unprotected in the framework of the social security system. Finally, reference must be made to the completely unsolved problem of child labour. In 1993, some 17 million children between the ages of 5 and 15 years were involved. This child labour plays a special role in India, as is well known enough for example from the carpet industry as an important export sector.

B. Social Security In The Informal Sector

There are differences in how widely social security in the informal sector and in the subsistence economy in India is defined and in how it is demarcated. For example, in a study of the International Labour Office, cites a number of funds or measures for the informal sector which have been also provide benefits in the framework of the formal sector.[30] Examples are the Central Welfare Funds, which chiefly provide funding for health services and medical care and education for children, public assistance schemes, which provide support in old age and also for the disabled, public assistance unemployment schemes for training the unemployed, etc.

It may be pointed out critically, however, that support is usually very small and that in addition this support is given to a varying extent in the various Indian states. In Kerala, for example, a relatively large part of the population in the informal sector benefits from social security measures. In Kerala, Maharashtra, Tamil Nadu and Gujarat there is support for self-employment.[31] In many other States only a small part of the population receives support from social security measures. But benefits on the whole are so small that they are nowhere near comparable to the formal system of social security and it is hardly conceivable that they could be brought closer to, or integrated with, the system of social security. For an appraisal of social security measures the problem arises that there are hardly any established analyses of their efficiency.[32] There are first approaches, though, regarding the planned national old age pension.

Although there are so far no comprehensive investigations on how many people in the informal sector are reached by state payments or other measures,[33] it may be assumed that the vast majority of the Indian population in the informal sector are largely out of reach of social security. So the question arises,

30. *Supra*, note 27.

31. *Supra*, note 23, 37.

32. W. van Ginneken, SOCIAL PROTECTION FOR UNORGANIZED SECTOR 37 (1995).

what alternative models or concepts exist to the classical systems of social security or are under discussion in India. Osmani[34] mentions four forms of alternative social security which have been partly planned or implemented in India. They are primarily related to incomes policy:

(a) social security through control or redistribution of farmland,

(b) social security through promoting self-employment, above all in areas of non-agricultural work (e.g. crafts sector),

(c) social security through wage employment, since widespread poverty in rural areas can be explained primarily by a lack of secure wage income,

(d) social security through the public provision of goods oriented to basic needs, such as clothing, food, living accommodation, health care and education.

Osmani analyses these various levels very subtly and shows which measures or benefits are already provided on the various levels and what deficits still exist. In this context Ganapathi names two programmes of the central government for combating the causes of poverty: the 'Integrated Rural Development Programme (IRDP)' and the 'Jawahar Rozgar Yojana (JRY)', which have received a great deal of attention in the past few years. While the IRDP was meant to lead to higher productivity and thus to increased incomes through the granting of subsidies and loans to poor families, the JRY Programme was conceived as an 'employment generating programme.'[35] However, there are a number of problems and obstacles to both these programmes regarding their application.[36] The Integrated Rural Development Programme envisages the setting up of social insurance schemes for its target group too. But here it becomes clear that poverty programmes are a specific form of social insurance for people in the informal sector. If poverty programmes lead to a sustained improvement in the lives of the target groups (material improvements and reduction of dependency structures), then poverty programmes may be thought very highly of.

We may record here that the relevance of social security both in the informal sector of the Indian cities and in rural areas is uncontroversial and that there is a broad discussion of adapted concepts and strategies. The national and international development agencies have also realized this relevance

33. S.Guhan, *Social Security Options for Developing Countries*, in J.B. Figueiredo, Z. Shaheed (eds.) New Approaches to Poverty Analyses and Policy II, 103(1994).

34. S.R.Osmani, Social Security in South-Asia 305 - 349 (1988)

35. A.L. Ganapathi, *Social Security in India - Some Suggestions*, in R.K.A.Subrahmanya (ed.), Social Security in Developing Countries 334 (1994)

36. M.v. Hauff. *supra*, note II.

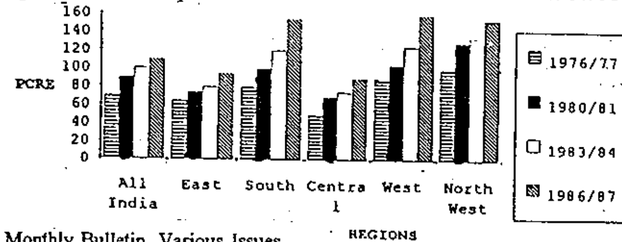
and are making efforts to develop and implement corresponding concepts. But for India a distinction must be made whether social security is only understood in the sense of a temporary emergency relief measure (position of the World Bank) or in the sense of a regulative measure of social security aimed at the long-term reduction of life contingencies which is theoretically well founded and is based on clearly defined formal principles (cf. the remarks on theoretical foundations in the Introduction to this paper).

There are, finally, a series of attempts to introduce insurance systems in the informal sector. For example, a Working Group for Social Security set up by the Commission for Administrative Reforms in the Economy recommended to the Indian government in 1984 that it consider a suitable insurance system for the poorest of the poor in the non-organized sector.[37] The Insurance Department of the Finance Ministry, on the basis of this recommendation, began in 1985 to introduce an accident insurance scheme in 200 districts in the framework of a pilot project. In 1988 this insurance was extended to all the districts in the country. In the case of death or invalidity caused by accident the dependent relatives of the insured person were to be able under this system to claim 3,000 rupees if their income was below 5,000 rupees. The insurer is the General Insurance Company of India, the payments being made solely by the central government.

C. *Regional Differences In Social Security*

There are clear regional differences regarding public expenditure for social security. For the level of the federal state it has become clear that there is a large gap between town and country: wherever the central government administration and the public-sector enterprises are primarily situated, there is a relatively high level of social insurance. However, since the individual states differ widely as to the level of social security, a more complex picture emerges.

Fig. 5 : Per Capita Revenue Expenditure on Social Services in Rs. at 1980/81 prices.



Source : RBI Monthly Bulletin, Various Issues.

37. *Supra*, note 26, 539.

Central and eastern India lag far behind the regions of the south and west (about equal levels) and the North-west. States with very low public expenditures are Bihar, Uttar Pradesh and those with a very high level of expenditure are Andhra Pradesh, Kerala and Himachal Pradesh.[38] Empirical analyses in this area are particularly difficult and awkward, however, since the database for social service funding patterns is very weak.

IV. Case Study: The Self-employed Women's Association (SEWA)

The introduction of a system of social insurance in the informal sector has turned out to be one of the central problems of social security in India. In the framework of development cooperation between Germany and India a project has come into being in this context with the aim of working together with an Indian NGO to construct a self-supporting and integrated social insurance system, as a model, on the basis of self-help.[39] It is the women's NGO, the Self-Employed Women's Association (SEWA), which has existed in India for about 20 years and has attracted considerable attention in the Asian region. SEWA is a cooperative bank with about 50,000 members, which, however, also carries out a trade union function and other functions of a self-help development organization. Seventy per cent of the women organized in SEWA live in rural areas of the Western Indian state of Gujarat, while 30% of them live in the slums of the capital Ahmedabad. The majority of the women have savings accounts of 100 to 1,000 rupees at SEWA's cooperative bank, which in return gives loans for productive investments at an interest rate of 12 to 16%. It was an important aim of SEWA even before this project cooperation to build up social security schemes.[40]

Social insurance in the context of the project cooperation is classed as one instrument among others to contribute to the social security of poor groups of the population - in this case the members of SEWA.[41] The question of what risks can or should be insured against is highly relevant. For instance the question arises whether traditional forms of social insurance for the target group are still feasible etc., or whether an old age insurance seems necessary

38. World-Bank, India — Poverty, Employment, and Social Services 125 (1989).

39. A. Bauer, J. Freiberg-Strauss, H.M. Haeuser, *Entwurf eines TZ-Leistungsangebots 'Sozialpolitik'*, in Deutsche Gesellschaft fuer Technische Zusammenarbeit (ed.), Sozialpolitische Beratung in der technischen Entwicklungszusammenarbeit 37(1993).

40. P.A. Chatterjee, J. Vyas, *Organizing for Social Security - Some experiences of Self-employed Women Workers*, in R.K.A. Subrahamanya (ed.), Social Security in Developing Countries 82 (1994).

41. J. Freiberg-Strauss, Versicherung fuer Arme—Erfahrungen mit der Einfuehrung von Versicherungsleistungen fuer Arme Frauen in Indien, Veroeffentlichungen der Abt. 401 GTZ Reihe Sozialpolitik, Nr. 10, 2 (1994).

and is accepted by the women. These matters cannot, however, be discussed in detail here.

Developing the 'Integrated Social Security Scheme' (ISSS) financially is taking place on the basis that India's insurance companies cover 25% of the premiums, part of this being financed by the Indian government, 25% are raised by the target group itself and 50% are contributed by Germany in the framework of mutual development cooperation. Germany pays a contribution of about 560,000 Deutschmarks, which goes towards a capital fund, and the interest on this is used for contributions to the premiums. The capital fund is administered by the cooperative bank. Besides the financial contribution the GTZ gives technical counselling and consultancy regarding the organization, structuring and the actuarial calculations and regarding cooperation with the Indian insurance companies. The composition of the premiums for the first financial year is shown in Table 5.

Tab. 5: Composition of the premiums for the ISSS with SEWA for the financial year 1993/94 (01.07.93-30.06.94) in Rs. per person insured, excluding the subsidy of the insurance industry.

	premiums (Rs)	insured by	insurance benefit (Rs)
Death of member		LIC	
natural death	7,5		3 000
accidental death	7,5		6 000
Accidental death of		UIIC	
members	7,66		10 000
husband	0		10 000
Hospitalization	14,14	UIIC	up to 1 000
Contingencies		UIIC	
(fire, flooding,			
Calamities)	5,10	UIIC	up to 2,000
damage to huts,			
household effects and	2,85	UIIC	up to 3 000
trade merchandise			
Maternity	36,00	SEWA	up to 300
Reinsurance	20,00	SEWA	not stipulated
Administration	32,00	SEWA	
total (rounded)	133,00		

Source: A.Bauer, J. Freiberg-Strauss, The GTZ Approach on Social Security - with Special References to PSBA and SEWA, in S.Dittrich, J.-Petersen-Thumser (eds.), Social Security in Africa 123 (1994).

— For each insured woman there is a total outlay of 133,00 rupees per year.

— Each insured woman has signed a contract with SEWA and pays SEWA an annual premium of 36,00 rupees. The insured women are thus insured against all the 'risks' listed.

— The total premiums are remitted by SEWA to the insurance companies once a year, the difference between the insured women's own contributions and the total sum being financed by the interest on the capital.

— In the next policy year (1994-95) it is planned to insure 20,000 members of SEWA.

The essential criteria of this case study are that in the framework of the development cooperation with an NGO in India a social insurance system was jointly planned and carried out. It is of special importance that the ISSS

was conceived for women in the informal sector but was coupled to the formal insurance sector. They are a group of 7,000 selected insured women who so far have only been insured against some risks. First experiences have been gathered, though it is too early to form any general assessment.

V. Conclusions

1. Following Indian independence the maxims of 'self-reliance' and 'welfare' dominated. But there was no success in building a consistent system of social security which gives the majority of the population protection against risks that threaten their livelihoods.

2. The economic framework conditions determine crucially the perspectives of social security. In the case of India the high degree of heterogeneity of the economic structure and of the national economic development, the high poverty index and the high domestic and foreign debt do not generally augur very positively.

3. The Indian economy is at present undergoing a transformation process which is being promoted both by the liberalization policy of the Indian government and by the structural adjustment programme of the World Bank. The comprehensive privatization being aimed at is marked more by actionism than by a clearly defined reference model. For this reason no clear prospects can be derived for social security in India in the private sector.

4. The system of social security in India is clearly marked by the dominance of the public sector, where employees are comprehensively covered by a graded system. By contrast, the system of social security gives comparable protection only to those workers and employees in the private sector who work in large enterprises. The promotion of privatization requires a rethinking of and, in part, a reorientation of the system of social security, since, for example, the risk of unemployment becomes more relevant. In order to avoid regional distortions as a way of social dumping, minimum legal standards should be set up in all the Indian states. So far there has been a wide gap between the states.

5. Over 90% of the working population (95% of all working women) are employed in the informal sector. For the informal sector there is so far no system of social security but a series of individual measures which only reach a few people and are completely inadequate to cover risks. Although conspicuous differences can be observed between states, the vast majority live in the informal sector without adequate protection through the appropriate social security systems or measures.

6. In the framework of cooperation between Germany and India, cooperation with one NGO (SEWA) is giving rise to the construction of a

self-supporting and integrated social insurance system on a self-help basis. The 7,000 selected insured women all work in the informal sector. The project is a model, and it is becoming evident that for comparable projects NGOs have to fulfil certain criteria. For instance, according to present knowledge, social insurance schemes can be set up in the informal sector in India via NGOs. However, insurance coverage is only feasible for a small minority. It should be the role of these projects to lead the way. The central government, by agreement with the states, should not be released from its responsibility to set up an integrated system of social security to cover everybody.

INDIAN TORT LAW — A HISTORICAL INQUIRY

*Martin Lau**

The Annual Surveys of Indian Law contain year after year the same complaint : there is hardly any case law on tort and the few cases which do arise are mostly concerned with malicious prosecution and defamation, i.e. intentional torts.[1] The author of the tort section of the 1975 Annual Survey of Indian Law observed that 'it has almost become customary to begin the annual survey of the tort law with some such observation bemoaning the scarcity of the reported tort decisions.'[2] Indian tort law is based on the English common law and is widely held to constitute one of the few areas of law which have developed very closely and without any fundamental departures along the lines of its English counterpart. Tort law is concerned with the redress of unlawfully inflicted harm on individual members of society. It tries to reconcile conflicts of a civil nature in society. The procedures necessary to get any kind of compensation is a cumbersome one : The tort action for the redress of material or non-material damage has to be initiated by the victim. The victim has to assert that the harm he or she suffered was unlawfully inflicted. The action will then be couched in terms of one of the many different torts, for instance libel, slander, nuisance or negligence, and will be brought before a court, which normally requires the involvement of a lawyer. The victim will then have to pay court fees and will have to be able to sustain the proceedings before damages are paid.[3] Tort law is certainly not an ideal legal tool for efficient accident compensation. It is, however, in India, apart from the Motor Accident Tribunals, the only officially recognised procedure to secure compensation in ordinary 'tort' situations.

A comparison of the legal developments in the field of tort between India and England in the twentieth century reveals that the English counterpart has developed in a very different way.

A recent review of the 1989 cases on economic loss in negligence in Britain for instance started off with the remark that 'Fifteen years ago, important

* Lecturer in Law, School of Oriental and African Studies, University of London, U.K. The paper is the revised version of a lecture delivered in the Faculty of Law, University of Delhi.

1. R.V. Kelkar, *Law of Torts*, 12 ANNUAL SURVEY OF INDIAN LAW 366 (1976).
2. R.V. Kelkar, *Law of Torts*, 11 ANNUAL SURVEY OF INDIAN LAW 124 (1975).
3. For an introduction into the drawbacks of tort law in India see B.B. Pande, 'Introduction' to Gandhi, LAW OF TORT - Legal technicalities and general principles of tort law have been widely criticised in other common law jurisdiction too. See for instance, P.S. Atiyah, ACCIDENTS, COMPENSATION AND THE LAW (1987); R.W.M. Dias and Markesinis, TORT LAW 42-51 (1989); C. Harlow, UNDERSTANDING TORT LAW (1987); PEARSON COMMISSION REPORT, United Kingdom (1987).

cases in negligence were as rare as diamonds, and case notes could dwell lovingly on each of their facets. In the last four years they have become as common as muck, and this note can cast only a cursory pitchfork over the latest wheelbarrowful'.[4]

This statement cannot be applied to the Indian law of torts as it stands at the present. The modern law of negligence and the emergence of compensation schemes based on strict liability, which constitutes the most active and progressive area of tort law in highly industrialised common law countries, for instance the United Kingdom or the United States, is not very often applied by the courts.[5] A perusal of the journal literature on modern Indian tort law reveals a similar situation in the academic field : there are not very many articles on tort law or on related areas.[6] It is striking that some authors do not cite a single Indian case and ignore the problematic field of Indian tort law completely.[7] The situation is not very different in the field of text books. Many of the text books on tort are indebted to English textbooks and were first published before 1947. Derrett's remark that 'Indians began to imitate English writers, not least in dullness, prolixity'[8] applies to many of them.[9]

4. A. Huxley, *Economic Loss in Negligence - The 1989 Cases*, 53 MODERN LAW REVIEW 369 (1990).
5. R.W.M. Dias, B.S. Markesinis, TORT LAW 55 (1989).
6. The ANNUAL SURVEY OF INDIAN LAW, which has been publishd since 1964, regularly contains a section on tort. The Law Commission of India Reports address topics related to tort. The Indian Law Institute, New Delhi, organised Seminar on Law of Torts in 1969. Some of the the papers were published in the JOURNAL OF THE INDIAN LAW INSTITUTE (c.f. 11 JOURNAL OF INDIAN LAW INSTITUTE 1969), furthermore: S.K. Bhatia, *Specific Problems of Law of Torts in India*, 11 JOURNAL OF INDIAN LAW INSTITUTE (1969); A.R. Blackshield, *Tortious Liability of Government : A Jurisprudential Case Note*, 8 JOURNAL OF INDIAN LAW INSTITUTE 643 (1966); K. Gupteshawar, *Comparative Negligence in Motor Accidents*, 11 JOURNAL OF INDIAN LAW INSTITUTE 413-479 (1969); S.B. Horvitz, *Contributory versus Comparative Negligence : Labour's views*, 4 INDIAN LAW REVIEW 227-234 (1950); A.Jacob, *Vicarious Liability of Government in Tort*, 7 JOURNAL OF INDIA LAW INSTITUTE 246 (1965); Jawed, Iqubal and Altaf, Nusrat, *Remotness of Damage and Judicial discretion in India*, 3 COCHIN UNIVERSITY LAW REVIEW 380-389 (1979) (mainly on contracts); B.B. Pande, Introduction of B.M. Gandhi, LAW OF TORT (1987); P.P. Paul, *Workmen's Compensation : Impact on Agriculturist*, 4 COCHIN UNIVERSITY LAW REVIEW 73-78 (1980); H.C.M. Patro, *Damages in Motor Accident Claims - A Fresh Look*, 3 COCHIN UNIVERSITY LAW REVIEW 214-244 (1979); R. Ramamurthy, *Difficulties of Tort Litigants in India*, 12 JOURNAL OF INDIAN LAW INSTITUTE 313-320 (1970); D. D. Sharma, *The Lack of Tort Law in India*, in ALL INDIA REPORTER, 1966, J. 75-78; J.M. Shelat, *Changing Pattern of Law of Tort*, 11 JOURNAL OF INDIAN LAW INSTITUTE 403-406 (1969); S.C. Thanvi, *Law of Torts*, in J. Minattur, THE INDIAN LEGAL SYSTEM, 589-632 (1978).
7. See for instance S. Boparu, *Problems of Factual Causation in Negligence Tort Cases Involving Doubtful Casual Relation between Conduct and Harm*, 20 JOURNAL OF INDIAN LAW INSTITUTE 219-248 (1978).
8. J.D.M. Derrett, LEGAL SCIENCE DURING THE LAST CENTURY : INDIA'S; M. Rotondi, INCHIESTE DI DIRITTO COMPARATO, 420 (1976).
9. See for instance, C. Collett, A MANUAL OF THE LAW OF TORTS AND OF THE MEASURE OF DAMAGES (1866). It was used as a text-book for candidate for the offices of the Principal Sadr Amin, the District Munsiff, and for pleaders in a civil court. The sixth edition (1886) was the official text-book for these offices in Madras. A. K. Chan, ANALYSIS OF THE LAW OF TORT AND MEASURE OF DAMAGES (1881) is basically a summary of it and does not contain a single independent idea. G.D. Parikh, A MANUAL OF THE LAW OF TORTS (1903) is based on F. Pollock, THE LAW OF TORTS (1887) and does hardly ever quote any Indian cases on tort. Ranchhoddas, Ratanlal and D.K. Thakore, ENGLISH AND INDIAN LAW OF TORTS (1897), appeared in 1973 in its 20th ed. and is still widely used as a standard text book on tort by Indian law students.

Modern treatises on tort law in India too are usually based on the traditional framework of English textbooks[10] and it is only recently that an Indian author wrote the first 'allround and truely Indian Tort Law treatise.'[11]

The lack of tort law attracted the attention of legal scholars in the academic aftermath of the Bhopal disaster, which triggered off the first serious debate on the working of the Indian law of tort.[12] The discussion concentrated on two issues : the compensation of the victims and the allocation of fault. Victims, dependants of deceased victims and their supporters were interested in quick and adequate compensation and in a kind of punishment of the tortfeasor—two areas of law which are covered by the modern Indian legal system.

Victims or the relatives of the deceased victims and academics realised soon after the disaster that one of the peculiarities of the Indian legal system consisted of a stagnant tort law, which did not appear to be able to provide the victims with compensation within a reasonable time.[13] The Indian law of torts made it apparently very difficult for victims to claim compensation in civil courts. Research and affidavits revealed a bleak scenario : The civil courts were clogged up with arrears while the Indian legal profession was abusing this situation by seeking interlocutory relief for their clients. Access to the courts was prohibitively expensive due to *ad valorem* court fees and determined the kind of litigation : plaintiffs were more ready to resort to criminal complaints rather than to file compensation claims in civil courts. This attitude was reflected by a low level of tort consciousness. Ordinary citizens did not expect legal remedy in case of an injury inflicted by new technology and resorted rather to self help than to approach a cout—apparently a vicious circle which reinforced the ineffectiveness of tort law. These findings were in itself not new and a perusal of the above mentioned literature shows that there is a standard set of explanations[14] for this situation.

I. Mentality

The allegedly meditative character of Eastern societies has been *en govue* as an explanation for the paucity of cases about 15 years ago. Asian people in general would, according to this argument, show an antipathy to settle

10. S.M. Hasan, *Law of Torts*, 8 Journal of Indian Law Institute 149(1966).

11. B.B. Pande in his introduction to B.M. Gandhi, *op. cit.* at 47.

12. M. Galanter, *Legal Torture : Why So Little Has happened in India After the Bhopal Tragedy*, 20 Texas International Law Review 273(1985).

13. The term 'stagnant' is being used at this point of the argument in order to emphasise the inability of the Indian legal system to provide quick compensation. It does not imply that tort law in general is the most suitable accident compensation scheme or that its English counterpart would have been able to compensate the victims adequately.

14. D.D. Sharma, *op. cit.*

disputes of a civil nature in court.[15] The argument is normally based on the idea that Western societies and their legal systems are right-orientated whereas Eastern legal systems are based on notions of duty rather than of rights. Members of Eastern societies would therefore resort to a court less often in order to get damages awarded —the victim would normally not insist on her or his rights and try to avoid litigation. The argument has been rejected frequently since then and is not very often advanced.[16]

II. Unreported Cases

Only a fraction of all civil cases ever reach the High Court or the Supreme Court, which are the only courts whose decisions are reported.[17] Specialised series which cover the decision of the trial courts[18] do not cover tort cases.[19] Even the reported decisions of High Courts and Supreme Court do not indicate the total amount of cases since 'judges are, [...], reticent to certify a case as fit for reporting unless it involves a new principle of law and, in tort, Indian courts have generally followed English precedents. Several torts action, though decided at the appellate level, are in fact not reported. It is significant that 24,959 civil appeals were disposed of by various High Courts in India during the year 1954 but not even ten per cent of them were reported.[20] The argument is not very often advanced and it seems to be unlikely that there is a vast amount of cases which have not been reported. It should, however, be noted that there is no survey on tort litigation on trial court level available which could prove that the number of cases on this court level is similarly low.

III. High Costs of Civil Proceedings

The Indian Court Fees Act of 1870 provides for the pay of ad valorem fees which have to be paid at the time of the filing of a suit for money damages.[21] It had been preceded by similar enactments, which were all enacted in order to repress litigation.[22] Court Fees are widely held to be one of the most

15. Northtrop, The Taming of the Nations, 1954. The most forceful presentation of this argument can be found in S.K. Bhatia, *Specific Problems of Law of Torts in India*, 9 Journal of Indian Law Institute 510-519(1969).

16. Cf. S.M. Hasan, *The Law of Torts*, Annual Survey of Indian Law 110-149 at 112(1966) and D.C. Pandey, Annual Survey of Indian Law 180-196 at 195 (1975).

17. Cf. Law Commission of India, 14th Report, at 366(1958). During the year 1954, 1,055,553 civil suits had been filed but in the same year only 5,193 civil appeals were filed.

18. See *eg.* Labour law Journal or Company Cases.

19. The Accident Claims Journal relies mainly on High Court and Supreme Court decisions.

20. S.K. Bhatia, *op. cit.* at 511.

21. M. Galanter, Affidavit of M.S. Galanter, U. Baxi and T. Paul (eds.), Mass Disaster and Multinational Liability : The Bhopal Case 161-222 at 179(1986).

22. The imposition of court fees has been continuing in India since 1795 (Regulation XXXVIII of 1795) down to the present day.cf. M.P. Jain, Outlines of Indian Legal History 221, 241-245(1966).

prominent reasons for the low number of tort cases since they prevent especially poor victims from approaching a court. Fees can be waived for poor parties — there is, however, no reliable information on the availability of legal aid.

IV. Bureaucracy And Delay Causing Civil Procedure

Backlog of cases are caused by a number of defects of the Indian legal system, like the relatively small size of the judicial establishment,[23] the provisions for interlocutory appeals (Code of Civil Procedure, sec.115) and in the provisions for appeals to the next higher court (for eg Constitution of India, Art. 136 (1)) which prolong the total length of the proceedings. The compensation award becomes somewhat meaningless if the victim of an accident has to wait 13 1/2 years for the award of damages.[24] Backlogs and delays can, however, not be the sole reason for the low number of tort cases since other kinds of suits, for instance, disputes over immovable property, appear frequently before the courts.

V. Low Compensation Awards

The amount of compensation payments is very often seen as a reason for the reluctance of tort victims to approach a court.[25] This explanation was linked to a general critique of the common law's attitude towards monetary compensation by Rajeev Dhavan. He claims that the root of the problem lies in the English tort law itself.[26] It 'has always been niggardly towards the injured and hopelessly uncharitable toward relatives and dependants.' The history of the law of compensation of accident victims especially in respect of the legal rights of the estate of the deceased in England leads to the conclusion that 'the general strategy of the common law appears to have been to protect defendants who, in most cases, were the instruments of commercial business and manufacturing expansion.' The enforced adaptation of this law leads to an even worse result for the accident victims in India : 'The Indian law of torts follows the British, erring wherever possible on the side of meanness. (...). Basically, Indian tort law is balanced in favour of the defendant.'[27] The argument ends with the remark that the common law approach to the allocation

23. Cf. Indian Law Commission, 27th Report 9(1964).
24. R. Ramamoorthy, Difficulties of Tort Litigants in India, *op. cit.* at 321.
25. Cf. R. Ramamoorthy, Difficulties of Tort Litigants in India, *op. cit.* at 321.
26. C f. R. Dhavan, *For Whom ? For What ? Reflections On the Legal Aftermath of Bhopal*, 20 Texas International Law Journal 295-306(1980).
27. *Ibid.* 301.

of legal responsibility rests on the assumption that liability can only be traced to particular individuals in their capacity as relatively isolated actors or as property owners.

Dhavan's interpretation of the history of Indian tort law had its main thrust in an alleged class bias of the common law : it served the interests of the manufacturing and commercial classes by keeping the compensation payment for the estate of the deceased very low. This argument, however, cannot explain the whole phenomenon of an undeveloped Indian tort law : The low compensation payments handed out to the dependants of the accident victim did not impede the development of tort law in England; on the contrary, the development leads, although admittedly slowly, to an improvement of the position of the estate of deceased accident victims.[28] The low thresholds of payment, are apparently only in India, an impediment of the development of the law of tort.

VI. Tort Cases Under Criminal Proceedings

Criminal Proceedings as compared to civil proceedings are less expensive and less dilatory. It has often been noted that 'the Indian much prefers, if he can seek its assistance, the criminal court for the redress of his civil wrongs.'[29] Section 545 of the Code of Criminal Procedure, 1898 empowered a criminal court to award the recovered fine or parts of it as a compensation payment to the victim of the offence. The amending Act 26 of 1955 entitled the estate of a deceased victim of a criminal offence to recover damages under the provisions of Fatal Accidents Act, 1855. The new Code of Criminal Procedure, 1973, goes one step further and empowers the criminal court to order the offender to pay damages to the victim of the crime even though the sentence is not one of fine.[30] Section 5 of the Probation of Offenders Act contains a similar provision. There are, however, no statistics available, which would show that the criminal courts do actually award compensation to the victims of a crime.[31] A successful prosecution of a tortfeasor in a criminal trial might satisfy the desire of vengeance of the victim but it will normally not result in the award of damages.

28. See for instance P.W.J. Bartrip and S.B. Burman, *The Wounded Soldiers of Industry*, Industrial Compensation Policy 1833-1897 (1983).
29. C. Walsh, Crime in India 26(1930).
30. See Sec. 357(3) Criminal Procedure Code 26(1930).
31. Cf. R.V. Kelkar, *Law of Torts*, in Annual Survey of Indian Law 1-18 at 3. Kelkar, however, notes that criminal courts hardly make use of these provisions.

VII. Uncodified Tort Law

Tort law in India has never been codified which has lead to the hypothesis that 'the Indian legal mind, well-attuned to the pursuit of an appropriate remedy where the law is codified, does not find it equally comfortable to take the legal proceedings where the law is not codified.'[32] The argument was stressed in the affidavit made by Mark Galanter shortly after the Bhopal accident,[33] the British introduced the English common law tort law into India. They left it, unlike many other legal areas, uncodified although a codification was demanded by the Fourth Law Commission in 1879 and by various experts on the British Indian legal system during the last two decades of the 19th century. He concludes that there was a conscious decision by the colonial power to forestall the development of tort law in India.[34] The argument is advanced in almost every article on Indian tort law.[35] It is, however, difficult to sustain the argument that there was a conscious effort to suppress tort litigation in British India by not codifying it since the common law tort law in England and in the United States is not codified either. It can, however, be argued that the non-codification was part of a wider policy which consciously attempted to prevent the emergence of an Indian law of torts.

Court fees, an appeal procedure which prolonged the duration of the trial and the failure or even conscious refusal to codify the law of torts are the most frequent explanations for the lack of tort law. They are linked to Indian's colonial past and go nicely with examples of colonial exploitation in other fields like international trade relations or the arrested development of India's industry. It is certainly tempting to assume that the colonial power tried successfully to suppress a troublesome area of law in order to cut down litigation and deprived thereby the modern Indian legal system of the institutional and intellectual means which are necessary in order to redress civil wrongs efficiently and frequently.

The multitude of possible causes and the lack of research on tort law in India makes it, however, difficult to identify the true reasons for the poor state of this area of law. The above mentioned possible causes are mostly based on guess work and give in at least one case — the 'codification argument' —a very distorted view of the development of the Indian tort law. A superficial and simplistic interpretation leads in this case to serious misinterpretation of colonial policy and impedes — as will be shown below —a more constructive

32. P.M. Bakshi, *Law of Torts*, 16 Annual Survey of Indian Law 339-360 at 340(1980).
33. M. Galanter, *Legal Torture : Why so Little has Happened in India after the Bhopal Tragedy*, 20 Texas International Law Journal 273-295(1980).
34. M. Galanter, *Ibid* at 180.
35. Cf. J. Cottrell, *The Functions of the Law of Torts in Africa*, 31 Journal of African Law 161-185(1987).

approach to the interpretation of legal development in British India.

VIII. The Codification of The Indian Law of Torts

A look at the official colonial attitude towards tort law supports the view that there was a conscious attempt to suppress tort litigation in India. Demands for the codification of tort law had indeed been made quite frequently and unsuccessfully during the second half of the 19th century and the beginning of the 20th century.

The first formal request for the codification of the law of torts was made by Lord Salisbury, then Secretary of State of India, in 1875.[36] He announced in his dispatch to the Government of India that he intended to appoint the Fourth Indian Law Commission whose task would be the codification of the remaining uncodified areas of India's substantive law. He expressively mentioned the law of torts. Salisbury encountered a stiff opposition from the Government of India which rejected the idea to appoint a new Law Commission. Arthur Hobhouse, Law Member of the Governor General's Council, and Lord Northbrook, the Governor General, claimed that 'India is not the country into which any large body of law, either actually or virtually new, can prudently be introduced, except slowly and continuously.'[37] They were specially concerned about a codification of the law of torts and stated :[38]

> Again, we are aware that from a lawyers's point of view, a code on the subject of tortious acts or wrongs would be a valuable addition to a body of written law. But we doubt very much whether it would benefit Indian society. It would perhaps be more effectual in suggesting new kinds of litigation now very rare, if not wholly unknown in India, than in removing difficulties actually felt in practice. In fact, on many subjects, rights have not become sufficiently settled to afford a basis for a codified law of wrongs. In some cases (as for instance, the somewhat delicate subject of claims to privacy) a right has been found to exist in one territory, and not elsewhere. To propose a uniform law on such a subject would lead to much difficulty.

Salisbury rejected these contentions and asked the Government of India to

36. *Despatch from the Secretary of State for India*, 4 March 1975, Leg. 12, India Office Library and Records, London (hereafter : IOLR), L/P&J/3/31.
37. *Government of India, Leg. Dep., Dispatch No. 6 of 1875, 5th July 1875*, IOLR l/p&j/3/314, at para 11.
38. *Ibid* at para 8.

proceed with the work of codification. The matter rested after this order for almost a year and a-half and was taken up again by Whitley-Stokes who succeeded Lord Hobhouse as new Law Member in spring 1877.[39] Whitley Stokes, strongly in favour of codification, envisaged the enactment of a complete Civil Code, which would naturally contain a section on tort. The Fourth Law Commission was set up in 1879 (11th February) in order to consider six bills, which had already been drafted by Whitley Stokes, and to make suggestions regarding the further codification of the substantive law. It recommended in its report[40] not surprisingly inter alia the codification of tort law, however, only as one of the last codes to be enacted. The commission felt, that the details of life and social relations differ infinitely in this country from what they are in England, albeit the foundations of morality are in both countries the same : great care therefore should be exercised to avoid giving an arbitrary generality to special or secondary principles of the English system.

The Commission, however, hoped :

> clearly drawn code of absolute duties, well adapted to the character of the people, may, with the Penal Code and the Contract Law, serve in the course of time as the solid core of a greatly improved scheme of popular ethics.

The Government of India had furthermore consulted two former Law Members on the subject of codification, Sir James Stephen and Sir Henry Maine. Both were quite explicit in their support of a codification of the law of civil wrongs. Maine stated : [41]

> The absence of a measure on the subject [tort] is the great gap in the body of codified India law [...]. Nobody who has inquired into the matter can doubt that, before the British began to legislate, India was, regard being made to its moral and material needs, a country singularly empty of law. I think it, therefore, very possible, and even certain, that there are not, in India, indigenous rules to guide the Courts of Justice, when questions of civil wrongs are brought before them.[...] Civil wrongs are suffered every day in India and through men's ideas on the quantity of injury they have received may be vague, they are quite sufficiently conscious of being wronged somehow to invite the jurisdiction of the Court of Justice.'

Maine was mainly concerned with the drawbacks of judicial legis-

39. Cf. C.P. Ilbert, *Indian Codification*, 20 Law Quarterly Report 347-369(1889).
40. Indian Law Commission, 4th Report, 1st Dec. 1879. The members were Whitley Stokes, Justice Turner, Justice West.
41. *Memorandum on Codification in India by Sir Henry Maine, 17th June 1879*, IOLR C/142/432-433.

lation, which is 'haphazard, inordinately dilatory, and inordinately expensive, the cost of it falling almost exclusively on the litigants' and which would lead to the introduction of foreign law 'developed thousands of miles away, under a different climate, and for a different civilization'. He concluded his memorandum with the remark that 'I look with dismay therefore, on the indefinite postponement of a codified law of Tort for India.'

Sir James Fitzjames Stephen's memorandum was marked by a deep concern regarding the introduction of scientific legislation into India. Stephen was opposed to a complete 'scientifically arranged' civil code for India and introduced a three stage test in order to identify areas of law which could be codified:

1. Is any legislation on the subject required at all?
2. Is the English law on the subject rational?
3. Are there in existences in India, native laws or customs which the English law would affect, and if so, is it wise to bring them into conflict?[42]

Tort law survived this scrutiny and he held it to be the 'only remaining codifying Act of much importance'.

Almost all the recommendations of the Fourth Law Commission had become law by the beginning of 1882 — the Negotiable Instrument Act (XXVI of 1881), the Indian Trusts Act (II of 1882), the Transfer of Property Act (IV of 1882) and the Indian Easements Act (V of 1882). Tort law, which had already been pretty low on the agenda, had not been drafted yet, but its codification had not been completely forgotten.

Sir Courtenay Ilbert's appointment as a Law Member in the Legislative Council in 1882 meant ironically the end of the era of codification in British India - ironically, since Ilbert himself was very much in favour of it.[43]

Ilbert had already received strong hints to go slow in the matter of legislation and he supported this view in respect of general codification since 'the programme of codification laid down by the successive law commissions is nearly exhausted. If Indian codification is to be much further extended, it must be applied to the field of native law'.

The codification of tort law, however, appeared to be still desirable and Ilbert contacted Frederik Pollock, a London based Barrister, who was asked

42. J.F. Stephen, *Memorandum on Codification in India, 2nd July 1879*, IOLR C/142/418-431.
43. On Ilbert see Pollock, Sir Frederick, Sir Courtenay Peregrine Ilbert, G.C.B., 1841-1924, From the Proceedings of the British Academy, London : Ilbert became involved in parliamentary drafting in England after his retirement from the post as a law member : 1886-1899 Assistant Parliamentary Counsel, 1899-1902 Parliamentary Counsel, 1902 -1921 Clerk of the House of Commons.

to draft a bill on the law of civil wrongs.[44] Pollock drafted the bill on actionable wrongs between 1882 and 1886. It took him almost four years to draft it because he wrote at the same time *pari passu* a treatise on tort, which was first published in 1887.[45]

The draft code itself was the first-and for almost another 80 years the only attempt to codify the common law tort law. Pollock entitled his book *A Treatise on the Principles of Obligations Arising From Civil Wrongs in the Common Law* and stated that the purpose of this book is to show that there really is a law of torts, not merely a number of rules of law about various kinds of torts. Pollock was in touch with members of the Indian legal profession throughout this time and tried to assess especially the working of the code in rural districts.[46] The draft bill was not very well received in India and its rejection can-among other reason-almost be regarded as bad timing since Ilbert, the original initiator, had received the Bill only two month before his retirement from the Governor General's Council. The new law member, Sir Scoble, was if compared with his predecessors, a rather unadventurous law member and certainly not a supporter of codification. Ilbert had tried to put pressure on Scoble in order to speed up the examination procedure of the Bill but Scoble declined this request saying that 'I think a Civil Wrongs Bill is too tough a morsel to be digested (in the intervals of business) within the space of three months. So I have altered your draft, to give the High Court and other authorities a little more leisure to consider it.'[47] He circulated the draft among local governments, judges and judicial officers in Dec. 1886 and by Dec. 1888 he had received 54 replies —12 in favour of legislation and 42 opposed to it.[48] The Legislative Department felt quite apprehensive about the Bills even before it had received all the opinions on it. It noted in October 1887 that '[...]it may well be to throw out a hint that the draft seems not to be well received. I have spoken to only two High Court Judges on the

44. There is surprisingly little material Published on Pollock, Primary material : The Pollock Holmes Letters and Sir F. Pollock, For My Grandson, Remembrances of An Ancient Victorian London (1933). Secondary sources : H.D. Hazeltine, *Sir Frederick Pollock*, 1845-1937, From the Proceedings of the British Academy, Vol. XXXV; Schwarz, B. Andreas, *Sir Pollock und die englische Rechtswissenschaft*, Sonderausdruck aus den Annales de la Faculte de Droit d' Istanbul 1(1951).

45. Sir F. Pollock, The Law of Torts : A Treatise on the Principles of Obligations Arising From Civil Wrongs in The Common Law (1887).

46. The correspondence between Pollock and Mr. Justice Syed Mahmud and other Judicial officers could not be located. Pollock, however, acknowledged their assistance in the introduction to the draft code which was added to the 4th and 5th edition of his The Law of Torts.

47. *Indian National Archive*, A Proc. Nos. 98-105, Legislative Department March 1989, dated 25 October 1886.

48. Precis of Opinions received by the Legislative Department to the Government of India concerning Mr. Fred. Pollock's *Draft Bill on Civil Wrongs for India*, Legislative Department, Calcutta, 1 December 1888, IOLR L/P&J/5/415.

subject, Sir John Edge and Mr. Justice Wilson, and they both disapprove of the draft, the latter very emphatically indeed'.[49] The Legislative Department informed the Secretary of State for India in March 1889 :[50]

> We have come to the conclusion that the proposal to codify for British India some of the leading rules of the law of civil wrongs should be abandoned for the present. When the time comes for codifying that law, Mr. Pollock's draft will be of the utmost value to the draftsman. But the bill in its present form is unsuited to the general conditions and far in advance of the wants of the country and would, we fear, suggest much litigation of a kind which it is most undesirable to encourage.

The first attempt to codify the law of civil wrongs for a common law country had failed and Professor Allott, who was involved in a codification project for African countries, could state in 1964 that 'the law of torts was never codified in British India, so that it is no use turning to this source of inspiration. There is then no legislative model available for us to follow in the common law world'.[51]

Galanter's remark that the British consciously attempted to suppress tort litigation seems to be right in the light of the above outline of the official colonial discourse.

A second look at the sources which were used in order to construct a picture of imperial suppression and its lasting effects, however, reveals a surprising scenario. The normally consulted sources for the codification argument are Acharyya's book 'Codification in British India', published in 1914[52] and Ilbert's article 'Indian Codification' in the Law Quarterly Review.[53]

Acharyya was a fervent supporter of codification, ranging from the personal laws of Hindus and Muslims to the law of Master and Servant. His usage of sources was very selective and opinions against legislative activities are hardly ever mentioned. James F. Stephen's memorandum from 1879 is for instance used as evidence for the desirability of the codification of tort law. Passages in which Stephen was very strongly opposed to legislation—for the master and servant bill —are, however carefully omitted. Stephen wrote on this bill, urgently demanded by Acharryya;

It is difficult to describe the amount of petty tyranny which the legislation

49. *Indian National Archive*, A Proceedings Nos. 98-105, dated 28 September 1887.

50. *India Office, legislative Letters Received*, Legislative Department, No. 19 of 1889, 12 March 1889, IOLR L/P&J/3/400.

51. Allott, A., *The Codification of the Law of Civil Wrongs in Common Law African Countries*, A. Allott (ed.), Integration of Customary and Modern Legal Systems in Africa 179-196 at 178(1971).

52. B.K. Acharyya, Codification in British India (1914), based on the Tagore Law Lectures 1912.

53. Ilbert, *Op. cit.* at 347.

of the Master and Servant Bill would produce. Every ill tempered woman who was angry with her ayas because she did not understand broken Hindustani or who thought that the khidmatgar was saucy would have in her hands a short, sharp legal remedy, which she could use by driving up with the servant to her personal friend the magistrate, and asking him to cut the servants wages.[54]

Subsequent users of his book were similarly biased in their selection of references. It is usually overlooked that his argument for the codification of tort law was not founded on the impression that it was underdeveloped. He argues instead, that there is an abundance of tort cases which would justify its codification. He counted under six important tort heads in the 1912 digest of Indian cases almost 300 cases and concludes that it is inexplicable that this branch of law still remains uncodified 'but as to the utility and desirability of this branch there is no question'.[55]

Ilbert had expressed the same view 23 years earlier and applied a four stage test in order to determine whether tort law should be codified. The test looked at the classes of cases which afford the greatest material for litigation, the area in which cases arise, at the cause of the litigation and finally at the possibility to declare the law without 'raising difficult or delicate questions'[56]. Ilbert concludes that 'the application of these tests to the law related to torts supplied a strong case for codifying at all events some portions of the law' and holds that 'the rapid growth of so large a body of case-law was prima facie evidence that the law required codification'.

A look at other sources on tort in 19th century India supports his view. R.D. Alexander, officiating judge of the small cause court in Allahabad, wrote a book entitled 'Indian case law on torts' in 1881.[57] The book contains the Indian rulings on tort of the past 18 years and is based on the decisions of the Privy Council and the four High courts as reported in the main law reports of British India. The first edition quotes almost 500 tort cases, that are almost 25 per year (as compared to 5.6 cases per year over the past 15 years). It was reprinted in 1884 and new editions were published 1891, 1900 and 1910.

The argument that the conscious refusal to codify the law of torts in British India is the reason for its underdevelopment cannot convince since it was quite fully developed at the turn of the century.

The reasons for the failure to codify it can be located in the context of law-making in British India in the last two decades of the 19th century. The

54. J.F. Stephen, *Memorandum on Codification in India*, 2 July 1879, IOLR C/142/418-431.
55. B.K. Acharyya, *Op. Cit.* at 306.
56. Ilbert, *Op. Cit.* at 362, 363.
57. R.D. Alexander, Indian Case Law on Torts (1884).

Government of India and its Legislative Council had been reluctant to enact laws which had been drafted in British especially for India. Law Members, who earlier could state that 'Practically and substantially I am a sort of king in my own department for nobody interferes with me and I can bring in well whatever I choose' and who compared their situation with a schoolboy let loose in a pastry cook's shop with unlimited credit. The dainties provided, in the way of legislative business, are attractive in kind and boundless in quantity'[58] encountered now a stiff resistance from local governments and officials. It was not so much the rejection of legislation in general —the colonial apparatus continued to produce endlessly regulations and orders— but the rejection of a kind of legislation which became known as scientific legislation.[59] It was heavily influenced by German legal thought and meant, here in the words of the fourth Law Commission :

> Every statute, if it is to be self consistent and duly proportioned, must be framed with reference to some central group of ideas which dominate the whole work. The impressions received from a study and application of one branch of the law cannot be cast off in expounding and applying another, nor is it possible that really just and philosophical conceptions of law as an organic structure should gain possession of the minds of the community, or even the legal profession, unless the minor generalizations embodied in particular laws centre in higher generalizations drawn from the elementary truths of human nature and experience. Unless such a coordinating influence is allowed to operate, the development of the law, and the social growth of the community so far as it is affected by the law, must proceed irregularly and disproportionally.

It is understandable, that especially, local governments resented this kind of legislative activity. They were concerned with the day to day business of running a province of British India and therefore more interested in laws providing for prison rules, public health and so on. The Law Commission itself sensed already the end of its own era when it states legislation has for

58. J.F. Stephen, quoted in K.J.M. Smith, James Fitziames Stephen, Portrait of a Victorian Rationalist 126, 128(1988).

59. Even tort law was not excluded from piecemeal legislation. Local and central government legislated especially in the areas of nuisance law and cattle trespass, see for instance Smoke of Furnaces Act., Bombay 1862, Madras Towns Nuisances Act, 1889. Calcutta and Howrah Smoke Nuisances Law, 1863, and the Bill on Petty Nuisances Outside The Presidency Town, Madras 1888. The Cattle Trespass Act, 1856 was subject ot frequent amendments introducing harsher penalties. Local governments tried very often to legislate in areas which were of prohibiting trespass on an area which may annually be reserved for submarine mining practice in the port of *Rangoon in Indian National archive*, B. Proceedings, No. 56, Legislative Department, October 1889, or the *Rule for pasteurising cattle in certain forests, Bombay, Indian national Archive*, B. Proceedings, No. 158, Legislative Department, September 1882.

the time become distasteful, scientific legislation a kind of bugbear.

IX. Conclusion

The argument that the refusal to codify the law of tort is one of the main reasons for its undeveloped state is attractive but misleading. It is based on a theory of legal development which assumes that modern Indian commercial and civil law with the exception of family law developed along the lines of English law. This does not mean that all the provisions of the law of contract are held to be identical. Details of legal provision might be different but the main current of legal development is assumed to be similar — law in general becomes always more refined and is undergoing an upwards development all the time. This assumption makes it easy to conclude from the observation 'there are few Indian tort cases' that there had never been many cases. The other option, i.e. that there had been a decline of tort law or at least a kind of arrested development is hardly ever taken into consideration.

Alexander's above mentioned book, the activities of the Fourth Law Commissions and the recommendations of legal experts like Sir Frederick Pollock, however, could suggest exactly such a scenario : the character and the importance of tort law in India did decline during the 20th century —not only in comparison to the number of tort cases in England but also in respect of the total numbers of Indian cases per year. This assumption is naturally at the moment as unfounded as Galanter's and Dhavan's argument, but it enables one to ask a further question : What happened to tort law in India?

It seems to be unlikely that there is one single explanation and all research into Indian tort law will have to start with very basic questions like What kind of tort law did the British import into India under the formula 'justice, equity and good conscience'? It leads already to a complex of issues which have so far never been addressed by legal scholars. Was it different from the English law of that time? Was it applied to a different class of cases or was the case law interpreted differently by a biased judiciary which supported the commercial and manufacturing classes or even the colonial interests of the British? How was it possible to apply a case law in India, which had emerged in the course of the industrial revolution in England and which was based on socio-legal interactions which were peculiar to England but not to India.[60] Or was it possible to apply the case law because 19th century India and 19th century England were not so different after all and

60. On the development of tort law in England see J. McLaren, *Nuisance Law and the Industrial Revolution - some Lessons from Social History*, Oxford Journal of Legal Studies 155(1983); J.f. Brenner *Nuisance Law and the Industrial Revolution*, 3 The Journal of Legal Studies 403-433(1973); P.S. Atiyah, The Rise and Fall of Contract, 501-505(1979); P.S. Atiyah, *Liability for Railway Nuisance in the English Common Law : A Historical Footnote*, 23 Journal of Law and Economics 191-196(1960).

that the different economic progress of the two countries lead in the one case to the decline of tort law, in the other case to a refinement and progress of the tort law? Why did the Indian population or at least certain sections of the population accept so readily the legal remedies offered by tort law?[61]

This set of questions makes it clear that the first step of the historical approach into the lack of Indian tort law has to compare the development of tort law in India with its English counterpart in the 19th century. A comparative study would reveal how colonial tort law in India really was and would perhaps give insights on how to achieve the ultimate goal : to create a law of compensation in India which would be able to redress the harm inflicted on innocent victims of accidents, which would be able to deter the potential tortfeaser and which would be economically feasible.

61. J. Cottrell looked at these questions in the African context where there is a similar lack of case law. She concluded that 'the law [of torts] fails to deal with most of the real issues of wrongs done in African society - and that it does so not just because of legal technicalities, nor because of the lack of legal aid, but because of fundamental characteristics of the law itself ..., it remains true that the law of tort in Africa caters for the needs of the elite, and of commercial interests,' *op. cit.* at 182.

HUMAN RIGHTS IN INDIA : SOME EPISTEMOLOGICAL QUESTIONS

*Parmanand Singh**

I. Introduction : Multiple Universe of Human Rights Discourse

The popularity of the concept of human rights in current politics, the rapid growth of law relating to international protection of human rights, and frequent appeal to human rights for social change, curbing governmental lawlessness, exploitation, and satisfaction of basic needs, has been so over-powering in its force and rate of acceleration that the language of human rights has become an empty catch-all under which any political or moral values can easily be subsumed. Today every benefit and support, every good or value and every claim against blows of misfortune, sadistic abuses of power and exploitation is being asserted by people in the guise of human rights. Since appeal to human rights is being employed as stimulant to human emotions, a list of these rights can easily be derived from deprivations, privations, brutalities and atrocities. If the rights have to be 'human' then 'human being' is the measure and there is no reason that a limit should be placed to the claims made in the guise of human rights. Since 'human rights' are grounded in humanity, these rights simply require positive social and political action in their support. It is considered quite unimportant that the new claims should be justified by any political or moral theory. And when we are thwarted in the realisation of these proclaimed human rights, we tend to abuse the legal apparatus or the political economy or point to the growing decline in political or public morality.

The language of human rights has acquired such a momentum in India through a long line of judicial decisions that the age-old divide between traditional civil liberties and social and economic rights has completely been bridged and all claims are asserted under the rubric 'human rights'. The influence of international concern for human rights has been so overpowering that even the Protection of Human Rights Act, 1993 has defined human rights as 'rights relating to life, liberty and equality and dignity of the individual guaranteed by the Constitution or embodied in the International Convenants and enforceable by courts in India'.[1]

*Professor, Faculty of Law, University of Delhi, Delhi.

1. Sec. 2(d), The Protection of Human Rights Act, 1993.

The concept of human rights has entered into the contemporary universe of rights talk after the second World War when the General Assembly of the United Nations adopted the Universal Declaration of Human Rights on December 10, 1948. The Declaration was motivated by horrors and outrages experienced during the war and it embodied the moral commitment to prevent the recurrence of these events in future. Right to life, health, food, shelter, decent living, freedom from torture and degrading treatment and many other rights were declared to be indispensable for the dignity of the individual and free development of his personality.[2] The universality of human rights was re-affirmed in various international covenants ensuring both freedom from fear and freedom from want.[3] In some international conferences, an abiding concern has been expressed to develop the idea of indivisibility of human rights which means that both civil and political rights and social, cultural and economic rights are important for fullest development of human person-ality.[4] Some scholars believe that human rights can be promoted by acknowledging 'right to development' which means the launching of needs based strategy for development.[5]

The normative development of human rights is sometimes traced in terms of three generations. The first generation of civil and political rights arose out of French and American Revolutions. The second generation of economic, social and cultural rights is linked with Russian Revolution and the third generation rights are called solidarity rights reflecting contemporary issues such as peace, development and environment. The implication of tracing the development of human rights by reference to historical events which occurred in the Western hemisphere, however, ignores a vital fact that the struggles for civil and political rights were fought even by the freedom fighters in non-Western societies also, for example, by the nationalist leaders in India. Mahatma Gandhi had a clear vision of human rights which he had proclaimed

2. For a brilliant account of international developments in this area, P.M. Smith, *The Notion of Development As a Right*, in M.P. Singh (ed.), Comparative Constitutional Law 314 (1989).

3. Art. 25, Universal Declaration of Human Rights, 1948 ; Art. 11(1) and (2), Covenant on Economic, Social And Cultural Rights, 1966.

4. The International Conference on Human Rights held in Tehran in 1968 proclaimed: Since human rights and fundamental freedoms are indivisible, the full realisation of civil and political rights without enjoyment of economic social and cultural rights is impossible. Again in 1977, Resolution 32/1300 of the U.N. General Assembly recognised the link between realisation of new international economic order and promotion of human rights. In 1986, the U.N. Declaration On the Right to Development focussed on the basic needs strategy for promotion of human rights. Again in 1993, the U.N. World Conference On Human Rights held at Vienna reiterated the concept of indivisibility of human rights. See, for a recent discussion on these aspects, D.J. Ravindran, *Invisibility of Human Rights :A Neglected Concept*, Mainstream 8-10 (October 15, 1994).

5. See P.M. Smith, *supra* note 2 at 317.

as early as in 1916. He said :[6]

> Every human being has a right to live and therefore to find wherewithal to feed himself and where necessary to clothe himself.

In 1931 he again said :[7]

> Every man has an equal right to the necessaries of life even as birds and beasts have.

The Congress Declaration of Independence of January 26, 1930 drafted by Gandhi proclaimed :[8]

> We believe that it is the inalienable right of the Indian people as of any other people, to have freedom and to enjoy the fruits of their toil and have necessities of life, so that they may have full opportunities of growth.

It is thus clear that the concept of freedom is not necessarily Western in its origin.[9] It is quite likely that the contributions made by Gandhi might have influenced the drafting of the Universal Declaration of Human Rights which incorporates both the right to freedom as well as rights to basic necessities of life within the concept of human rights.[10]

Today, in India, every one talks about human rights by bringing ordinary people in public focus. In a sense, human rights have become resources both for politics and populism. A scholar has very aptly remarked that 'poverty alleviation programmes, even when they show some concern for the poor, are largely directed to meet the needs of party political regimes; and the gap between rhetoric on war against "poverty" and the reality in terms of changing life-conditions of the "poor", is very often a function of coherence of political ideologies, ways of organisation of party cadres, and the leadership styles'.[11] A recent editorial has remarked that mere human rights populism without action can hardly bear any fruit. On the contrary, populism results in the loss of credibility and legitimacy of the State.[12]

6. Lecture in Allahabad, 22 December 1916, 13 Collected Works of Mahatma Gandhi 312 (1958).
7. Young India, 26 March 1931, 45 Collected Works 339 (1958).
8. Gandhi's Draft (10 January 1930), 42 Collected Works 384 (1958). The quotations are taken from D. Conrad, *The Human Rights To Basic Necessities of Life*, 10-11 Delhi Law Review 1,17 (1981-82).
9. C. Badrinath, *Dharma and Jainism : Foundation of Human Rights*, The Times of India (14 March 1995). Badrinath argues that it would be wrong to conclude that freedom is chiefly a western idea. In India 'from the first awakening of the human mind...freedoms were seen as the very substance of human worth'. He believes that the deeper foundation of human rights should be found in *Dharma* and *Jainism* which preach *Ahimsa* as supreme value. *Ahimsa* embodies the idea of freedom from fear which is the first condition of human dignity.
10. In 1946, in M. Gandhi's letter to UNESCO Secretary General, A. Huxley on the principles for a Universal Declaration of Human Rights, it was stated: '...all rights to be deserved and preserved (come) from duty well done' ; UNESCO (ed.) Human Rights : Comments and Interpretation : A Symposium 18 (1949).
11. U. Baxi, Law and Poverty : Critical Essays 12 (1988).
12. V.N.Narayanan, *Populism Is Not A Dirty Word*, The Hindustan Times 13 (20 January 1995).

Some political critics of India's political economy contend that a model of economic development based on multinational capital and privatisation of economy will have a negative impact on human rights contributing to increased inequalities, dismantling of social services with adverse effect on the poor and restrictions on trade union rights.[13] It is also alleged that the implementation of developmental projects will have a negative impact on the local population, particularly, indigenous people. An eminent political scientist has argued that the new philosophy of trade would increase unemployment, lead to a model of modernisation that will push the people to the brinks of survival, erode workers rights and further depress the conditions of migrant women and child labour.[14] Another critic argues that 'development' always creates poverty and negates human rights.[15]

The UNICEF State of *World's Children Report 1995* also subscribes to the view that liberalised economy will negate the rights of the poor. It states:[16]

> Whereas it is obvious that free market economic systems are capable of generating economic growth, it is far from obvious that they are capable of creating just, civilized and sustainable human society. And in the recent commitment to free market economic policies...supported by the World Bank, and the International Monetary Fund, insufficient account had been taken to the effects on the poor or vulnerable or on the environment.

Some scholars argue that in a capitalist society, rights merely serve as an ideological legitimation to mask social and economic inequalities in the society.[17] Rights, on this view, are simply devices for mystifying the masses and masking the reality of capitalist dominance. The implication of this approach is that in a capitalist society, the exercise of liberty creates spaces for domination by some over others and thus the conception of rights as freedoms becomes repressive and devices for 'primitive accumulation'.[18]

13. See D.J. Ravindran, *supra* note 4 at 10.
14. R. Kothari, *Flawed Democracies : Critique of Indian and U.S. Models*, The Times of India (30 May 1994). Also See M.N. Buch, *Economic Reforms : Myth and Reality*, The Hindustan Times (3 January 1995). Buch is critical of Indian economic policy of handing over the country to foreign sharks and their Indian business cohorts whose sole interest would be quick profit and not the least concern for the poor Indians. Similar views have been expressed by A.R. Desai, *Agrarian Movement*, Seminar 418, 34-36 (1994).
15. B. Pathak, *Social Development : Search For A New Paradigm*, The Hindustan Times (22 January 1995).
16. Quoted in V.N. Narayanan, *Supra* note 12 at 13.
17. B. Parekh, *The Modern Conception of Rights and its Marxist Critique*, in U. Baxi (ed), The Right To Be Human 1-23 (1987).
18. U. Baxi, *Law and State Regulated Capitalism in India : Some Preliminary Reflections*, in Capitalist Development : Critical Essays 185-209 (1991). Also U.Baxi, *From Human Rights To The Right To Be Human : Some Heresies*, in U. Baxi (ed), The Right To Be Human 185-99 (1987).

The critics of India's political economy want that the market economy should have a 'human face'. Some writers use the idea of human rights as a struggle concept. They say that the democratic rights to organise and agitate can be used as a resource for struggle against capitalist domination and arbitrary coercion by the dominant elements. In a recent article Rajeev Dhavan argues for dissolving the antinomy between civil and political rights (CPR) and economic and social rights (ESR). He describes the directive principles as a massive social empowerment of the state for securing social and economic rights and argues for dispelling the 'myth' that 'socialism' and 'human rights' are incompatible. He believes that at the root of the problem lies the troubling assertion that while CPR inhere in human beings, ESR are the gifts of the state. It is the patronising theory of human rights which is responsible for the fragmented approach to human rights which treats ESR and CPR as falling into two distinct trade-off-categories.[19] Dhavan shares the widespread belief that economic and social rights have become a matter of politics and planning and in this politics, the judges are the major participants because, on the one hand they are proclaiming every human benefit or value as a human right derived from the idea of 'human dignity' implicit in right to live, and on the other hand judges are backing off where the government or an expert committee have advised against action or further inquiry.[20] Today, in India, the courts have taken a central part in expanding the concept of rights, mainly through the device of public interest litigation.[21] But the new claims based upon the right to life have only led to the disillusionment and frustration among the deprived sections as the courts have generally been reluctant to provide positive social goods and services by affirmative judicial action.[22]

The multiple universe of rights talk renders the concept of human rights confused from the start because the meaning ascribed to this concept and uses made of it by lawyers, judges, economists, activists and legal scholars is of different and conflicting dimensions and contexts. In most of the Western legal material, the expression 'human rights' is used in the sense of freedoms of speech, liberty of person, religious freedom and freedom from arbitrary

19. R. Dhavan, *Ambedkar's Prophesy : Poverty of Human Rights in India*, 36 Journal of Indian Law Institute 9-36, 15 (1994).

20. *Id.* at 15.

21. For a discussion of the concept of public interest litigation and its effectiveness in bringing out desired change, see generally P. Singh, *Public Interest Litigation*, 21 Annual Survey of Indian Law 160 (1985), 22 Annual Survey of Indian Law 483 (1986), 23 Annual Survey of Indian Law 13 (1987), 24 Annual Survey of Indian Law 123 (1988), 25 Annual Survey of Indian Law 45 (1989), 26 Annual Survey of Indian Law 181 (1990), 27 Annual Survey of Indian Law 35 (1991), 28 Annual Survey of Indian Law 239 (1992). Also See R. Dhavan, *Law As Struggle : Public Interest Law in India*, 36 Journal of Indian Law Institute 302-38 (1994).

22. P. Singh, *Public Interest Litigation*, 28 Annual Survey of Indian Law 251 (1992).

coercion and torture. In the third World countries, people speak of human rights in terms of 'development' and basic needs satisfaction.[23] Some people talk of 'human dignity' as the source of all positive legal entitlements. Others relate it to environmental protection. One scholar describes human rights as a capacity, as a power of man to achieve self-realisation enabling him a rounded self and a fully developed person.[24]

The crucial philosophical question that should be asked is: What does it mean to say that there are human rights or that persons have them? Are human rights primarily claim-rights in the sense that they entail correlative duties of other persons or the government to act or refrain from acting in certain ways? Are these rights different in theory and content with the old family of civil and political rights? Can human rights be restricted for the fulfilment of collective goals or general welfare? Are these rights moral properties of the individuals? As Joel Feinberg puts it :[25]

> Rights are not mere gifts or favour...for which gratitude is the sole fitting response. A right is something which a man can stand on, something that can be demanded or insisted upon without embarrasment or shame.

It is doubtful whether several claims advanced today in the guise of human rights fulfil the characteristics of a right as described by Feinberg. The only thing that the contemporary discourse on human rights points out is that the new claims represent a response to a new situation of people frustrated by the existing inequities of the political economy and the repressive nature of modern capitalist society.

One way to understand the concept of human rights is to examine the difference, if any, between the traditional individual rights and the new doctrine of rights. In other words, is there any theoretical distinction between rights against various forms of intrusions and interference and rights to positive social goods and services? We now turn to this question.

II. Are the New Rights Different From The Traditional Individual Rights ?

In legal and moral theory the concept of rights first appeared on the stage of thought in the guise of natural rights. Such political philosophers as Hobbes,

23. U. Baxi, *From Human Rights To The Right To Be Human : Some Heresies*, *supra* note 18 at 187.

24. C.J. Friedrich, Constitutional Government and Democracy, 160 (1968).

25. J. Feinberg, *Duties, Rights and Claims*, 3 American Political Quarterely 137 (1966) quoted in L. Lloyd and M.D.A. Freeman (eds), Lloyd's Introduction To Jurisprudence 434 (1985).

Locke and Rosseau and such acute political thinkers such as the leaders of French and American Revolutions each had a clear conception of rights that must be assured to people if they were to live with security and dignity. According to the doctrine of natural rights of the seventeenth and eighteenth century, man was believed to have a fixed and unalterable nature, to be endowed with reason, which gave him certain rights without which he ceased to be a human being.[26] These natural rights summed up in the Lockean formula of 'right to life, liberty and property' were largely concerned with protecting the individual person against governmental power. The moral requirement was to act with respect for persons. The idea of respect for persons was interpreted as freedom from interference by others. Thus, rights against arbitrary coercion, physical restraint, freedom of speech, guarantee of due process and right against discrimination were concerned with the protection of the individual person against governmental power. These natural rights had a metaphysical or moral status derived from God or Nature or dictates of Reason and belonged to men as part of their intrinsic nature. The doctrine of natural rights had greatly influenced the drafting of British Bill of Rights (1689), Declaration of Independence (1776) and Declaration of Rights of Man and Citizen (1789) and also formed part of the U.S. Constitution.[27] The doctrine of natural rights viewed man as a self-determining and self-directing agent living in an environment that offered him ample resources and opportunities to pursue his own goals and choose his own actions free from interference by others.

Natural rights, thus, represented the struggle of man against various forms of intrusions and oppressions. These rights placed great emphasis on the values of freedom and independence of individuals. Since the doctrine of natural rights was theoritically suspect from the start, it never acquired intellectual respectability and failed to exploit the ground it had won. Towards the end of eighteenth century, Jeremy Bentham, the founder of classical utilitarianism and analytical positivism, mounted an attack on the doctrine of natural rights. Bentham argued that the doctrine of natural rights could settle nothing. The only proper basis for determining how people should live was the principle of utility. He held that rights and laws could be evaluated by reference to the principle of utility and not by reference to a misleading belief in the existence of natural rights. Rights were, according to him, not a matter of political

26. C. J. Friedrich, *supra* note 24 at 156.

27. *Ibid.*

or moral legitimacy but owed exclusively to positive law.[28]

The legal positivists transformed natural rights into legal rights by first refining the concept of individual rights and establishing a catalogue of specific rights and then by developing the substantive and procedural apparatus to secure these rights. Like the natural rights, these legal rights were also viewed as rights to freedom from interference. Not only the constitutional rights, but also various common law rights formulated in such terms as negligence, tort, liability, defamation, assault, nuisance are defined as prohibitions against interference with the individual freedom. Then, most of the fundamental rights are controlled by a negative verb forbidding the state to deny, abridge, violate, infringe, deprive, or discriminate against the specific rights. These rights rarely require a positive social or political action to endow men with positive social goods and services.

According to Iredell Jenkins, human rights are different from traditional individual rights in as much as they 'tend to take the form of claims to or for something. Their function is to assure to people certain goods, benefits and support for which they experience an urgent need, to which they feel entitled, and which they are unable to procure by their individual effort'.[29] The essence of 'what is happening here is that the concept of right is being enlarged to include not only means but also ends. What men are now claiming as a right is not merely that they be left unhindered in their pursuit of values, but that these values be bestowed upon them'.[30]

Jenkins holds that the origin of 'human rights is quite similar to that of natural rights: each is born of desperation and dedicated to action. But there are also important differences that will have important consequences. The doctrine of human rights appeals chiefly to the feelings of men, while that of natural rights spoke more seriously to their minds'.[31] According to him, the doctrine of human rights marks a return to that of natural rights but without metaphysical foundations of latter.[32] The long passage from natural to legal to human rights has been very poignantly summed up by Jenkins thus :[33]

> The concept of natural rights teaches us that any doctrine of rights must have a firm theoretical basis. Since rights are means to the

28. Bentham ridiculed natural right as a non-sense upon stilts and a 'wasted breath'. See J. Bentham, *Of Laws In General*, 120 quoted in L.Lloyd's, Introduction to Jurisprudence 254 (1985).
29. I. Jenkins, Social Order and the Limits of Law : A Theoretical Essay 253 (1980).
30. *Id.* at 257.
31. *Id.* at 251.
32. *Ibid.*
33. *Id.* at 254-55.

> achievement of human good, a correct catalogue of rights depends upon a sound theory of human nature and the human situation. Without such a theory, determination of what claims constitute rights becomes purely a subjective and haphazard operation; all we can do is to attend to the manifold demands that men voice, estimate the extent of their support, and try to satisfy those that are, most widely and vociferously urged. This is obviously a hit and miss procedure substituting clamour (if not violence) for reason and discontent for justification.

This is exactly what is happening in India today. Clamour has been substituted for reason and discontent has been substituted for justification, when every week a court proclaims something as a human right to be satisfied by positive state action. The standard device for such kind of judicial-right-making is to invoke the elusive concept of human dignity and create anything as a human right. This certainly is a hit and miss procedure because when someone demands that these rights be enforced, the courts back out saying that the positive rights can be realised only if the government has sufficient resources and capacity to satisfy them.[34] As has been very clearly stated by Jenkins :[35]

> The doctrine of legal rights teaches us that declaration of rights are vain without an effective apparatus to implement them. This is a familiar teaching, but two of its important lessons are often overlooked. One of these concerns the need for a constant renovation of the legal apparatus itself, to keep it responsive to changes in social circumstances and human expectations. The other reminds us that we must take steps to ensure that all men are able to invoke these

34. For example in D.D. Horticulture Employees' Union v. Delhi Administration, A.I.R. 1992 SC 789, the Supreme Court realised that it is possibly false to proclaim that right to means of livelihood, work and other positive benefits are matters of enforceable rights when Justice P.B. Sawant remarked: 'This country has so far not found it feasible to incorporate the right to livelihood as a fundamental right in the constitution. This is because the country has so far not attained the capacity to guarantee it and not because it considers it any less fundamental to life. Advisedly, therefore, it has been placed in the chapter on Directive Principles,. Article 41 of which enjoins upon the State to make effective provision for securing the same within the limits of its economic capacity and development'. *Id* at 795. Earlier in Olga Tellis v. Bombay Municipal Corporation (1985) 3 SCC 545, the Supreme Court interpreted Article 21 as embodying all graces of human civilization such as right to work, employment, shelter and means of livelihood but contradicted itself by saying that these rights can be denied by complying with a fair procedure such as notice or hearing or could be denied if the State lacked resources. Then in Mohini Jain v. State of Karnataka, A.I.R. 1992 SC 1858 the Supreme Court declared the right to education as an aspect of the right to live with human dignity but in Unnikrishnan v. State of A.P. (1993) 1 SCC 645, the court limited this right only to the level of primary education. For the failure of the courts to satisfy basic human needs see B.B. Pande, *When they Came To the Court Seeking Basic Needs : Alternatives To The Flawed Response*, 31 Journal of Indian Law Institute 368 (1989).

35. I. Jenkins, *supra* note 29 at 255.

> rights when they stand in need of them. *Legal rights cannot be truly established until everyone has equal access to, and standing before, the legal apparatus.*

If the idea of rights involves the notion that their holders must be able to invoke these rights when they stand in need of them, then how do we justify various rights to well-being or the beneficial rights within the framework of the established theory of rights ?

III. Rights And Respect For Persons

Some moral and political theories[36] hold that the only right is right to freedom which requires only duties of non-interference. Rights as freedoms or liberties connects closely to the will theory of rights. This theory holds that rights mark out an area within which a person's will is decisive. In other words, rights make the enforcement of another's duty depend on one's exercise of will. The will theory presupposes correlativity of rights (claims-liberties, powers, immunities) in Hohfeldian sense and treats rights as a power of waiver over someone else's duty.[37] H.L.A. Hart who is the contemporary exponent of will theory shares the view that all rights are derived from a basic right to equal liberty.[38] According to this view, rights make sense only in a system where people are left free to lead their own lives and be responsible for their own actions and decisions. The basic moral requirement is to act with respect for persons. Only when a person's action interferes with the equal liberty of other, that a person can be restrained by law. Many traditional civil liberties such as right to privacy, right against discrimination and arbitrary physical restraint, right to freedom of religion and property have been derived from a basic right to equal liberty. In other words, liberty in the sense of freedom of action is recognised as a distinct value to be respected by all persons and the government.

The contemporary belief in human rights as embodying both the rights to freedom from interference and rights to welfare cannot be accommodated within the will theory and the idea of correlativity of rights and duties. As we have seen above, some of the rights to welfare such as right to work, education, shelter, clothing and so on can hardly be enforced through affir-

36. A recent work on theories of rights is of J. Waldron, Theories of Rights (1984).

37. The will theory is highly controversial one at least in the area of criminal law and in respect of children's rights. The Indian Supreme Court has held in some cases that fundamental rights cannot be waived. See Basheshar Nath v. C.I.T., A.I.R. 1959 SC 149.

38. H.L.A. Hart says : 'If there are any natural rights at all, it follows that there is at least one natural right, the equal right of all men to be free', 64 Philosophical Review 175, 189-91 (1955).

mative litigation. What, then counts as respect for persons when we speak of human rights as involving both freedom and welfare? If one takes a wider view of human rights, then freedom of will implying freedom of action ceases to be a distinct value. The notion of freedom now takes within its fold freedom of action as well as freedom from hunger, noise, disease, poverty and so forth. Apparently, the modern doctrine of human rights seeks fresh grounds and content of rights so that the deficiencies of the traditional doctrine of individual rights are exposed and the unmet needs and neglected values are accommodated within the theory of rights. The new concept of rights is, in a sense, impelled by the logic that traditional individual rights only promote purely acquisitive values and 'rugged' individualism and thus lead to capitalist exploitation and repression.

Susan Moller Okin defines human rights as a claim to something (whether a freedom, or a good or a benefit) of crucial importance for human life.[39] The things crucial for human existence, according to her, are claims to basic physical goods, to physical security and to be treated with respect by persons. Susan's description of human rights thus includes both the values of freedom and welfare. If human rights are viewed as respect for persons these will include right to life, freedom from arbitrary coercion and to be respected as a human person.

The Indian Supreme Court has derived a catalogue of human rights in both the senses discussed above from the notion of 'human dignity' implied by a right to life. People of India have a fundamental right to food, shelter, hygiene, clean air, health care, education, and so on as aspects of their right to live with human dignity.[40] In *Kartar Singh* v. *State of Punjab*,[41] the Supreme Court has ruled that liberty aims at freedom not only from arbitrary restraint but also a right to secure such conditions which are essential for full development of personality. But what is meant by 'dignity'? Certainly

39. S. M. Okin, *Liberty and Welfare : Some Issues in Human Rights Theory*, in J. R. Pennock and J.W. Chapman (eds.), Nomos XXVII : Human Rights 235 (1985) quoted in L. Lloyd's Introduction To Jurisprudence *supra* note 25 at 233.

40. See Francis Carolie Mullin v. Administrator, Union Territory of Delhi, (1981) SCC 608, 610-19 (Right to life includes right to live with human dignity and this includes bare necessities of life such as adequate nutrition, clothing shelter and food); Bandhua Mukti Morcha v. Union of India, (1984) 3 SCC 161, 183 (In addition to the above, right to life also includes right to education, health care, decent living); Olga Tellis, *supra* note 34. (It includes right to work and means of livelihood); Shantistar Builder v. N.K. Totame, A.I.R. 1990 SC 630 (Right to reasonable accommodation); State of H.P. v. Umed Ram, (1986) 2 SCC 68 (Right to road); U. Krishnan, *supra* note 34 (Right to education); Ram Sharan Autyanuprasi v. Union of India, AIR 1989 SC 549 (Life includes tradition, culture and heritage of man). Parmanand Katara v. Union of India, (1989) 4 SCC 286 (To health care) Buffalo Traders Association v. Maneka Gandhi, (1994) Supp.3 SCC 448 (Right to hygiene in slaughter house).

41. (1994) 3 SCC 569.

'dignity'[42] is not an 'empirical' characteristic as feeling of pain or suffering which can be empirically ascertainable. For the Indian Supreme Court however, 'human dignity' can be empirically ascertained by reference to whether a person has adequate nutrition, shelter, clothing, and other bare necessities of life and lack of these things will result in denial of dignity to people.[43]

In our view, when someone says that dignity can create rights, it signifies nothing more than this that every human person has the right to be respected and that every human being, as a moral agent has a certain fundamental moral status. Respect for persons, in this sense, involves the idea of mutual respect and co-operation without being dominated and harmed by others. As has been observed by Jeremy Waldron :[44]

> One possible view is that our convictions are based on a deep ethical view about the respect we owe to one another in virtue of our common humanity and in virtue of our potential to act morally. Individually and in our political life, we believe that people have got to be able to retain their dignity, their self-esteem, and at least the basic capacity to make a life for themselves in the society we are organizing.

And further :[45]

> Human dignity is violated when someone is tortured, their-home-life thrown open to surveillance, their culture denigrated, their political voice taken away or their needs treated with indifference. You cannot do that to people and expect them to retain the basis of self-esteem that they must have in order to live a human life.

As long as the concept of respect of persons or human dignity is limited to freedom from pain, torture, neglect, exploitation, repression and suffering or from other forms tyrannical or sadistic uses of power, there would be no difficulty in advocating a legal or political morality to act with respect for persons. Some philosophical problems might, however arise, when respect for persons is interpreted as embodying claims to positive social goods and services such as food, clean air, an efficient transport or economic system,

42. The Universal Declaration of Human Rights (1948) in its first article provides : All human beings are born free and equal in dignity and rights.

43. See the cases cited in *supra* note 40. G. Mishra, however, considers it a mistake to describe human dignity in terms of basic needs satisfaction for a man may exist with or without dignity. See *The Concept of Human Dignity and the Constitution of India*, in M.P. Singh (ed.), Comparative Constitutional Law 353-366 at 366 (1989).

44. J. Waldron, The Law 96 (1990). I am grateful to Professor M.P. Singh for making this book available to me.

45. *Ibid.*

medical aid, potable water, means of livelihood, adequate nutrition and so on. As we have seen above, many of these claims can simply be promoted. Perhaps, they are by their very nature incapable of being secured by affirmative litigation. What type of moral belief is implied in treating these claims as those of human rights?

Neil Mac Cormick[46] has offered a modern version of interest theory of rights which might be employed to treat human rights as embodying both the rights to freedom from interference and the right to assistance of others. Mounting heaviest criticism on the will theory, he argues that the will theory obscures the fact that duties are imposed in order to protect rights and that this theory unnecessarily emphasizes the idea of correlativity of rights and duties. According to him, rights can exist without being adequately protected by established legal rules and procedures imposing duties. The purpose of rights is not to protect individual assertion or free exercise of will but certain interest or benefits. A person has a right whenever the advancement of his interest has received social or legal recognition. Such recognition itself is a good reason for imposing a duty or for providing assistance to those who stand in need. Thus viewed, the existence of rights is independent of whether they are enforced or not.

Thus a judge may talk of right to life as including a right to clean air, education, medical care, housing, clothing, decent living, and so on without exactly determining who has the duty and how such a duty can be protected. Similarly, various freedoms such as that of speech, assembly religion and the like can be seen as advancing some interests or benefits of the individuals. Rights on this view, have an objective existence and cannot simply be invalidated because they cannot be enforced. Thus Neil Mac Cormick holds that when we ascribe a right to someone, we are saying that the interest represented by that right is an interest which ought to be protected.[47] In other words, the rights would appear to be correlatives to *oughts*.

Many economic and social rights can, on this view, be justified on the basis that rights can exist prior to a duty. But such kind of recognition of rights without any practical application in terms of enforcement is just like treating rights as directive principles. Such rights do not satisfy the characteristics of a right described by Feinberg as being something that can be demanded or insisted upon without embarrasment or shame.[48] To overcome these conceptual problems, people invoke the idea of obligation. In cases

46. N. Mac Cormick, *Rights in Legislation*, in P. Hacker and J. Raz (ed.), LAW, MORALITY AND SOCIETY (1977). Also his LEGAL RIGHTS AND SOCIAL DEMOCRACY (1987) Ch.8.

47. N.E. Simmonds, CENTRAL ISSUES IN JURISPRUDENCE : JUSTICE, LAW AND RIGHTS 137 (1986).

48. See, *Supra* note 25.

involving the constitutional rights to positive goods, the state is charged with the obligation to provide for people's needs, food, housing, income, health care, when people are for any reason unable or unwilling to secure these for themselves. Put in simple terms, if the people have positive rights, the state has the corresponding duties to provide for the enjoyment of the world's goods. These rights as benefits must be bestowed by the state.

In this way we get a picture of rights which take the forms of claims to or for certain benefits or positive assistance along with freedoms against intrusions and oppressions. The question is: Can we make people more free and at the same time achieve positive equality? The arguments for rights to welfare are in reality arguments of distributive justice. One of the most accepted conceptions of justice is that it consists in giving each person his due. Here one is reminded of the celebrated formula of Karl Marx: 'From each according to his ability, to each according to his need'. The dream embodied in the second-half of this formula, 'to each according to his need' represents the idea of positive equality or equal distribution of resources and opportunities. But the Indian Constitution and the principles of common law applied in this country also embody the first part of Marx's formula, 'from each according to his ability' which is represented by the guarantee of various freedoms and liberties forbidding the state to intrude into these freedoms and liberties, except on certain urgent grounds.

It is difficult to see how the right to freedom and right to welfare can co-exist in the present form because the conditions that liberty and welfare (positive equality) are intended to provide are conflictual and irreconcilable. In guaranteeing various freedoms such as of speech, assembly, religion, profession, trade, or privacy, the doctrine of individual rights requires that the state must not interfere in the lives of the people, but leave them free to live as they like and bear the risk of their decisions and choices. In guaranteeing to satisfy basic human needs, the doctrine of positive equality requires that the state must supply positive goods and services to the citizens and protect them against their mistakes and misfortunes.

Put in more legal terms, right to welfare is not a right not to be interfered with, but a right to be positively assisted. How can such rights have any place in a scheme based on the basic right to equal freedom? Such claims of positive assistance by others can only be justified by a political or moral theory which justifies constant interference with certain specific liberties in order to achieve equality of welfare or resources. Such theories have been offered by John Rawls and Ronald Dworkin and we shall now seek briefly to refer to them in so far they are relevant for this essay.

49. J. Rawls, A THEORY OF JUSTICE (1971).

Rawls in his massive book *A Theory of Justice*[49] rejects the classical doctrine of equal liberty which cannot easily accommodate the value of equality. He is concerned with the value of liberty as well as with the value of equality. His first principle of justice holds that each person is entitled to the most extensive system of basic liberties that is compatible with a similar system for everyone.[50] The second principle of justice, which is also known as difference principle, holds that social and economic inequalities are only fair so far as they work to the advantage of the least advantaged people in society.[51] The rights according to Rawls have lexical priority in as much as the first principle takes priority over the second. In other words, the inequalities in society will be rectified only if certain specific liberties such as traditional civil liberties of freedom of speech, freedom from arbitrary coercion or arrest, freedom of conscience and freedom to hold personal property are protected. These specific liberties cannot be interfered with, under any circumstances, not even to promote general welfare or social utility. Other liberties such as market liberties do not require any special protection, because Rawls is positively hostile to free market transaction which inevitably results in acquisitive capitalism and encourages oppression and domination.

The second principle of justice or the difference principle of justice requires that inequalities in the distribution of resources must be justified by reference to the interests of the least well off. Rawls explains his difference principle by contrasting what he calls the system of natural liberty and the notion of equal opportunity. The system of 'natural liberty' connotes the liberty of pure free market which allows people's life chances to be unduly influenced by considerations of one's luck or fortune or social status. Such a system is objectionable from moral point of view because people's prospects in such a system is determined by one's wealth or economic status. The notion of 'equality of opportunity' allows people's prospects to be determined by one's natural talent, ability, desert and so on. For Rawls, even one's natural talent or ability is an arbitrary factor in determining the life-chances of the individuals. Rawls, therefore, rejects both the system of natural liberty and the notion of equal opportunity as irrelevant from the point of view of justice. He then develops the idea that the natural talents of the individuals are to be treated as common assets of the community. N.E. Simmonds sums up

50. According to J. Rawls, the rational persons in the original position will choose the principles of Justice in the 'veil of ignorance'. The discussion on Rawls here is based upon the analysis of his theory by N.E. Simmonds *Supra* note 47 ch.2. entitled RAWLS 39-54.

51. These two principles of Justice are drawn from N.E. Simmond's formulations. See *Supra* note 47 at 42.

Rawls's conception of difference principles as follows :[52]

> If I am a talented individual in a Rawlsian society, I will be allowed to increase my material welfare only if, in doing so, I also increase the material welfare of the least advantaged. Thus my talents are not resources that I may exploit for my own benefit alone, they are to be regarded as common assets that must be exploited for the benefit of everyone.

Can the dream of John Rawls ever be fulfilled in modern society where liberty and money alone are regarded as the constituents of good life. Take the example from our own country. The growth-driven and export-oriented policies of the Indian government will inevitably affect a shift in agriculture from food crops to cash crops with its high capital inputs like power, water, chemicals and fertilizers. This will deprive the village workers of the means of production. The intrusion of multinational capital into India's economy is also resulting in ecological degradation, displacement of tribal population and mushroom growth of urban slum dwellers. When we promote a system of 'natural liberty' in the Rawlsian sense, we are expressing our fundamental commitment to the acquisitive values of capitalism. We are made to believe that a truly valuable, good and worthwhile life is the life of individualism, and egoism in which a person is the exclusive owner of the fruits of his labour.

A Rawlsian society would have a different conception of a truly valuable, good and worthwhile life. A society where one's worldly possessions shall be the common asset of the community, will be a society of compassionate and caring individuals. Such a society will discourage individualism, material acquisition, and capitalist domination, and encourage a sense of sacrifice or obligation to assist those in urgent need. The point is that if a theory of rights has to be based upon facts of human nature, how can we talk of rights to welfare, when all our efforts to require sacrifices and contributions from the fortunate ones is thwarted by a system of 'natural liberty' characteristic of a pure market society?

Philosophers such as Robert Nozick[53] would oppose Rawls and argue that a theory of rights requiring positive assistance of others would violate the individual right to liberty and property. Nozick maintains, that liberty and equality are incompatible ideas. Any attempt to achieve equal distribution of resources and opportunities would require constant interference with liberty and would thus violate the 'distinctness' of persons implied by the basic idea of respect for persons. The idea of 'distinctness' of persons entails an exclusive

52. *Supra* note 47 at 43-44.

53. R. Nozick, ANARCHY, STATE AND UTOPIA (1974) Chap. 7 and 8.

right of each person in his labour and in his own person and no right in the person or labour of others. If a person acquires something by his own efforts by a free and voluntary transaction without use of force or fraud, then he has the exclusive right to that thing. This implies the individual rights to liberty and property. In this way, Nozick offers his famous historical entitlement view of justice. He thus rejects a patterned conception of justice, which seeks a pattern of distribution by employing the maxims such as distribution according to need or equal distribution. If wealth is brought into existence by a person's individual efforts, such wealth cannot be divided up by a patterned conception of justice. It is thus clear that a state which gives overriding consideration to free market transaction implied by a liberalised economy would consider money and liberty as the highest values for pursuing a good and worthwhile life. Rights to well-being or positive equality would be a mere rhetoric or benevolent paternalism in such a society.

There is much truth in Nozick's theory if a society chooses the capitalist path of development as has been indicated in the *UNICEF State of World's Children Report* 1995 quoted earlier. This economic model is likely to contribute to increased inequalities, dismantling of social services with adverse effect on the poor, restrictions on trade union rights and dislocation of indigenous people. In most situations, as experience has shown, economic liberalisation was accompanied with gross violations of human rights in the form of extra-judicial executions and disappearances of the opponents of the government. In other words, the rights of the citizens will have to be sacrificed for the sake of new economic development, the human rights remaining mere rhetoric, as tools of political legitimacy.

One of the most interesting philosophical theories of rights as the basis of legal and political morality to be offered in recent years is that of Ronald Dworkin.[54] Dworkin's basic idea is that a right is a political trump which overrides considerations of the general welfare or social or economic policies. When the governments and legislatures are taking crucial decisions or formulating policies for governance or for devising economic, legal or social institutions, the fact that a particular policy or law or decision will advance the overall equality or general welfare or social utility better than any other alternative, cannot permit the government to interfere with individual rights. When we ascribe a right to someone, such as right to freedom of speech or right to education, we are in effect holding that the person ought not to be interfered with, in respect of his freedom of speech or right to education, even if such interference would be in the interest of social utility or general welfare.

54. R. Dworkin, TAKING RIGHTS SERIOUSLY (1977).

Dworkin argues that Rawl's theory presupposes the existence of a basic right to equal concern and respect which finds expression in the required unanimity of the choice of the principles of justice in the original position. He believes that anyone who talks about rights seriously must accept the basic idea of human dignity which consists in the moral requirement that people have a basic right to equal respect and concern when certain laws are enacted or governmental decisions are taken that affect the people. Like Rawls, Dworkin also rejects classical utilitarianism and a general right to liberty. To him rights have a dimension of weight and therefore vary in importance depending upon their power to trump considerations of utility. A right which does not have such power to override the considerations of general welfare cannot be a genuine right. Rights cannot be thought of as coming and going with fluctuating calculus of utility. They must be stable. Dworkin, concedes some specific liberties to people such as freedom of conscience and religion, freedom of speech and freedom from arbitrary coercion, which cannot be restricted in pursuit of utility. Rights can, however, be restricted to protect the rights of others. For example X's freedom of speech can be limited to protect Y's right to the integrity of his reputation. He rejects a general right to liberty because such a right would always result in an unrestricted right to free use of property and thus encourage a market society.

'The central concept in my argument' says Dworkin 'will be the concept not of liberty but equality'.[55] He holds that an ideal society is that which is dedicated to equality. Dworkin draws a distinction between two senses of equality. One of these is right to equal treatment - 'to an equal distribution of some opportunity or resources or burden',[56] the other is the right to treatment as an equal —'to be treated with the same respect and concern as any one else'.[57] He further holds that the right to treatment as an equal is fundamental and the right to equal treatment is derivative.[58] Right to treatment as an equal is a right in the strong sense, and the government would do wrong if someone is denied this right. He says :[59]

> I shall say that an individual has a right to a particular political act within a political theory, if the failure to provide the act, when

55. *Id.* at 272. Instead of a general right to liberty Dworkin would concede certain specific liberties such as freedom of conscience, speech, freedom from arbitrary arrest and other traditional civil liberties but not market liberties. The liberty of conscience or speech will be subject to external preferences and hence require stronger protection. According to Dworkin only personal preferences should count and external preferences should be ignored in deciding about the rights of the people. See for details *supra* note 54 at 235.

56. *Id.* at 227.

57. *Id.* at 277.

58. *Id.* at 273.

59. *Id.* at 169.

he calls for it would be unjustified within that theory even if the goals of the theory, would on the balance be disserviced by the act.

At another place he states :[60]

> Government must not only treat people with concern and respect but with equal concern and respect. It must not distribute goods or opportunities unequally on the ground that some citizens are entitled to more because they are worthy of more concern.

Closely linked with this theory of rights is Dworkin's famous (but controversial) distinction between arguments of policy and arguments of principle. Arguments of policy are based on the ground of fulfilling some collective goals. Arguments of principles are based upon the appeal to some individual rights which operate as trumps over collective goals. Let us illustrate this distinction by an example. A society may have various goals such as full employment, a clean environment, an efficient balance of payment system, high industrial productivity, an efficient transport system, low inflation and so on. These policies may conflict with each other and may justifiably be balanced against one another. Priorities may be laid down and one policy may be traded off against another. But individual rights, according to Dworkin, cannot be traded off this way. If some one has a right, such as right to free speech or right to education, such a right cannot be interfered with even for the pursuit of utility or general welfare.

Let us take the example of reservation for the Scheduled Castes (SCs). Reservations might be thought of as serving a social policy of equalisation or reduction of group disparities or enhancement of representation of SCs in the polity, economy and professions. Indeed in India, reservations are regarded as matters of policy to achieve actual equality. But Dworkin would argue, (as he has argued in defence of reverse discrimination in the United States) that reservation is based upon the principle that everyone must be treated with equal respect and concern and that every member of the Scheduled Caste has a right to reservation on the ground that no one can be subjected to discrimination on insulting or prejudicial grounds. Whether reservations would promote or impede the social policies of equalisation would be irrelevant for Dworkin.[61]

The point in Dworkin's theory is that, policies might be influenced by people's preferences in a democratic process or legislative process. Rights

60. *Id.* at 272-73.

61. M.P. Singh has developed the arguments on the lines of Dworkin in holding that the members of the Scheduled Castes and Tribes have a fundamental right to reservation. See M.P. Singh, *Are Articles 16(4) or 15(4) Fundamental Rights?* (1994) 3 SCC (J) 31-41. But for a contrary view See P. Singh *Fundamental Right to Reservation : A Rejoinder* (1995) 3 SCC (J) 6-12.

should not be influenced by people's preferences because as principles they operate as trumps over utilitarian goals. In this sense, rights are stable and are rights against the ruling forces in the society and polity. Since freedom of speech, religion, and freedom against torture are likely to be influenced by people's preferences or external preferences, these freedoms require stronger protection than the freedom of contract or property which are far less likely to be influenced by such preferences.

Dworkin treats right to equal concern and respect as a fundamental political right prohibiting the government from treating people in certain ways that would impede people's right to treatment as equals. Apparently, this concept of right is non-possessive, non-conflictual and non-aggressive because a fundamental political right to be respected as an equal and be not subjected to prejudicial laws and institutions cannot conflict with the rights of others. Dworkin's theory, in this way, offers a sound basis of political morality and serves as a strong control over the ruling powers in the society.

The conclusion of this discussion may now be stated in simple terms. The idea of human rights is an expression of respect owed by every human being to every other human being. But there has been a long-running dispute among the philosophers as to what should count as respect for persons. Philosophers, such as Robert Nozick, would interpret the idea of respect for persons as respect for the individual rights to liberty and property and a belief in a system of what John Rawls calls 'the system of natural liberty'. John Rawls would interpret this idea as embodying a basic right to equal concern and respect in which the natural talents will be treated as common assets of the community. Dworkin will further develop the idea of the basic right to equal concern and respect as a fundamental right to political equality and positive legal entitlements.

The contemporary human rights discourse treats human rights as embodying both the claim of freedom from interference and the claims of positive benefits and services. But for over one and a half century, the most widely influential moral and political theory has been of legal positivism. The positivist theory of rights claims that a right holder is the intended beneficiary of a duty and it must be the object of a duty to benefit the right holder. If it is difficult to determine who the intended beneficiaries of a duty are, the notion of right introduces a degree of uncertainty as is happening with new claims to positive goods such as food, shelter, education, health care, housing, employment, clean air and so forth, which have simply been proclaimed or declared as social goals incapable of being enforced by establishing duties on others.

According to established theory of rights, the only genuine rights are the rights to freedom from interference, oppression, arbitrary coercion or torture

and other forms of tyrannical uses of power. A concept of human rights understood in this sense is supported by a coherent theory accompanied by established legal procedures in common law and constitutional principles. The most common view is that we (the politicians, officials, private citizens) are prohibited from actively doing certain things or letting something happen which outrages the integrity and personal dignity of human being. How can people retain their self-esteem and dignity if they are treated by others with indifference, neglect and are used as resources for exploitation. In this sense, the idea of respect for persons is intertwined with the idea of human duties. Human rights can be truly established not by mere judicial-right making embedded in law reports but by bringing about radical changes in human attitudes and values. Such a change will include a willingness to share with others beyond what one earns, to have sympathy for the poor without charity, and to have a sense of obligation to positively assist those in need.

We speak glibly of launching wars on poverty, disease, hunger, illiteracy, discrimination, violence and oppression and every form of lawlessness and misrule. But fighting 'war' on these fronts would require a tight regulation over all aspects of individual and social life. Limited resources will have to be allocated, uses of income and properties will have to be controlled and a sense of obligation will have to be encouraged. And all of these measures will be met with stiff resistance by those who enjoy dominance and power.

The dilemma in which we find ourselves is simple. The realisation of right to equality will require the imposition of duties upon others and upon the government but the imposition of these duties is thwarted by a system of liberties. The only escape from this dilemma is that we treat rights as a struggle concept. How long can those in power and dominance mystify the people by dominating through economic force and arbitrary coercion. Those who rule us also realise that they need to legitimise their powers and moralise their actions. A famous historian E.P. Thompson has very aptly remarked : [62]

> People are not so stupid as some structuralist philosophers suppose them to be. They will not be mystified by the first man who puts on a whig...Most men have a strong sense of justice, at least with regard to their own interests. If the law is evidently partial and unjust, then it will mask nothing, legitimate nothing, contribute nothing to any class's hegemony.

Even Ronald Dworkin seems to have used the idea of rights as a struggle

62. E.P. Thompson, WHIGS AND HUNTERS : THE ORIGIN OF THE BLACK ACT, 262-63 (1977). This quotation is taken from J. Waldron, THE LAW 22-23 (1990).

concept, when he says: 'In our society a man does sometimes have the right, in the strong sense, to disobey the law'.[63] At another place he argues: 'It (the government) must dispense with the claim that citizens never have the right to break the law'.[64] The hidden assumption in these statements is that mass protests against morally evil laws and policies are legitimate and just. If we are to take rights seriously we must be ready to acknowledge that rights can be used effectively to combat repression and as a means of emancipation. The idea of rights provides ideologies and structures which can be used as struggles for equal respect and concern. For instance, the democratic rights of free speech, freedom of press and freedom to organize and agitate can be utilized for voicing claims against repression, torture, invasion of privacy and the neglect of human values.

The foregoing discussion has made it amply clear that human rights are not a simple matter. One is free to express these rights in simple slogans, but there would remain an endless dispute about what counts as respect for persons, whether individual rights can be sacrificed for pursuing the goals of prosperity, economic growth, order and so on or whether the various rights to basic amenities should be simply matters of social policies or matters of enforceable rights and whether the government has the power to require sacrifices from the people to help those in need. At least in this country where human rights are not likely to be used as a protracted struggle against domination and tyrannies, the judges as unrepresentative elites will remain the leading participants in national political debate by imposing their own convictions about human rights. Our experience with public interest litigation has shown that the impetus for organising agitations for human rights has not come from the people but from the judges. The legal doctrines thus produced in the course of judicial-right making have provided legal resources for symbolic protests, sits-in, or mass demonstrations over such issues as Bhopal tragedy, rape of *Uttarkhandi* women, bride burning, dowry deaths, atrocities on *Dalits* and the like.

The concept of rights expresses the idea that something is owed to the individual and that he can demand certain treatment from others to which he is entitled. In the absence of such a concept, of rights people can only make a request or beg or ask for favours for what is due to them. It is difficult to say with confidence whether many new rights called human rights can be demanded or insisted upon without embarassment or shame.

63. *Supra* note 54 at 192.
64. *Id.* at 204.

AUTHOR'S MORAL RIGHTS IN INDIA — A CRITICAL REVIEW

*Virendra Kumar Ahuja**

The hallmark of any culture is excellence of arts and literature. The maturity and vitality of any culture are determined by the quality of creative genius of artists and authors. The creative genius needs adequate protection of law. In India, the creative genius of authors is protected by the Copyright Act, 1957. Apart form the protection of economic rights, the Copyright Act also protects the moral rights of the author.[1]

Moral rights flow from the fact that a literary or artistic work reflects the personality of the creator, just as much as the economic rights reflect the author's need to keep body and soul together.[2] Moral rights or '*droit moral*' originated in French law. The Rome Act of 1928 added the *droit moral* to the Berne Convention of 1886. The moral rights are exceptions to the general rule that after an author has parted with his rights in favour of a publisher or other person, the latter alone is entitled to sue in respect of infringements.[3] The author has a right to claim authorship of the work even after the assignment of copyright.

In most of the countries, author's 'moral rights' in his work are recognised, and the work is protected against degradation, mutilation and abuse. There are three basic moral rights.[4]

Right of Publication *(Droit de divulgation)* is the first basic moral right which is not available under Berne Convention. It consists of two rights : the right to decide upon making the work public and the right to withdraw the work after publication, if the author wishes to do so. For example, a scientist or a philosopher has a right to withdraw an edition of the work and to make some corrections in the new edition, if he has changed his theory in the light of new discoveries or further works.

Right of Paternity *(Droit de paternite)* is second basic moral right of an author who has a right to claim authorship of his work and he can prevent all others from claiming authorship of his work. Moreover, he has a right to demand that his name should appear in all copies of his work at the appropriate place. He can also prevent others from using his name in their works.

* Lecturer, Faculty of Law, University of Delhi, Delhi.
1. See Sec. 57, The Copyright Act, 1957.
2. S.M.Stewart, International Copyright and Neighbouring Rights 59(1983).
3. T.R.Srinivasa Iyengar, The Copyright Act, 1957, 333(1985).
4. Stewart, *Supra* note 2 at 60.

Right of Integrity *(Droit de respect de l' oeuvre)* is third basic right of an author to prevent distortion, mutilation or other alteration of his work, or any other action in relation to the said work which would be prejudicial to his honour or reputation.
This is particularly important, where a licence or assignment has been granted to adapt or alter the work in some way, *e.g.*, novel into play, play into film, etc. It is for the courts to decide the borderline between adaptation and distortion.

I. Moral Rights Under English Law

Before the Copyright, Designs and Patents Act 1988 (hereinafter referred as CDPA 1988), the British copyright law had never given specific recognition to these moral rights and Britain had never carried out its obligation as a member of the Berne Convention to protect the moral rights of the authors. But British law protected the author against the wrongs done to him in the following ways. If a work of some other persons is presented to the public in the author's name, two common law torts may be committed. First, if the public thinks that it is getting a known author's work, there will be passing-off; secondly if the misrepresented work is of a sufficiently poor quality to lower the author's reputation, he may sue in defamation.

Now, CDPA 1988 has incorporated four distinct moral rights. These are: the right to be identified as author or director, popularly known as right of paternity ;[5] the right to object to derogatory treatment of a work, popularly known as the right of integrity;[6] the right against false attribution of a work,[7] and the right to privacy in certain photographs and films.[8] The first two moral rights are in fulfillment of the obligation of Berne Convention. All these moral rights have adopted one basic characteristic, viz, they are inalienable to others,[9] while being transmissible on death.[10]

The right against false attribution of a work involves the converse situation in which the person concerned complains that he is not the author of the work. Under the fourth right (the right to privacy in certain photographs and films), where a person commissions a photograph or a film for private or domestic purposes and that work attracts copyright, he has the right to object

5. Sec. 77, Copyright, Designs and Patents Act 1988.
6. *Id.*, Sec.80.
7. *Id.*, Sec.84.
8. *Id.*, Sec.85.
9. *Id.*, Sec.94.
10. *Id.*, Sec.95.

to issuing copies to the public, public exhibition or showing, broadcasting or cablecasting.[11] To this there are certain exceptions which also apply to copyright.[12]

II. Moral Rights Under Indian Law

The Indian Copyright Act, 1957 though based on the British pattern, took a step ahead of Britain by incorporating section 57 and therefore, giving recognition to the moral rights of author. Section 57 of the Copyright Act reads as under:

> 1. Independently of the author's copyright, and even after the assignment either wholly or partially of the said copyright, the author of a work shall have the right to claim the authorship of the work as well as the right to restrain, or claim damages in respect of :-
>
> a. any distortion, mutilation or other modification of the said work;
>
> or
>
> b. any other action in relation to the said work which would be prejudicial to his honour or reputation.
>
> 2. The right conferred upon an author of a work by sub-section (1), other than the right to claim authorship of the work, may be exercised by the legal representative of the author.

The draftsman while drafting section 57 mutilated the language of Article 6 (b) itself. Article 6 (b) makes objectionable only such modification of the original work which would be prejudicial to the honour or reputation of the author.[13] While Section 57 of Indian Copyright Act 1957 has delinked the words 'other modification' from the words 'which would be prejudicial to his honour or reputation' by splitting up the provision into two sub-clauses (a) and (b), and thereby changed the sense. By a bare reading of Section 57, it seems that all the modifications of a work, whether these are prejudicial to the honour or reputation of the author or not, are prohibited.

Justice S.B Wad in *Mannu Bhandari v. Kala Vikas Pictures Ltd.*[14] has rightly observed that the words 'other modifications' appearing in the sub-clause (a) will have to be read *ejusdem generis* with the words 'distortion' and 'mutilation'.[15]

11. *Id.* Sec. 85(1).
12. *Id.* Sec. 85(2).
13. K. Ponnuswami, *Intellectual Property,* Annual Survey of Indian Law 375(1987).
14. AIR 1987 Delhi 13.
15 *Id.* 16.

Section 57, sub-section (1) of the Copyright Act, 1957 has now been replaced by the Copyright (Second Amendment) Act, 1994 as follows:

> (1) Independently of the author's copyright and evenafter the assignment either wholly or partially of the said copyright, the author of a work shall have the right -
>
> (a) to claim the authorship of the work; and
>
> (b) to restrain, or claim damages in respect of any distortion, mutilation, modification or other act in relation to the said work which is done before the expiration of the term of copyright if such distortion, mutilation, modification or other act would be prejudicial to his honour or reputation Provided that the author shall not have any right to restrain or claim damages in respect of any adaptation of a computer programme to which clause (aa) of sub-section (1) of Section 52 applies.[16]
>
> *Explanation*: Failure to display a work or to display it to the satisfaction of the author shall not be deemed to be an infringement of the rights conferred by this section.

Thus, this section amends the present section in four ways: First, it limits the remedies available to the author in respect of distortion, mutilation, modification or other acts in respect of his work to cases where such acts would be prejudicial to his honour or reputation. It is noticeable that under previous Section 57 (1), the remedies were also available in those cases where distortion, mutilation and modification of the work were not prejudicial to the author's honour or reputation.

Secondly, it specifies that the author's special rights *i.e.* moral rights shall subsist during the term of copyright only, which is generally author's life plus sixty years. According to this new provision, once the copyright in author's work ceases to subsist, one can use his work in a way he likes. However, the authorship of the work will continue to remain with author, even after the expiry of copyright in his work.

Thirdly, it adds a proviso in respect of computer programmes, whereby adaptation of a computer programme for the purpose commonly known as 'debugging' is sought to be made permissible . In other words, making of

16. Clause (aa) of sub-section(1) of Section 52 is a new clause which the Copyright (Second Amendment) Act, 1994 inserted just after section 52(1) (a) of the Copyright Act, 1957. It provides as under:
(aa) the making of copies of adaptation of a computer programme by the lawful possessor of a copy of such computer programme, from such copy -
(i) in order to utilise the computer programme for the purpose for which it was supplied; or
(ii) to make back-up copies purely as a temporary protection against loss, destruction or damage in order only to utilise the computer programme for the purpose for which it was supplied.

copies or adaptation of a computer programme is allowed only in two circumstances by the lawful possessor of a copy of such computer programme: First, in order to utilise the computer programme for the purpose for which it was supplied and secondly, to make back-up copies purely as a temporary protection against loss, destruction or damage in order only to utilise the computer programme for the purpose for which it was supplied. It is, however, noteworthy that unlawful possessors of computer programmes are not allowed to adapt or make copies of such a programme for aforesaid purposes. The making of copies or adaptation of a computer programme by lawful possessors of such computer programme for purposes other than those mentioned in Section 52(1) (aa) are not allowed.

Finally, it adds an explanation in regard to the right of the current owner of an original copy of an artistic or other work to display or keep such copy at his discretion.[17] Failure to display the work will not be deemed as infringement of the rights conferred by this section.

Though author's moral rights were incorporated in Copyright Act, 1957, the first dispute in this regard came before the court after 30 years in *Mannu Bhandari v. Kala Vikas Pictures Ltd.*[18] The parties, however, settled their disputes out of court, but on the request of counsel for the parties Justice S.B. Wad pronounced the judgement as there was no decision of the court of law before this case on the interpretation of Section 57 of the Copyright Act, 1957. Mannu Bhandari, being the author of Hindi novel *Aap Ka Bunty*, had copyright in the work which included *inter alia*, the exclusive right to make a cinematograph film in respect of the work. In April 1983, she assigned her cinematograph rights in the novel to the Kala Vikas Pictures Pvt. Ltd. for a consideration of Rs. 15,000/-. It was agreed that the author would allow the script writer who was directing the film to make certain modifications in the novel in discussion with her to make it suitable for a successful film-version of it.

From the very begining, differences started arising between the parties. The first objection was about the title of the film which was resolved by the parties. The court also did not consider the change of title as a distortion or a mutilation of the work. But on the other objections raised by the author, the court directed the deletion of some sentences from the film on the ground that they distorted the character and were not necessary changes.

The next objection was raised by the author with regard to the end of the film. In the novel in the end the child was admitted in hostel by his natural

17. Clause 20, The Copyright (Second Amendment) Bill, 1992, 27-28.
18. *Supra* note 14.

father while the film showed that the child died of starvation after he ran away from the house. The court justified the end of the film, but felt that the manner in which the death was presented to the two families and the entire scene in the mortuary were 'too crude, brash and nauseating' and directed that the part of the end of the film which showed a large number of dead bodies spread on the table in the mortuary and the desperation of the families to identify the child's body should be deleted from the film.[19]

The court, while discussing the object and scope of Section 57, made some important observations. The court observed that Section 57 was a statutory recognition of the intellectual property of the author and therefore it should be protected with special care. The court observed further that the author should have a right to claim authorship of the work as well as a right to restrain infringement or to claim damages for the infringement. These rights are available to the author even after the assignment either wholly or partially of the said copyright. These additional rights are available to the author of a literary work and not to the owner of a general copyright.[20]

It becomes clear that the Section 57 overrides the terms of the contracts of assignment of the copyright. Therefore the contract of assignment must be consistent with section 57. The assignee of a copyright cannot claim any rights or immunities based on the contract which are inconsistent with the provisions of Section 57.[21]

While interpreting sub-clause (a) of clause (1) of Section 57, Justice Wad held that the words 'other modification' appearing in the sub-clause (a) will have to be read *ejusdem generis* with the words 'distortion' and 'mutilation' and modification should not be so serious that the modified form of the work looked quite a different work from the original.[22]

Justice Wad made an important observation on the court's powers under Section 57 of the Act. He held that the court does not sit as a sentinel of public morals or super-censor in exercise of its powers under the said section. It cannot impose its views (prudish or liberated) on sex or its depiction in the works of article. The concern of the court is to examine how far the new 'avatar' is true and authentic and what changes are necessary due to constraints of a medium.[23]

The court after disposing of all the objections by directing marginal modifications and deletions upheld the decision of trial court to refuse an

19. *Id. at* 19-20.
20. *Id. at* 16.
21. *Ibid.*
22. *Ibid.*
23. *Id. at* 19.

ad interim restraint order and to permit the film to be exhibited.

III. Do Performers Enjoy Moral Rights?

Performers are recognised by the society as vital links between literary, dramatic and musical works and the public. There is no doubt that a performer spends sufficient skill and labour to merit copyright protection. Often the works come alive through the renderings of talented performers. The great musicians, singers, dancers, actors and other performing artists delight the hearts and feast the eyes and ears of millions of people every day by their visual or acoustic presentation. In spite of all this the performer's position in law was very weak, as his rights were protected only recently by Copyright (Amendment) Act, 1994.

'Performer' includes an actor, singer, musician, dancer, acrobat, jugglar, snake charmer, a person delivering a lecture or any other person who makes a performance.[24] 'Performance' in relation to performer's rights, means any visual or acoustic presentation made live by one or more performers.[25]

Performer quite often performs an existing work and in that sense his performance is considered as derivative. Performer's right are considered as neighbouring rights as they are nearly always rights in derivative works because they presuppose a pre-existing work.[26] The copyright law does not protect the moral rights of the performer. But it does not mean that derivative works performed by performers are of inferior quality and do not require any artistic skill.

IV. International Picture of Author's Moral Rights

A. Berne Convention

Berne Convention for Protection of Literary and Artistic Works (Paris Act, 1971) protects the author's moral rights. Under Article 6 (b), the right of paternity and the right of integrity are available to the author in his work. Right of publication is not available to the author. Author's moral rights shall be maintained, at least until the expiry of the economic rights of the author. However, these moral rights may cease to exist after the death of the author in those States whose legislation, at the moment of their ratification of or accession to this Act do not provide for the protection after the death of the author.

Section 57 of the Copyright Act, 1957 is based on Article 6 (b) of the Berne Convention.

B. TRIPS Agreement

The Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement of Final Act Embodying the Results of Uruguay Round Multilateral Trade Negotiations does not make it obligatory for State Parties to protect moral rights of the author.

Conclusion

Though the court in *Mannu Bhandari v. Kala Vikas Pictures Ltd.*[27] discussed the purpose and scope of Section 57, it remains very difficult to demarcate the boundaries of permissible and impermissible modifications, when a literary or dramatic work is being transformed into cinematography. As film-making requires huge investment of money, a restraint order when the film is in progress, will have devastating effect on film producers. As a consequence of which film producers will opt for the easy, less expensive and less risky alternative of borrowing 'ideas' from published literary works for making their films, and thereby escape from the copyright law. The automatic result of this would be that the literary copyright owners might lose a valuable market.

This does not mean that *droit moral* should not have any place in our copyright regime. Indeed, the author's moral rights must be protected. It is, however, necessary that their parameters must be clearly defined so as to enable the parties to know their rights and obligations and make their best efforts to avoid differences between them. *Droit moral* is, no doubt, a salutary provision in copyright law.

24. Sec. 2 (qq), The Copyright Act, 1957.
25. *Id.*, Sec. 2 (q).
26. Stewart, *Supra* note 2 at 178.
27. *Supra* note 14.

THE PREFERENTIAL ALLOTMENT : CAUSES, CONSEQUENCES AND CONTROL

*Suman Gupta**

The practice of preferential allotment of shares and warrants to promoters at preferential prices is perhaps the greatest misuse of deregulation and has become a most disreputable form of raising capital. Promoters, both Indian and foreign, have enriched themselves at the cost of general investing public by grabbing over Rs. 5,000 crore (at current market prices about Rs.9,000 crore) in preferential allotments.[1] Of the aggregate enrichment, nearly two-thirds are accounted by about 30 major Transnational corporations (TNC's), which have raised their stakes in their Indian affiliates at throw away prices.[2] The balance is accounted for by about 100 promoters, including large business houses like Birlas, Thapars, Ruias and Oswals.[3] The Government, RBI, and SEBI has only recently begun to realise the huge values of shares that promoters have grabbed for themselves at the cost of investing public. Such reduced value for the allotment of shares greatly harms the interest of small investors, and in that manner makes a mockery of corporate democracy.

The game of the transnational corporations to hike their stakes in their Indian subsidiaries started in 1991 when the New Industrial Policy allowed foreign companies to increase their holdings to 51 per cent or above and allowed TNCs to once again become the majority owners of their companies.[4] Moreover, the current row over preferential allotments also started when many TNCs hiked their stakes in their Indian progeny to 51 per cent by short charging their small shareholders.[5]

The TNCs justified their views for the preferential prices by stating that the move was only historical justice for the low prices at which they were forced to sell their equities in 1978, when they were forced to bring down

* Lecturer, Faculty of Law , University of Delhi.

1. *The Economic Times Survey* The Economic Times 1(1 August 1994).
2. Castrol hiked its stake in Castrol (India) at a discount of 89 per cent, Colgate-Palmolive at 90 per cent, Glaxo 75 per cent, ABB 84 per cent, BATA 84 per cent, Reckitt & Colman 78 per cent etc.
3. The details of major foreign and Indian beneficiaries is provided in The Economic Times 5 (1August 1994).
4. Press Note No. 17 of the Ministry of Industries.
5. Preferential allotments in Public Issues in 1993-94 formed 32 per cent of aggregate public issue amount of Rs. 12, 544 crore made by 770 companies,Prime Annual Report Of Public Issues (93-94).

their equity holdings to 40 per cent to comply with the requirements of FERA.[6] They argued that current market price of their subsidiaries reflect performances built around by brands and technology supplied by parents; and to pay market price, therefore, would be tantamount to buying their own goodwill. Further, low floating stock of TNCs subsidiaries and the Bull runs on the market has pushed prices up to unrealistic levels. TNCs also argued that they should not be treated at par with other shareholders, as unlike other shareholders they are providing their subsidiaries many benefits like brand names, technology, management, distribution network and purchase of supplies at favourable prices. If they were to be treated at par with other shareholders, they claimed, they would then have to charge a royalty, and the payout would then be much higher than the discount it got for the preferential allotment.[7]

The Indian promoter, on the other hand, was not able to play the game because listing agreements prevented any holding beyond 40 percent.[8] But, under pressure from Bombay Club the 40 percent ceiling was raised to 75 per cent.[9] That opened the way to preferential allotment to Indian promoters.

I. Causes For This Sudden Flurry To Hike Equities

The Indian promoters justified themselves to shore up their shareholding by putting many arguments of which few are worth mentioning:

(i). Take-over threat: With the economic liberalisation, Indian business houses, have become open to the threat of take-overs. Further, putting up a hefty amount of $ 1,000 million into the Indian stock markets, has become a disturbing downside of liberalisation. Indian promoters argue that FIIs (Foreign Investment Institutions) have no responsibility to company's management, they are committed only to safeguard the interests of their shareholders. FIIs book profits and their selling will be in chunks and among these bulk buyers there could be corporate raiders.

They also argue that FIIs have been allowed 24 per cent of a company's equity in aggregate, which they can easily snap up because market capitalisation of average Indian group is small, and in dollars FIIs will be paying peanuts. Further, with NRIs also allowed to hold upto 24 per cent

6. Than, Controller of Capital Issues formula forced TNCs to sell at prices much lower than the market prices.
7. J. Mulraj, *Wheels within Wheels,* The Economic Times, (16 April 1994).
8. The Securities Contracts (Regulations) Rules, 1957, Rule.19.
9. The Securities and Exchange Board of India Guidelines (11June 1992).

of a company's equity, they are worried about NRI raiders. Thus, the opening up of capital market to foreign investors, the dilution of FERA and MRTP laws and the presence of FII in strength have put a fear in the minds of Indian promoters which justify their preferential allotments.

It is not, that Indian companies are worried only from foreign raiders. But they now feel threatened by their big sisters, who are flush with funds after successful Euro-issues and can now go on a buying spree.

(ii). Not at par with the ordinary shareholder : The promoters argue that they lay the seed and nurse the plant; they are running the administration and have an onerous responsibility to discharge. They have to bring in working capital and other financial requirements; hire suitable personnel ; tap correct sources for procurement of raw material; lay out market strategies; build up a suitable infra-structure; and last but not the least, comply with the various laws and face prosecution for violations. Thus, they can not be put at par with other shareholders.

The promoters argued that they also suffer many discriminations from the ordinary shareholders, like; their reserve quota is subject to a lock-in-period; the shares applied by them should be fully paid up; and the minimum number of shares which each applicant is entitled to apply for, is of the nominal value of Rs.25,000.

Thus all this, justify the preferential allotment to them at preferential prices.

(iii). High tax argument : Promoters argue that high wealth tax rates of the past have compelled them to whittle their stakes down considerably. They further argue that preferential allotment can correct the wrong done to them by the high tax rates of the past.

But critics of preferential allotments[10] say that it is undeniable fact that high tax rates were a bad part of earlier ideological ethos and did much harm, but one cannot look at one fact in isolation. Industries benefited in many ways too, chiefly by the *licences/permit raj* and high tariff barriers. If during these four decades of protection, managements could not build up sufficient capital, do they deserve a preferential treatment ?

The critics claim that the fact was that most managements were comfortable with lower holdings, so they could use the surplus to set up other projects. They had the support of financial institutions which had a

10. J. Mulraj, *Preferential Allotments: Other People's Money*, The Investor's Guide, The Economic Times (14 March 1994).

policy of not 'destabilising' existing managements. This stance of FIIs is now changing, causing a worry about takeover and hence the demand for preferential offers.

(iv). Expansion plans arguments : Indian Companies need to expand substantially to be able to compete with global giants. In the era of free pricing and global issues, this expansion necessitates an offering of equity to international investors. The preferential offers are being made in order to maintain the stake of Indian managements. The alternative is not to grow.

(v). Corporate democracy arguments : The Indian promoters also talk of corporate democracy. They say that let the shareholders decide on whether or not to approve the preferential allotments and at what price.

But the critics argue that to usher in true corporate democracy, there is requirement to disallow interested parties from voting on the resolutions.[11]

However, the reasons may well be monetary. Many promoters buy cheap, and later off load a portion at huge prices. Even where a lock-in-period on new allotments is enforced, some promoters sell their old holdings at prices substantially higher than the ones at which they have acquired.[12]

II. How Do Indian Promoters Manage To Do It ?

Firstly, the preferential allotment to foreign promoters at heavy discount can be restrained by the finance ministry by asking the RBI to withhold approval under FERA. However, no such provision exists for domestic promoters.

Secondly, most managements privately placed shares with the FIIs at steep premiums and as this lead to a dilution, they made up by allotting equity to themselves at highly discounted prices. What's more, since this was a secondary market transaction, managements were under no compulsion to make the deal transparent. Some companies even gave the benefits of rights issues to the warrant holders who were in fact the promoters themselves.

Thirdly, the lack of stipulation that EGMs (Extraordinary general meeting) have to be held only in the registered offices of each company was another loophole which the promoters exploited. Promoters, deliberately organised EGMs in remote towns, thus making it difficult for minority shareholders

11. J. Mulraj, argues that with 40 per cent holding management is in a position to get the resolution approved, especially since there are no postal ballots,' in The Economic Times (14March 1994).

12. For example., the promoters of Bhabnam Sugar Mills Ltd issued 11 lakh equity share on a preferential basis to themselves to increase their holding from 42 per cent to 50 percent. However, stock market sources speculated that the promoters had liquidated their holding during the boom when share price touched Rs. 245 and are now trying to get back their holding through this preferential allotment at a lower price. The Economic Times (10 March 1994).

to attend those meetings.

Finally, under the provisions of the existing Companies Act, as long as the resolution for preferential allotment is carried through by 75 per cent of shareholders present at the meeting, there can be no grounds for governmental intervention.

Thus, in the absence of suitable laws on the subject, the promoters were busy exploring ways and means of issuing preferential shares to themselves at a big discount.[13]

III. Consequences

It is not only the small shareholders who suffer when shares are allotted at prices below market level, the companies also lose the premium they might have collected, for example, Colgate-Palmolive offered Rs. 60 per share for raising its equity stake in Colgate-Palmolive (India) from 40 to 51 percent when the share was quoted at Rs. 700. Thus, 1.13 crore shares worth 791 crores were picked up by Colgate at only Rs. 67.8 crores. Thus, the Indian Company's coffers were deprived of the balance[14] (nearly 750 crores of Rupees).

The Government also stands to loose, since the foreign exchange inflow is a lower than it would have been had the TNCs paid market prices.

Further, one of the key elements of economic reforms is that inefficient managements should be ousted by persons who can offer a better deal for shareholders. But by allowing managements to increase their stakes at low prices, one is stymying this cleaning process by takeovers and mergers. The consequences will be that Indian industry will not become as efficient as it should, and *shareholders will not get their just reward.*

IV. Legal Sanctions Of Preferential Allotments

The preferential allotment of shares has legal sanction. According to

13. The delay in framing rules on the subject was primarily the result of ongoing tussle between the Department of Company Affairs and the Finance ministry. Because the DCA was not in favour of incorporating a pricing formula in the Companies Act, the finance ministry was helpless and took shelter in the provision whereby it asked the RBI to withhold allotment to foreign promoters by withholding approval under FERA. But in the case of domestic companies, specifically, where the FIs had a small stake, the ministry had its hands tied.

14. A. Mehta, *Promoters' bonanza at public cost* The Economic Times 1 (1August 1994).

the provision of section 81(1A) of the Companies Act,[15] if a special resolution for issue and allotment of shares to promoters' controlling group is passed by three-fourths of the members, present in person or by proxy, the management can award themselves shares at discounts to the market prices.

Thus, the Companies Act, allowed promoters to go ahead with this practice provided they were able to steer special resolution through general meeting of shareholders. Furthermore it is a well settled principle under the Company law that the corporate affairs are conducted on the basis of a majority rule expressed through voting by the shareholders on the basis of their shareholding, subject only to the provisions of the memorandum or articles of the company concerned and the relevant provisions of the Companies Act. It is a valuable franchise of a shareholder to exercise the voting right in a manner he desires. Any attempt to restrict this right or compel the shareholder to exercise this right in a particular manner would strike at the very root of corporate democracy. Thus, once such a resolution is adopted, all the shareholders of the company concerned would be bound by the implications and effect thereof.

Promoters also draw strength from observations made by the Bombay High Court in *Tomco-Lever case.*

> as the law and the new industrial policy stand, the shareholders are completely free to determine the price for allotment of shares by passing a special resolution under section 81(1A) of the Companies Act.

The Government of India also publicly announced that existing companies wishing to raise foreign equity up to 51 per cent can make issues at the price determined by the shareholders by a special resolution under section 81 (1A) of Companies Act.[16]

Another Government declaration was made by the Union Minister of State for Industry in the Rajya Sabha, stating that existing companies wishing to raise foreign equity holding can do so at the price determined by the

15. Section 81(1A) deals with 'Further Issue of Capital' by a company. It states that" Further issue of shares may be offered to any persons (whether or not those persons include the holders of equity shares) in any manner what so ever-

(a) If a special resolution to that effect is passed by the company in general meeting, or,

(b) where no such resolution is passed, if the votes cast (whether on show of hands,or on a poll, as the case may be) in favour of the proposal contained in the resolution moved in that general meeting (including the casting vote, if an, of the chairman) by members who, being entitled to do so, vote in person, or where proxies are allowed,by proxy, exceed the votes, if any, cast against the proposal by members so entitled and voting and the Central Government is satisfied, on an application made by the board of directors in this behalf, that the proposal is most beneficial to the Company."

16.Goverment Press Note. 13 (1992) Series.

shareholders of the respective companies by a special resolution u\s 81(1A) of the Companies Act.[17]

Yet another statement that lent support was made by Union Minister of State for law on behalf of the Prime Minister, in the Lok Sabha in following words: [18]

> Several instances have come to the notice of the Government where the promoters have increased their stake by issue of further capital at a premium below the market price. Section 81(1A) of the Companies Act, empowers a company to issue further shares to any person (whether any existing or other person) in any manner whatsoever if a special resolution to that effect is passed by the company in general meeting.... on such price as may be approved by the shareholders in a general meeting.

V. The Control Of The Preferential Allotment : Preferential Allotment Guidelines

When the Indian associates of several transnational companies began issuing shares to the TNC parents on a preferential basis at steep discounts to their market prices, all that investors could do was protest in vain. No Government agency wanted to carry the buck. The finance ministry asked the Department of Company Affairs (DCA) to drop section 81(1A), but DCA, on its part insisted that this will be possible only, when the new Companies Bill is tabled before the Parliament. DCA was ready to issue, however, an ordinance to drop section 81(1A), if the finance ministry asked it do so. But the finance ministry did not want to do this, because it never wanted to be seen as a bad boy by foreign investors. The matter was then passed to Foreign Investments Promotion Board (FIPB) which was more concerned with vetting applications for foreign investment, than with pricing issues. SEBI, the market watch dog, also threw the towel saying that since special resolutions are passed under the Companies Act, it has no say in the matter.[19] Monopolies and Restrictive Trade Practices Commission was also helpless.[20]

17. In response to an unstarred question No.1999, on 16 December 1993.

18. In response to question No. 2967 on 16 March 1994.

19. SEBI chairman G.V.Ramakrishna, while speaking to journalists at Banglore said that our guidelines on Disclosure and Investor Protection do not allow any preferential allotment along with a right issue. But we can do little if such an allotment is sanctioned during a.g.m through a special resolution, in The Economic Times 4(28 December 1993).

20. MRTPC restrained the promoters of the Videocon Narmade to take the benefit by issuing cheaper convertible debentures to group companies but promoters got the stay vacated from Supreme Court.

When Indian promoters also began following the lead set by the TNCs, the ordinary investors were still helpless, except to the extent that the FIs in some cases, opposed and successfully resisted such preferential allotments, for example, of Essar Shipping, Mahindra & Mahindra, Bombay Dyeing and C P Tools. It was only in November 1993, when all the financial Newspapers repeatedly pointed out the harm that was being done to the investing public, that the Finance Ministry told FIIs that they should allow preferential allotment only when this is done at market prices.[21] However, the FIs could influence decisions only where they held a significant voting rights. In other cases, especially, in the case of TNCs, where they didn't they were helpless. That is when the ministry of finance on 11 May 1994 and RBI on 3 June 1994 issued the guidelines on the subject. The DCA and the FIPB also suggested that regulation of premium must be checked and as CCI has ceased to function, the responsibility of regulating the prices could be taken up by the SEBI. Further, as SEBI had already issued the guidelines for fixing premium to new issues and Right issues, it could also take up the additional responsibility of fixing premium in case of preferential allotments. Therefore, SEBI also issued its guidelines on preferential allotments on 4 August 1994.

A. *Guidelines Issued By The Ministry Of Finance*

The Ministry of Finance, Department of Economic Affairs issued the following guidelines, on preferential shares & warrants.[22]

Action on the proposal of shareholders shall be completed within a period of 3 months from the date of passing of resolutions.

An amount equivalent to at least 10 per cent of the price fixed for the warrants would become payable on the date of their allotment. The amount is adjustable against the amount payable eventually for acquiring the shares, and if the option is not exercised the amount would stand forfeited.

In cases of warrants (Fully Convertible debentures partly convertible detentions)FCDs, PCDs carrying rights of entitlement of equity shares at a future date should not exceed 18 months from the date of issue.

Pricing of the issue will have to conform to the earlier guidelines, the present guidelines, Reserve Bank of India and finance ministry regulations both in regard to acquisition of shares against preferential allotment or on conversion of convertible instruments.

21. The Economic Times (6 December 1993).

22. Issued on 1 May 1994.

The financial instrument such as warrant, FCD, PCD are not transferable and are valid for 18 months from the date of the relevant instruments.

The shares allotted on a preferential basis will not be transferable in any manner for a period of 5 years from the date of allotment.

B. Reserve Bank Of India Guidelines :
On The Pricing Of Preferential Allotments

The Reserve Bank of India announced new guideliness[23] for the pricing of preferential allotment of shares to foreign shareholders.[24] Under these guidelines:

Pricing will be determined on the basis of the average price of the shares during the preceding six months at the main listing centre.

Average price is to be calculated on the basis of the monthly average of the high and Low rates for these shares.

This rule will not be applicable for the allotment on a rights basis.

For unlisted companies, or companies whose shares are not traded regularly, the RBI will go by the pricing formula notified by the erstwhile CCI[25] (Controller of Capital issues).

C. Financial Institution Guidelines For
Preferential Issue Of Shares Securities And Warrants

The Financial Institutions announced guidelines on 28 July, 1994 which will determine how they will vote on special resolutions seeking preferential allotments to promoters.

These revised guidelines basically fix the issue price of shares on conversion of warrants at 10 per cent premium over the average of six months price. The average price is to be calculated on the monthly average of high and low rates quoted for the shares on the main listing centre.

The main features of the guidelines are as follows:

Promoters seeking preferential allotment of warrants should pay an up front 5 per cent of the 'striking price' which will be at a 10 per cent premium

23. Issued on 3 June 1994; intended to curb the issue of discounted shares to foreign promoters.

24. However, market observers considered this as closing the stable doors after the horses have bolted.

25. The CCI formula took into account three basic factors :
1. net asset value of share (NAV) ;
2. profit earning capacity (PEC) ;
3. market value of share and high and low reached in the previous three years.

on the average price of the preceding six months.[26]

5 per cent up front price would be forfeited by the company if the promoters fail to exercise the option to convert the warrants into equity shares within 18 months.

Warrants shall not be transferable until conversion.

Promoters shall be not be allowed to get themselves allotted with the naked warrants.

The lock-in period for shares acquired by promoters on exercising warrants will be for a minimum of 10 years.[27]

The existing shareholding of the promoters seeking preferential allotments will also be locked-in for 10 years.

The list of preferential allottees will be approved by the financial institutions.

The company must comply with the provisions of the section 81(1A) of the Companies Act.

The company must abide the applicable regulations of SEBI for such preferential allotments.

These norms would be a applicable to both domestic and foreign companies to facilitates level playing field.

The earlier guidelines announced in November, 1993 did not insist upon any up front payment, secondly the option of conversion of warrants rested with the allotted and not the issuer.[28]

D. SEBI Guidelines On Preferential Allotments

The Securities and Exchange Board of India issued guidelines for the allotment of preferential issues.[29] The guidelines were to be effective immediately and was to apply with retrospective effect.

Under the guidelines, all preferential issues by listed companies through any financial instrument shall be subject to the fulfillment of various requirements relating to the pricing of the securities, pricing on conversion, non-transferability of instrument, and currency of shareholders' resolution.

The guidelines will govern the issue of shares, warrants, fully convertible

26. Six month period have to be counted from the month preceding the board meeting approving preferential allotment.

27 Lock-in will be for old shares that promoters held in concerned company as well as for the new shares being issued to them.

28. This gave promoters considerable advantage as they were not required to make any payment for seeking rights to acquire shares at a later date, and if prices become unfavourable, the promoters could back out of their option. THE ECONOMIC TIMES 1 (29 July 1994).

29. Issued on 4 August 1994 under sec. 11(1) read with sec. 24 of the SEBI Act.

debentures (FCDs), partly convertible debentures (PCDs) or other financial instruments made on a preferential basis to a select group of persons.

The guidelines set out two sets of pricing norms for allotment of preferential allotment, which shall apply in all cases with a cut off date of 4, August 1994.

The price of preferential shares shall not be also less than:

(1) the average of the weekly high or low of the closing prices of related shares quoted on the stock exchange during the six months preceding the relevant dates; or

(2) the average of the weekly high and low of the closing prices of the related shares quoted on a stock exchange during the two weeks preceding 30 days, if the price is higher than six months average.

'Relevant date' has been fixed at 30 days prior to the date on which the meeting of the general body of shareholders is convened. However, in case of 'Warrants', the relevant date is 30 days prior to the date on which the warrant holder becomes entitled to apply for shares.

VI. Stock Exchange

'Stock Exchange' shall mean any of the stock exchange in which the shares are listed and in which the highest trading volume in respect of the shares of the company has been recorded during the preceding six months prior to the date on which meeting of the general body of shareholders is held to consider the proposed issue.

Preferential allotments should be exercised within a period of 3 months from the date of passing the resolution. If such a resolution is not acted upon with in 3 months, a fresh consent of shareholders will have to be obtained and the relevant date too will relate to the new resolution.

The statutory auditors of the issuer company must certify that the issue of the shares, warrants, FCDs, PCDs or other financial instrument is being made in accordance with the requirements contained in these guidelines.

Copies of the certificate obtained from the auditor shall also be laid before the meeting of the shareholders convened to consider the proposed issue.

In the case of warrants, if the warrants are issued on a preferential basis with an option to apply for shares, the issuer company shall determine the price of the resultant shares in the same manner as for the preferential shares. However, in this case the 'relevant date' will be 30 days prior to the date on which the holder of the warrants becomes entitled to apply for the said shares.

Promoters will make an up front payment of 10 per cent of the price fixed on the date of allotment.

Up front payment would be adjusted against the price payable subsequently for acquiring the shares by exercising an option for the purpose.

Up front payment would be forfeited if the option to acquire shares is not exercised within 18 months.

Where PCDs, FCDs and other instruments are issued on a preferential basis providing for the issuer to allot shares at a future date, the issuer shall determine the price at which the shares could be allotted either by conversion or otherwise in the same manner as provided for pricing of shares allotted in lieu of warrants.

Warrants,FCDs,PCDs or any other financial instrument should be converted into equity shares within 18 months from the date of issue of such preferential instrument.

Warrants, FCDs,PCDs or any other financial instrument issued on preferential basis will not be transferable.

Preferential shares will also not be transferable in any manner for a period of 5 years from the date of allotment.

Shares acquired by conversion or otherwise, would also remain lock-in for a period of 5 years from the their allotment.

Allotments, if any, to be made in favour of foreign institutional investors shall also be governed by the guidelines by the Government of India\RBI on the subject.[30]

VII. Company's Ways To Bypass SEBI's Proposed Lock-In Period

SEBI guidelines stipulate that any financial instrument other than shares, issued on preferential basis, will not be transferable. The shares allotted on a preferential basis or acquired by conversion or otherwise will also not be transferable in any manner for a period of five years from the date of allotment. But promoters and managements have found many ingenious ways to circumvent this imposition of five years lock-in-period stipulated for FIIs, FIs and MFs in private placements and preferential allotments of equity.

30. This means that apart from satisfying the conditions of SEBI guidelines, such investments will also be regulated by the guidelines issued by the RBI (June 1994) and of the Ministry Of Finance (1 May 1994).

A. Circumvention Of Lock - In Period By Public Issues

According to SEBI guidelines, a company has to offer a minimum of 25 per cent of its issue to public, this makes the promoters to reserve 75 per cent for firm allotment. Further, according to the guidelines, there is no problem in issuing shares at reduced prices as long as they are offered to the public also. Another factor that goes in favour of this route is that unlike preferential issue, there are no pricing formulas to adhere to. The only requirement is that premium has to be justified in the prospectus.[31] The promoters after raising their stake by public issues can sell their existing holdings to FIIs at market prices, who happily take, because they get a bulk lot without a lock-in period and with no hassles of buying in the secondary market.[32]

The story does not end there, in many cases, the issue is priced at the market price. This makes the issue less attractive to individual investors, but the FIIs and others who are interested in bulk buying are prepared to pick up the equity at these prices. The companies, therefore, arrange for underwriting by these institutions. Hence, the issue finally lands up in the lands of FIIs and others without the hassle of a five year lock-in of liquidity.[33]

B. Circumvention Of Lock - In Period By Rights Issue

In this route, companies struck a deal with those FIIs, which are keen to have a large block of their shares. The game plan is that companies issue right shares at very high rate and at exorbitant premium, so as to keep the investors away. The companies renounce in favour of the FIIs.

Secondly, this rights issue at a high premium and at a good ratio make the prices of shares to slip in the post issue secondary market. This means that right's share price would be slightly more than the market price. In this scenario, it is expected that most of the common shareholders would also renounce their right or would not be in position to claim it. Promoters, who hold substantial stake in company, would also renounce in favour of the FIIs.

The legal position is that the renouncement by the company would be decided by the board and it would be mandatory for them to disclose this fact to SEBI. But, the disclosure is not necessary if the promoters renounce

31. Autolite (India) Ltd made public issue at Rs.90 while the scrip was quoted around at Rs.400.

32. Even, if there is a lock-in period of 3 yrs on public issue for promoters, it is less than 5 years.

33. S.Sharma, in The Economic Times 1(11 October 1994).

the rights, as they act in the capacity of a shareholder.

The FIIs buy the rights despite the exorbitant price because, firstly they are piqued at the five-year lock-in-period on the private placement. Secondly, their buying from the secondary market shoots prices upto at least 30 to 40 per cent and they are not able to pick the bulk. Thirdly, FIIs are confident that as a large chunk of holding would be with them, the market sentiment will boom and they would be in position to book substantial profit. Thus, this route serves both promoters, who get cheap money and the FIIs who get growth oriented share in large volume.

However, this whole process will dilute the promoter's stake in the company and to compensate that dilution, the company would bring another public issue at a low premium and allot a promoter quote to help the promoters to regain their position.[34]

C. Buying Shares In Unlisted Securities

As the SEBI's guidelines are not clear on the issuance of securities of non-listed companies to financial institutions,[35] the FIIs are cornering the entire issue of such unlisted companies. Hence, this is one more route to by pass the lock-in period.

This route is being applied to new companies and closely-held companies. This route is advantageous to the promoters as instead of going public at par or at a low premium,[36] they find it more lucrative to deal with the FIs. Going by this route, they also save commissions and other expenditure of the public issue.[37] Promoters, thus, find it more prudent to wait and enter the market after a year of good performance and to assure them a hefty premium.

FIIs, on the other hand, as part of their investment strategy are also keen to invest in low-priced stocks of medium sized companies where the gains are much higher than in highly priced stock. They sell at profit when the companies go public.[38]

34. A. Kumar, *Cost Plan to By pass SEBIs 5-yrs Lock-in-period*, The Hindustan Times 19 (10 October 1994).

35. SEBI guidelines mention only listed companies and companies to be listed. However, no time frame is mentioned, and this is being exploited. FII can take a private placement and then sell in six months or more when the company is ready to go public.

36. Merchant bankers usually do not allow promoters to charge premium on new issues,even if they are sure of profits.

37. It is about 8 percent of the total size of the public issue.

38. The Economic Times 1(11 October 1994).

D. Private Placement

The route of private placement to FIIs opened with the SEBI guidelines of January 11, 1994, which stipulated that listed companies can make private placement of shares with registered FIIs after obtaining shareholder's consent by a special resolution in their general meeting under section 81 (1A) of the Companies Act.

However, there was a conditions that the allotment should not exceed 5 percent to a single FII and be subject to a maximum of 24 per cent of the issued capital. Further, shares could be placed with FIIs not at a price lower than the highest price during the preceding 26 weeks in the domestic market.

This route became the most attractive one to meet the fund requirements, with a perception that public issues are to be priced close to par and rights issues are priced at around 50 per cent of the market price. FIIs placements are better option as they are willing to pay a higher price if they are convinced about the future profitability of the company.[39]

The promoters have also found a way to circumvent the stipulation to SEBI of 3 months period within which the allotment has to be made to FIIs. They allot shares to their own investment companies, often on a partly paid-up basis and then a secondary market sale is made to FIIs which does not require RBI approval.

The Indian companies which were previously intending to raise small amounts job 35 to 50 million from GDR issues have shifted to this private placement route. There are also many other benefits. As the cost of raising funds through private placement is much lower (1.5 to 2 per cent) than Euro Issues (5 to 7 per cent); private placement route does not involve holding conferences at different centres in international markets; the brokerage is paid in rupees unlike fees for lead and co-lead managers in dollars, the share price in private placement is usually or even higher than the market price; while in the GDR, a small premium is possible in booming market but never at the highest level of the preceding 26 weeks.

Companies also prefer private placement rather than to go for public or right issues in the domestic market because of the following advantages:

Placement with FIIs leads to much higher prices than obtained in rights or public issues.

The issue could be completed much faster as against public issues.

The usage of funds raised are not to be subject of monitoring by any

39. FII paid Rs.60 for each of 1,72,500 shares of Autolec Industries Ltd. while the market price was hovering around Rs.45.

agency.

There is also a sense of prestige attached to doing on FII placements.

VIII. Conclusions

The distortions in the matter of allotment of preferential allotments arise owing to the guidelines laid down by the Government which permitted the issuing companies to make preferential allotments to, amongst others, the promoters merely by complying with the provisions of the companies Act. In fact, the confusion has arisen mainly due to the government belief that the companies are private fiefdoms of their managements -which they most certainly are not.

The concept of company as merely a means of earning profits is outdated and the traditional view of company as the property of shareholders is now an exploded myth. The view now prevailing is that public company should have social conscience and owe social responsibilities.

Once companies go public, they also become responsible to their minority shareholders. Having gone to the public to raise money, they cannot claim preferential treatment. Management's justification to raise their stakes to avoid being 'destabilised' holds no ground. If the returns they have provided to shareholders are less than what they should get, they deserve destabilisation.

If any shareholder wants to increase his stake, he can do so by purchasing from the market. There seems to be no acceptable reason why one class of shareholders, should be allowed to buy at lower than the market prices. It is even more unjust if stakes are hiked to a majority holding, as a hike to majority holding should command a premium.

Section 81, originally, provides for rights shares, which meant that such shares shall be offered to the holders of equity shares in proportion to the capital paid up on those shares at that time. However, an amendment made in 1960 permitted the management to avoid the applicability of this benefit when they were seeking to increase their pre-emptive holdings in the company. They did that simply by the device of issuing further shares to promoters at prices that were 'special' or much less compared to those prevailing in the market.

Technically, it is true that, if a special resolution is passed, a company could allot shares to promoters, at a lesser than market price. But that does not mean that if the price that is fixed is by comparison inadequate even then the management's action will be immune from the court scrutiny. The only caveat is that it would have to be subject to a finding that such step was not in the best interests of the company.

That, the court has the power, was evident in the case of *Needles Industries*

(1981) where the Supreme Court found that the board of directors had allotted to themselves shares at par, of the value of Rs.100 even though the market price than was Rs.190 on an average. The apex court held that it was only just that shareholders who had taken the shares at par should be asked to pay the difference of Rs.90, otherwise, it would amount to unjustifiable enrichment. The Court accordingly directed that the difference of Rs.90 per share be paid to the company, not withstanding the technicality that there was no default in the board exercising its powers under section 81(1A) of the Companies Act.

In comparison, in U.K., Prior to 1982, the English Companies Act did not provide for this preemptive right in the matter of further issue. But the courts nevertheless frowned on directors' decisions to issue further shares with the intent of maintaining their control; the courts also took an adverse view where the dominant purpose was to diminish the fighting powers of the minorities or amounted to a strategy to squeeze out such a group. These were considered to be abuses of the fiduciary powers.

Under the 1985 ECA, there is a provision of preemptive rights to shares if authorised by a special resolution. But there is an important safeguard, viz. that a special resolution need not be proposed unless it has been recommended by the directors and there is a written statement circulated to the members by the directors spelling out the reasons for making the recommendation, the amount to be paid to the company in respect of the proposed issue and the directors justification of that amount.

Under the Indian Companies Act there is no such requirement and the result is that this provision is being abused frequently. In some cases, the resolutions do not mention the fixed price but only provide for a loose range between the minimum and maximum leaving it to the discretion of the directors to fix any price. It is doubtful whether such vague unguided discretion in favour of directors can be held to be in compliance with the requirements of Section 81(1A). This is so, because the power to exclude the granting of pre-emptive rights to shareholders can only be attained if a condition precedent of passing a resolution is done. In the absence of a specific price, it is questionable whether the requirement of the Act have been complied with. Thus, any allotment made pursuance of such a vague resolution may not be regular.

It is relevant to refer to the SEBI guidelines, which even when providing for reservation of 10 per cent of expanded capital for employees, suggest that the price should be market price. Than, how can it be justified that the promoters who have the benefit of 20 per cent reservation can be permitted to take further self-serving decision which allow them to get shares at less than the market price.

IX. Some Suggestions For Reform

1. Amend the Companies Act, prohibiting preferential allotment at anything except market price.

2. Promoters benefiting from the allotment should be debarred from voting on the proposal.[40]

3. To correct the damage already done, two major suggestions are:

(a) promoters should be asked to distribute their preferential allotment among all shareholders at the same discounted prices on rights basis;or the beneficiary promoters should sell back to the company at the same prices at which they have been allotted, and be asked to raise their stakes at the market price;

(b) the companies should be permitted to buy-back their shares to facilitate the buy-back from promoters.

4. The company Act should be amended to allow shares with different voting rights or by an improved system to express corporate democracy, like postal ballot.

5. Preferential allotment at preferential prices ought to be acceptable only by exception and not by rule. For any such proposal, the directors should be required to make a statement as to how such a proposal would be in the larger interest of all shareholders. Directors should also make it clear that these interests can be served only through a preferential allotment at preferential price to promoters.

6. While selecting the price, the following bench marks are imperative: first, the preferential price should be the highest of net asset value; secondly, it should be at a price at which the rights or convertible debenture issue was made in the previous 12 months, and thirdly, the price must be calculated on the basis of the erstwhile CCI formula.

7. The price should not be less than the 80 percent of the market price prevailing at the time the resolution is passed in the case of rights shares or on the date of actual exercise of the warrant.

8. Promoters should not be allowed to disinvest their actual holdings for a period of 7 years from the date of allotment of the preferential shares.

9. Any disinvestment made prior to this period should have to be made

---

40. SEBI recommended that Sec.81 be amended to give effect to this proposal, so that if promoters are legally prevented from influencing the voting on resolutions, other shareholders would have the freedom to decide whether the allotment are to the company, SEBI chairman S S Nadkarni in Hindustan Times 19(11 June 1994) But the Government has dropped this suggestion, The Economic Times 1(19 September 1994). The DCA has also rejected the proposal of SEBI to amend the section by providing that companies should obtain approval of at least 25 per cent of small shareholders before making preferential allotment, The Economic Times 1(27April 1994).

to other shareholders of the company under the same price-formula at which the promoters bought the shares for themselves.

10. Do away with S.81 (1A) ; then promoters will have to buy their company's shares through right issues and the secondary market.

11. To allow private allotments only on a cash basis, and the shares should be fully paid up. Warrants, should only be in the form of rights so that all shareholders, including the promoters, benefit from this credit facility.

12. Remove the system of reservation, in public issues, for various categories; except for employees and shareholders of group companies.[41]

13. As small investors are being encouraged and pushed towards Mutual Funds, it becomes correspondingly imperative that the fund managers should be made more responsible and their actions transparent. There should be disclosure every time a mutual fund manager exercise his vote on special resolution.

14. FIs nominees on the company's boards should be asked to exercise their discretion judicially. They should consider the issue on merits and not be guided by political or personal overtones.

41. At present, a company can reserve as much as 74 per cent of the issue with a minimum of 25 per cent to be made to public. MFS can be given upto 20 percent ; FFIs along with NRIs and OCBs 24 per cent; FIs can get up to 20 per cent; while shareholders of promoters' companies and employees can get up to 10 percent. This reservation is being misused, as many of them apply for shares in reserved quota, get the allotments and offload them soon after the allotments just to book the gains in short term.

DEVELOPMENT OF INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT

*P.S. Sangal**

I. Concept of Sustainable Development

A. Meaning

The Report of World Commission on Environment and Development, entitled, *Our Common Future*, defines 'sustainable development' as development that meets the needs of the present without compromising ability of future generations to meet their own needs.[1] It contains two key concepts :

(a) The 'concept of needs', in particular the essential needs of the world's poor, to which the over-riding priority should be given; and

(b) The 'idea of limitations' imposed by the state of technology and social organisations on the environment's ability to meet present and future needs.

Thus the goals of economic and social development must be defined in terms of sustainablility in all countries - developed or developing. Development involves a progressive transformation of economy and society. A development path that is 'sustainable' in physical sense could theoretically be pursued even in a rigid social and political setting. But physical sustainability cannot be secured unless development policies pay attention to such considerations as changes in access to resources and in the distribution of costs and benefits. Even the narrow notion of physical sustainability implies a concern for social equity between generations, a concern that must logically be extended to equity within each generation.[2]

A world in which poverty and inequality are endemic, will always be prone to ecological and other crises. Sustainable development requires meeting the basic needs of all and extending to all the opportunity to satisfy their aspirations for a better living.[3]

Meeting essential needs depends in part on achieving full growth potential, and sustainable development clearly requires economic growth in places where such needs are not being met. Elsewhere, it can be consistent with economic

*Professor and Former Head & Dean, Faculty of Law, University of Delhi, Delhi.

1. G.H. Brundtland, *Report of the World Commission on Environment and Development*, Our Common Future 43 (1987).

2. *Ibid.*

3. Living standards that go beyond the basic minimum are sustainable only if consumption standards elsewhere have regard for long-term sustainability. Yet in many acts, we live beyond the world's ecological means, for instance, in our pattern of energy use. Perceived needs are socially and culturally determinable and sustainable development requires the promotion of values that encourage consumption standards that are within the bounds of ecological possibility and to which all can reasonably aspire.

growth, provided the content of growth reflects the broad principles of sustainability and non-exploitation of others. But growth by itself is not enough. High levels of productive activity and widespread poverty can co-exist, and can endanger the environment. Hence sustainable development requires that societies meet human needs, both by increasing productive potential and by ensuring equitable opportunities for all.[4]

An expansion in numbers can increase the pressure on resources and slow the rise in living standards in areas where deprivation is widespread. Though the issue is not merely one of population size but of the distribution of resources, sustainable development can only be pursued if demographic developments are in harmony with the changing productive potential of the ecosystem.

Growth has no set limits in terms of population or resource use beyond which lies ecological disaster. Different limits hold for the use of energy, materials, water, and land. Many of these will manifest themselves in the form of rising costs and diminishing returns, rather than in the form of any sudden loss of resource base. The accumulation of knowledge and the development of technology can enhance the carrying capacity of the resource base. Sustainability requires that long before the ultimate limits are reached, world must ensure equitable access to the constrained resource and reorient technological efforts to relieve the pressure.[5]

B. Agenda 21 And Sustainable Development

According to Agenda 21, States have decided to establish a new global partnership. This partnership commits all States to engage in a continuous and constructive dialogue, inspired by the need to achieve a more efficient and equitable world economy, keeping in view the increasing interdependence of the community of nations and that sustainable development should become a priority item on the agenda of the international community. It is recognized that, for the success of this new partnership, it is important to overcome confrontation and foster a climate of genuine cooperation and solidarity. It is equally important to strengthen national and international policies and multinational cooperation to adapt to the new realities.

Economic policies of individual countries and international economic relations both have great relevance to sustainable development. The reactivation and acceleration of development requires both a dynamic and a supportive international economic environment and determined policies at the national level. It will be frustrated in the absence of either of these requirements. A

4. *Report of the World Commission on Environment and Development, op.cit* 44.

5. *Id.* at 45.

supportive external economic environment is crucial. The development process will not gather momentum if the global economy lacks dynamism and stability and is beset with uncertainties. Neither will it gather momentum if the developing countries are weighted down by external indebtedness, if development finance is inadequate, if barriers restrict access to markets and if commodity prices and the terms of trade of developing countries remain depressed. The record of the 1980s was essentially negative on each of these counts and needs to be reversed. The policies and measures needed to create an international environment that is strongly supportive of national development efforts are thus vital. International cooperation in this area should be designed to complement and support - not to diminish or subsume - sound domestic economic policies, in both developed and developing countries, if global progress towards sustainable development is to be achieved.[6]

According to Philippe Sands[7], international environmental agreements have continuously expanded the boundaries of common responsibility and United Nations Conference on Environment and Development (UNCED) endorsed the general principle that States have a 'common responsibility' for environmental protection and sustainable development.[8]

C. Relation Of 'Sustainable Development' With Sources Of General International Law

Article 38 of the Statute of the International Court of Justice enumerates the following sources of international law:

(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;

(b) international custom, as evidence of a general practice accepted as law;

(c) the general principles of law recognized by civilized nations;

(d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

'Sustainable development' now falls under almost each of the aforesaid four sources of international law from (a) to (d). It falls under 'international conventions' because it falls squarely under the U.N. Convention on Biological Diversity[9] drawn up at United Nations Conference on Envionment and

6. Agenda 21, Section I (Social and Economic Dimensions), Chapter 2, entitled, 'International Cooperation to accelerate Sustainable Development in Developing Countries' and Related Domestic Policies'.

7. Director, Foundation for International Environmental Law and Development (FIELD), Kings College, London University, London.

8. *The 'Greening' of International Law: Emerging Principles and Rules*, 1 INDIANA JOURNAL OF GLOBAL LEGAL STUDIES 294 (1994).

9. Convention on Biological Diversity, 31 INTERNATIONAL LEGAL MATERIALS 818 (1992).

Development (UNCED) in 1992. Besides, there are several other Conventions starting since 1949.[10]

It falls under clause (b) i.e. under 'international custom' because the United Nations General Assembly has constituted U.N.Commission on Sustainable Development and Resolutions of the General Assembly passed by large majorities are considered to be evidence of instant custom and thus a source of international law.

'Sustainable development' falls under clause (c) also inasmuch as all civilized nations now recognize the need to follow a path of 'sustainable development'.

'Sustainable development' also falls under clause (d) inasmuch as it is now a subject of copious writing and teachings of the 'most highly qualified publicists of the various nations'.

Thus from all angles, the concept of 'sustainable development' is an important guiding factor for the development of international law.

II. Development Of International Law

'Sustainable Development' has become a goal to be achieved by the international community and that it also falls under the various sources of international law. It is a well-known concept that law in every society is used as an instrument to achieve its socio-economic objectives. When 'sustainable development' has become an objective to be achieved by the international community, naturally international law should be used more and more to achieve this vital objective. Sustainable development is now a peremptory norm of general international law i.e. it has become jus cogens[11] in the field of international law.

10. Inter-American Tropical Tuna Convention, 1949, 80 U.N.T.S. 3; Treaty on Principles Governing the Activites of States in the Exploration and Use of Outer Space, Including the Moon and other Celestial Bodies, 1967, 610 U.N.T.S. 205 ; Convention on Wetlands of International Importance Especially as Waterfovl Habitat, 1971, 996 U.N.T.S. 245 ; UNESCO Convention on the Protection of the World Cultural and Natural Heritage, 1972, 27 U.S.T. 37, 40, 11 International Legal Materials 1358; Convention on the Conservation of Migratory Species of Wild Animals, 1979, 19 International Legal Materials 11; United Nations Convention on the Law of the Sea, 1982, 21 International Legal Materials 1261; United Nations Food and Agricultural Organisation Plant Genetics Undertaking, Art.1. U.N. Doc.C/83/Rep. (1983) and United Nations Framework Convention on Climate Change, 1992, 31 International Legal Materials 849.

11. *Jus cogens* is the body of those general rules of law where non-observance may affect the very essence of the legal system to which they belong to such an extent that the subject of law may not, under pain of absolute nullity, depart from them in virtue of particular agreement.
Art. 53, 64 and 71 form *Jus cogens* regime of the Vienna Convention on the Law of Treaties. Art. 53 is the heart of the regime and provides:
A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present convention, a per-emptory norm of general international law is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by subsequent norm of general international law having the same character.

A. Directions For Development Of National And International Laws

National laws and international law have traditionally lagged behind events. Today, legal regimes are being rapidly out-distanced by the accelerating pace and expanding scale of impacts on the environmental base of development. Human laws must be reformulated to keep human activities in harmony with the unchanging and universal laws of nature. There is an urgent need:

(i) to recognize and respect the reciprocal rights and responsibilities of individuals and States regarding sustainable develpment;

(ii) to establish and apply new norms for state and inter-state behaviour to achieve sustainable development;

(iii) to strengthen and extend the application of existing laws and international agreements in support of sustainable development; and

(iv) to reinforce existing methods and develop new procedures for avoiding and resolving environmental disputes.[12]

B. Recognizing Rights And Responsibilities

Recognition by States of their responsibility to ensure an adequate environment for present as well as future generations, is an important step towards sustainable development. However, progress will also be facilitated by recognition of, for example, the right of individuals to know and have access to current information on the state of the environment and natural resources, the right to be consulted and to participate in decision making on activities likely to have a significant effect on the environment, and the right to legal remedies and redress for those whose health or environment has been or may be seriously affected.

III. A Universal Declaration And A Convention On Environmental Protection And Sustainable Development - Need Of The Hour

Building on the 1972 Stockholm Declaration, the 1982 Nairobi Declaration, and many existing international conventions and General Assembly resolutions, there is now a need to consolidate and extend relevant legal

12. *Report of the World Commission on Environment and Development, op.cit.* 330.

principles in a new charter to guide state behaviour in the transition to sustainable development. It would provide the basis for, and be subsequently expanded into, a Convention, setting out the sovereign rights and reciprocal responsibilities of all States on environmental protection and sustainable development. The Charter should prescribe new norms for state and interstate behaviour needed to maintain livelihoods and life on our shared planet, including basic norms for prior notification, consultation, and assessment of activities likely to have an impact on neighbouring States or global commons. These could include the obligation to alert and inform neighbouring States in the event of an accident likely to have a harmful impact on their environment. Although a few such norms have evolved in some bilateral and regional arrangements, there is need for wider agreement on such basic rules for interstate behaviour.

MANASHANISHTA CHINTANAM AND *KARMA BIGAR HITAM*: THE TENOR AND THE THRUST OF THE CONCEPTS OF *MENS REA* AND *ACTUS REUS* FROM MANU TO MODERN DAYS

P.C. Moharana *

World of Law's belief, hirherto has been,
mens rea is of common law origin.
This, however, is a mistake of fact,
Sexpeer research conclusively proves that.
His *terra incognita* finding shows,
kudos for its first use, to India goes.

I. *Mens Rea*

The just reason for punishment is not the wrong act, but the wrong mind (known as criminal intention, criminal knowledge or foresight of consequences or recklessness etc.) with which the alleged lawless act is committed. Every criminal act, properly so called, is based on a moral fault or a moral wickedness of the doer, which alone and nothing else, justifies lawful punishment.

This moral fault theory is so natural that it can be observed in our daily life. For example, if a blind man treads (or steps onto) our feet, we are ready to excuse him, for his act is not intentional or malicious.

As no moral fault lies with the blind man for his wrong act of stepping onto our feet is not a crime. His mind remains innocent. Similarly acts of infants and children as well as those of persons *non compos mentis* who do not know the nature of their acts and that they are wrong or contrary to law (at the time of doing them) are not crimes, their minds being innocent of spite or intentional illwill. If a child utters abuse of any obscene word, you are merely amused, but when an adult does so, you take umbrage. The cases of children *doli incapax* and persons of unsound mind illustrate absence of *mens rea* and therefore exemption from imputability.

The moral fault theory can be observed from nature too. When you stir a hornets' nest, an intentional act manifesting your moral fault, the wasps try to punish you by their stings with all their fury. In the absence of your moral fault of such stirring, they do not demonstrate such ire. Their reaction explains the principle of *mens rea*, that moral fault or intentionality of law's infraction is the just ground of punishment and not the wrong act alone. Monkeys and some

*Sexpeer. Former Lecturer, Faculty of Law, University of Delhi, Delhi.

other animals express similar furious reactions.

A. The Common Law Doctrine Of Mens Rea

In the words of Sandhwalia, Punjab and Haryana C.J.,

The maxim *actus non facit reum, nisi mens sit rea* is rooted in the antiquity of English legal history. The requirement of quility state of mind at least for the more serious crimes had come to be developed even by the time of Coke, which indeed is as far as the modern lawyer need go. In his institutes, Coke categorically states the law as follows :[1]

> If one shoots at any wild fowl upon a tree, and the arrow killeth any resasonable creature afar off, without any evil intent in him, this is *per infortunium* (namely it is an accident and not culpable homicide).
>
> It would thus appear that even from the time of Coke onwards, it was well-settled that the doctrine of *mens rea* epitomised the twin premise of English criminal jurisprudence that in order to constitute a crime there must be an *actus reus* accompanied by the requisite *mens rea*. To put it in simple language, a completed offence requires both physical overt act and also a guilty state of mind. In crimes requiring *mens rea* as well as *actus reus*, the physical act must be contemporaneous with the guilty mind. It is not enough that mentally innocent act is subsequently followed by *mens rea*. To put it in the classic words of Lord Kenyon. C. J. in *Fowler v. Padget* (1798)...The intent and the act must both concur to constitute the crime.

It is submitted that the purpose of our discussion is to establish that the loctrine of *mens rea* was rooted in the antiquity of Indian legal history and the common law doctrine started its journey only when the hitherto long march of he Indian concept of *mens rea* was halted by the onset of foreign rule over ndia.

Though the common law doctrine is traced back to St. Augustine(5th Century A.D.) and to Seneca (1st Century A.D.) the *mens rea* formula, namely, *ctus non facit reus, nisi mens sit rea* finds legislative mention only in the 12th Century in Leges Henrici (laws of Henry I). This was the period when the ommon law was evolving and along with it the rule of *mens rea*.

It is a strange coincidence that when the common law concept of *mens rea* as emerging in the 12th Century, in the self-same 12th Century, the Indian oncept of *mens rea* hitherto being in existence for millennia, was suffering an clipse due to foreign aggression. Thus one can well imagine the comparative ncientness of the Indian concept of *mens rea, vis-a-vis*, the common law rule. the common law doctrine appears more developed today, that is because it

1. Commissioner of Income Tax, Patiala v. Messrs Patram Das etc.,AIR 1982 Punjab and Haryana 1.

is not as ancient as India's is and their rule has been shaped and reshaped only in modern times by such galaxy of luminous judges like Coke, Blackstone, Stephen, Goddard et al during whose period Indian laws remained eclipsed by foreign rule for three-quarters of a millennium and therefore could not make strides as did the common law concept.

During the course of evolution of the common law rule of *mens rea*, its meaning underwent transformation. Intentionality of infraction of the law, not moral fault as in earlier stage of evolution, is the decisive factor in determination of *mens rea*. Thus under the present rule of *mens rea*, the defendant can be punished only if the following conditions are fulfilled :

a) It is proved that he has committed the forbidden act (the *actus reus*);

b) It is proved that he intentionally (knowingly or recklessly etc.) committed the act (i.e., with the *mens rea*) and

c) The accused failed to bring his case within one of the excuses or justifications for his act as permitted under the criminal law (The IPC provides of such escape routes under Chapter IV, Sections 76 to 106) that exempt the defendant from criminal liability.

B. Plurality Of Mens Rea

All crimes do not require one and the same single state of the guilty mind or *mens rea*. Many indeed are the states of such mind expressed in a single legalism *mens rea*. The state of the guilty mind differs from crime to crime. Under the Indian Penal Code, for example, theft (S. 378) requires a state of mind having a dishonest intention (causing of wrongful loss or wrongfull gain), whereas the traffic offence of rash driving or riding on a public way (S.279) needs a different *mens rea* (state of the mind) which must be 'rash' or 'negligent'.

In the vocabulary of the Indian Evidence Act, 1872, *mens rea* includes states of mind such as 'intention', 'knowledge', 'good faith', 'negligence', 'rashness', 'ill-will' or 'goodwill' towards any particular person and 'motive.'[2]

The offences under the Indian Penal Code, both express and implied, deal with over a score of *mens rea* expressed variously as :

1. 'Motive' (Ss. 162,163,164 etc.)
2. 'Intentionally' (Ss. 34,35,37 and many other sections)
3. 'Wilfully' (Ss. 107,177 and 477A)
4. 'Of his own accord' (s.94)

2. Sections 14 and 8. These sections deal how *mens rea* is proved or disproved, and what state of mind is relevant.

5. 'Voluntarily' (Ss. 39,107,112 and many other sections).
6. 'Knowingly' or 'Knowledge' (Ss. 39,80,84 and many other sections).
7. being 'aware of facts' (s.142)
8. 'believe' (S. 167,181, etc.)
9. 'believing' (S. 197)
10. 'having reason to believe' (S.26,136,156 etc.)
11. 'ignorant' (S. 137)
12. 'dishonestly' (Ss. 24,209,246,378 and many other sections)
13. 'corruptly' (Ss. 196,198,219,220)
14. 'deceitfully' (S. 493)
15. 'fraudulently' (Ss. 25,206,207,208, and many other sections)
16. 'wrongfully' (Ss. 23,340,341 and many other sections).
17. 'malignantly' (s. 153,270)
18. 'maliciously' (S. 219,220,295A)
19. 'wantonly' (S. 153)
20. 'good faith' (S. 52,76,77 and other sections).
21. 'negligently' (Ss. 129,223,225A etc.)
22. 'rashly' (Ss. 279,280,284 and many other sections).
23. 'common intention' (s. 34), a type of group *mens rea**
24. 'common object' (s. 149) a different type of such *mens rea***

These two dozen states of guilty mind or *mens rea* (*mentes reae*, to be more precise) show different degrees of graveness of wrong mind on which criminal liability is assessed.

II. Strict Liability

Strict liability means liability without fault or *mens rea*. Complexities of modern life have forced lawgivers to *mens rea* or quilty mind. Thus *actus reus* alone becomes punishable in derogation from the rule 'no *mens rea*, no crime' rule. Strict liability is mostly imposed on oft recurring minor offences like sale of illicit liquor, adulterated food and spurious drugs, environmental pollution, sale of narcotics, traffic violations and other acts which cause danger to health, safety and well-being of the community. Such offences are called public welfare offences and the faultless liability is tolerated inasmuch as the penalty

* 'common intention' as a group *mens rea* is used when it is not possible to prove which delated committed what offence or how much in a group crime. Under a legal fiction each member of such a group is construed to have committed the *actus reus*.

** 'common object' is another kind of group *mens rea* which may be formed on the spot without any prior concert (unlike the case of 'common intention'). Both are related to fictional *actus reus*.

is small. Some such offences which are treated as strict liability cases in the West come under the provisions of the Indian Penal Code (the like of which British don't have thus far and have only a Draft Code and God alone knows when the same will be adopted) and hence need *mens rea*[3] and therefore cannot be called cases of strict liability. No less an authority on criminal law than J. Hall observes that liability that is not based on moral fault (*mens rea* cannot be called criminal liability and therefore designates strict liability as 'corrective law' or 'administrative regulation' agreeing with a peer. Hall logic applies *afortiori* to what are called offences of absolute liability where no defences are allowed.

III. *Manashanishta Chintanam*[4] (or *Mens Rea*)

Under Manu Code:-

...Where does crime live before its commission?
'In mind', tells Manu through illustrations.[5]
By words and implication, he tells,
How mind crime instigates, he gives details.
'Manashanishta Chintanam' precedes,
and then to 'Karma Bigarhitam' leads.[6]
Mens rea, Manashanishta Chintanam[7]
Works *actus reus*, 'Karma Bigarhitam'.
Augustine's seven-word contribution,[8]
Manu's range outshines, in application.
Manu's is full-bodied delineation,
of *mens rea* and *actus reus* conception,
In denotation and connotation,
At early stage of civilization.
Monumental is Manu's *mens rea* deal,
who, mind's crime role probed, with uncanny skill.

3. Chapter XIV : Section 268 to 294A.
4. The legalism in Sanskrit *Manashanishta Chintanam* means fore-thought or premeditation to commit a crime or any wrong act. it is same as malice afore-thought or intentional wrong.
5. M: XII, 3 to 8.
6. *Karma Bigarhitam* signifies a forbidden or lawless act, namely the *actus reus*. The Latin legalese was coined by Kenny (though the concept was already in use) only in the dawn of the 20th Century, whereas the Sanskrit phrase exists from time immemorial.
7. M: XII, 5: note the euphony (sound harmony) or sound similitude of the Sanskrit version *Manshanishta Chintanam* with the Latin term *mens rea*.
8. The common law doctrine of *mens rea* is said to be derived from following words of St. Augustine: *ream linguam non facit, nisi mens rea*. But he was not a law giver like Manu was and therefore could not embody the rule in actual laws as Saint Manu had done ages before him and in a more comprehensive way.

Mens rea's definitive component,
His Code put in many crimes, for punishment.

We notice less criminal tendencies among those who have higher learning. This is because they understand the evil nature of criminal acts better than those learned less. Therefore, if a crime is committed by a man more learned, he ought to get more punishment than one learned less, for the rule of *mens rea* is - the greater the realization of culpability of the wrongful act, the greater is the quantum of punishment. This aspect of subjective *mens rea*'s high water mark we find in Manu when his law ordains that before awarding lawful punishment to any law-breaker, the king must properly take into consideration his (offender's) learning, physical capacity and place and time of commission of the offence. His law, in English verse reads :[8a]

place and time of crime and outlaws learning,
And their capacities have a bearing,
On the deserts just, that outlaws must get,
King must these judge, ere awarding punishment.

A. Objective And Subjective Mens Rea

According to Holmes, law disregards the personal peculiarities of the individuals delated of crimes and adopts the 'reasonable man' test to determine liability. Law takes no account of the limitations, in the capacity of the delated (accused) to conduct himself lawfully, namely the inhibitions 'which arise from abnormal instincts, want of education, lack of intelligence and all the other defects which are most marked in the criminal classes.[9] Law that establish standards of conduct, 'take no account of the incapacities, unless the weakness is so marked as to fall into well-known exceptions such as infancy or madness.'[10]

It is submitted that Holmes's observation is based on ignorance of ancient Indian law, recorded in Manu Code, where such incapacities were well-taken into consideration to determine liability and punishment.

'Personal peculiarities' and 'incapacities' besides infancy and insanity were the criteria under Manu Code for determining just deserts, as seen in the following discussion.

Let us take a hypothetical case and apply the law which Manu had ordained in his days to find out ourselves if he had taken the states of mind, mental elements and other aspects, which Holmes calls as 'incapacities' of the accused

8a. M. : VII : 16.
9. The Common Law 45 (1887).
10. *Id.* at 50.

into consideration at all in awarding punishment (as at that infancy of civilization subtler distinction between stages of conviction and sentencing was not made).

(i) Facts Of The Hypothetical Case

A lowborn Shudra, a Vaishya, a Kshatriya, a Brahmin and a King, each prigs a watch (of the same make) priced at one hundred bucks. Under Manu's class-nuanced laws what punishment would be awarded to each of them, though each committed the same offence ? An offence is same when ingredients are the same.

Manu ordains amercement for theft of non-gold objects (theft of gold being one of the major crimes or felonies) and in this the fine payable by each of them shall be different because of their difference in ranks, capacities etc. (namely, due to subjective *mens rea* reasons):-

a) The Shudra's amercement shall be 100x8=800 bucks.[11]

b) The Vaishya (of the business or peasant class commoners) has to pay a fine of 100x16=1,600 bucks[12]

c) The Kshatriya is to be fined 100x32=3,200 bucks.[13]

d) The Brahmin takes a still heavier burden. His fine may be one of the following three:-[14]

i) 100x64=6,400 bucks
ii) 100x100=10,000 bucks
iii) 100x2x64=12,800 bucks.

e) The King, however, takes the cake in so far as the burden of punishment is concerned. He is to be amerced :
1,600x1,000=16,00,000 bucks.[15]

The relevant Manu Laws translated into English verse in Popeful rhyming pentameter, follow:-

When a Shudra does non-gold object thieve,
Eight times its price as fine, he has to give.
If a Vaishya does same offence commit
Sixteen times as the fine he has to meet.
If a Kshatriya commits a like theft,

11. M: VIII: 337 The word 'bucks' is used as a synoym for 'rupees' in India to denote that it is a common name for each monetary unit. (Today's slang is tomorrow's standard language and today's standard language is tomorrow's archaism).
12. M: VIII: 337.
13. *Ibid.*
14. M: VIII: 338.
15. M: VIII: 336: The King has to pay one thousand times more than a commoner pays as fine in view of his position, social rank and capacity. One being in a position to enforce law and committing crime, meets with heaviest punishment. Note subjective *mens rea* applied by Manu. Today's petty ruling tyrants should bear this sublime rule in mind.

thirty-two times as fine await his fate.
A like offence, if a Brahmin commits,
Higher still is the amercement he meets,
Which must, sixty-four times at least be,
Or one hundred time price of thing, thieved he;
Or he may be asked to pay further more,
Which shall become twice of times sixty four.[16]
If a ruling King such an offence does,
Sixteen thousand times he must pay, say laws.[17]

Why such unequal punishment under Manu laws[18] that shocks our constitutional sense of equality today? Section 379 of the Indian Penal Code recognizes no such distinction based on class. It is because Manu applied subjective concept of *mens rea* to such wide an extent as almost to bring individualization of criminal justice.

Manu considered the higher intellectual attainments that go with higher social ranks and the higher culpability that must attach respectively to men of such ranks when they transgress the laws, for their minds comprehend the reprehensible nature of the criminal act more than what lower born, less learned or unlearned minds can. When a learned Brahmin or a King made a breach of the law, the culpability of the respective mind was at its acme and hence punishment was the heaviest. Shudras and quondam untouchables had no access to learning which entailed their incapacities and under the subjective *mens rea* rule, of which Holmes was not aware of, when he made his well known remarks.

But those who are familiar with the restricted tenor of the common law *mens rea* and its vocabulary as used in the Indian Penal Code in different word-avtars, would like to see similar use by Manu. We will now discuss some tell-tale versed laws of Manu (in English pentameter version) whose terminological similitudes conveying *mens rea* component of specific crimes are striking indeed. With such Manu treatment of *mens rea*, is germane what is known to the world of criminal law as 'Wootton schemes':-

Baroness Wootton unwittingly pleads.
And in *mens rea* use, to Manu Age leads.
Indian use of *mens rea* in ancient age.
Has, hitherto, escaped law world's knowledge.
The Indian culture must, its due get.
As pioneer of the *mens rea* concept.

16. M: VIII: 337 and 338.

17. One thousand times of the fine that Vaishysa pays which means sixteen thousand times of the price of the non-gold materials, the King mooched. M: VIII: 336 and 337.

18. Canto VIII: Verses 337, 338, 336.

Wootton model of strict liability does not exclude *mens rea* lock, stock and barrel. The implication of her scheme is that those who commit crimes without *mens rea*, shall get less punishment or 'treatment' (an euphemism for harsh punishment) than those who commit them with *mens rea*. In other words, in cases of crimes with *mens rea*, punishment or 'treatment' shall be more and in cases of crimes without *mens rea*. such punition shall be less. The baroness thinks that such use of *mens rea* would meet the present-day rise in crimes, when driving offences pose a great threat.

It is interesting to find out if Manu, in most ancient age did incorporate similar use of *mens rea* in select crimes (though not for driving of fences as such mechanical driving was not there in his days):-

For a crime major,[19] a brahmin's punishment.
Five hundred bucks, middle level amercement;
If act was *not wilful* but if *wilful*,
Banishment from the kingdom is the rule.
With him he can, his outfits and goods take,
An indulgence, not for non-Brahmins' sake.[20]
When non-Brahmin such major crime commits,
All his property to state, he forfeits.
If act was *not wilful*, but if *wilful*.
Banishment sans property, is the rule.[21].

What is the implication of this Manu Code law which incorporates modern *mens rea* vocabulary 'unintentionally' and 'intentionally'and which we substituted here by similar but shorter words (synonyms) 'unwilful' and 'wilful' in adjective form for the sake of metre, namely to comply with the requirement of pentametre verse? the substance of Manu law is simply this:-

Crime, when intentional, more punishment.
But less it is, when absent is intent.

This too is the pith and sustance of wootton proposal and eloquently speaks of Manu's wisdom, though he applied them only to select crimes and not generally. This Manu law clearly testifies that in case of intentional commission of any major crime, the punishment was much higher than the one committed unintentionally.

In case of unintentional commission of major crime by a Brahmin a fine of

19. Killing a Brahmin, drinking liquor, theft of gold and adultery with one's teacher's wife were the four major crimes under Manu Code and twenty-one other crimes were deemed to be their equivalent, making a total of twenty-five major crimes (felony).

20. Contextual verse translation of CantoIX-241. 'Pana' was a monetary unit like rupee or dollar (bucks being more appropriate), we have used to make sense in modern persepective.

21. M. : IX, 242.

five hundred bucks was to be imposed. But if a non Brahmin (namely, kshatriya or Vaishya including men from peasant castes) committed the same offence (a major crime) unintentionally, then all his property he had to surrender to the state (king). If the major offence was done intentionally, much heavier punishment was awarded-banishment from the kingdom. If the accused was a brahmin, he could carry his dress materials and money with him but a non Brahmin offender had to leave the state empty handed, (the principle of theft of non-gold object not applyiong to this case of major crime).

Manu at times provides alternative punishments for the same offence. The probe into *terra incognita* bring to light the use of famed *mens rea* and *actus reus* conceptions in ancient Indian laws, sublimely called *Dharma*. The words used in the aforesaid Manu verses clearly signify the states of the mind (namely the *mens rea* element) of the out law concerned.[22]

The punishment by state (king) as provided for above was awarded to such offender who underwent self-punishment called '*prayaschitta*' (or penance) under the dimorphic punishment scheme of the code. But if a man did not undergo such self punishment, heavier state punishment was inflicted on him namely, branding of a headless man on the forehead for killing a brahmin; the flag of a liquor shop for boozing liquor, a dog's foot for mooching (thieving) gold (theft of non-gold meterial was a less or minor crime) and vagina for adultery with one's teacher's wife.[23]

Those who performed penance prescribed under the Code, escaped branding ignominy and were punished with fine or loss of property, if acts were unintentional, but were expelled from the kingdom, if acts were intentional.

Under ancient dispensation , all sins were crimes and were subject to the law of penance or *prayaschitta*. Man sublimator, civilization-maker, martinet Manu records that under the Vedic provision no pennance or *prayaschita* was needed if the sinful act was committed unintentionally[24] but it was necessary if the act was intentional.

Sins vanish like the dew drops at sunlight,
If you read Texts sacral and act alright,
For such readings innerheat generate,
which burn up sins and all their evil effect
(So say Texts Holy).
(Dwitkiyam na samaacharet)
Unwittingly or wittingly, crime done,
regret and never make repetition.

22. M: IX-241,242.
23. M: IX-237.
24. M: XI-45.

Commit no crime twice, Manu ordains,
To be freed from evil effects', he maintains.[24a]

Many acts which come under positive morality today, came under laws in ancient times and it is therefore not improper to enquire whether to such laws Manu Code applied principles of *mens rea* while providing for a range of self-punishments. In other words, did the self-punishment increase if the forbidden act (sin or crime) was intentional and decrease if such evil act was unintentional?

(ii) Illustration Of Another Manu Law

A, a brahmin, believing a woman to be of his own caste (but who really belonged to a fearsome ancient untouchable caste) has sexual intercourse. The punishment for A, under Manu Code, is that his (A's) caste-rank falls, but he does not become equal in rank with the untouchable woman he had sex with for want of knowledge of her caste (*mens rea* component). But if A has sexual intercourse knowing her low caste status (and not believing her to be Brahmin), the punishment is more and A becomes equal in rank with the lowest-born woman. In this second case, punishment is higher because the *actus reus* ('Karma Bigarhitam') was done knowingly (adverbial *mens rea* vocabulary of modern codes). The germane Manu law,[25] versicularly reads:-

A Brahmin's caste rank falls when sex has he,
with a lowborn untouchable *Chandali*;
Unknowingly. that she was so born low,
Her food and gifts receives and did love show.
When her caste he knows, he her caste's becomes,
If knowingly , The Brahmin to sex comes.

This verse clearly shows that the consequences of sexual liaison with a quondam *chandali* are different if the mental element of the doer was different. The Brahmin becomes equal in rank with that of untouchable caste when he had sex knowing her to be so. But without knowing her actual caste, if he had such sexual relstionship, he does not become equal in social rank with the *chandali*, though nevertheless his caste rank falls (but still ranks higher than that of the *chandali*). To redeem from the consequences of this evil he has to perform apposite restoration (*praysachitta*).

Intoxication was one of the four major crimes because it was incompatible with high culture. Did not Aristotle approve of double punition of inebriate offenders[26] and did not Coke hold drunkenness as an aggravation and not a mitigation for the offence (as under specific intent cases of English Common

24a. M: XI: 232.
25. M: XI- 175.
26. *Ethica Nichomachea.*

law), committed by the wino? If a man, unknowingly, took wine extracted from date or palm tree, he could be cleansed and freed by undergoing a rite of passage or transformative ritual.[27] but if he drank such wine knowingly, capital punishment must be imposed. How draconian was the law relating to intoxication; The Manu law reads :-[28]

A man is cleaned by a rite of passage,
If he took date-palm wine as beverage,
when such drink was taken unknowingly,
But death is rule, if he drank knowingly.

How draconian was the law against intoxication, that intentional inebriation was punishable with death as the law contained in the aforesaid verse asserts. It was so because ancient Indian law was a scholars' law aiming at establishing a high culture and sublimation of man, and liquor being a derogation from that lofty destination, was punished so rigorously.

Similarly, killing a Brahmin was the foremost major crime for the same logic of promoting and protectiong scholarship. 'Knowledge prized, ignorance despised' seems to be the kernel or the ethos of the ancient legal system and the cornerstone of that high culture. Therefore, killing a *Dharma* knowing *(dharmajna)* Brahmin (at that age, they were mostly so) was tantamount to killing learning and so such homicide was the gravest offence. It was like killing a Homer or a socrates. Which is why, was punition so draconian : Law unambiguously prescribed that if any one killed a Brahmin unintentionally or unknowingly, he could be freed by prescribed self-punishment and state punishment (ancient punition being dimorphic). But if any one intentionally or knowingly killed a Brahmin (a synonym for scholar) no redemption was possible he was to receive prescribed state punishment as discussed earlier which included banishment from the kindom. In providing for this major crime, Manu has taken the mental element or state of the mind of the accused into consideration and intentional act met with harsher and higher punition than unintentional one :

No *mens rea*, no crime is Vedic vision,
Manu this records in its provision.[29]
Act unintentional, no penance needs,
Atone, if intentional, Veda pleads.
Wilful sin, Vedic recitation cleans,
But penance differs for unwilful sins.

Through this verse, Manu records for posterity, the Vedic ordinance that

27. Rite for example, as performed in initiation (upanayana) ceremony.
28. M: XI-146.
29. M:XI-45.

ordains a restoration, expiation or penance for sinful act or crime (malum in se) only when it was committed intentionally, of the doer's own volition in true sense of the term (which would exclude from its scope if there were elements of meddling to so impregnate the accused's mind). If the evil act was committed unintentionally or inadvertently or under mistaken belief or otherwise, no such penance was required. That is Vedic sagacity, using *mens rea* at the very dawn of civilization. So old (at least ten millennia according to honest assessment[30]) yet so modern in outlook, so far as the rule and the philosophy of the *mens rea* conception is concerned. Man's magna carta, (metaphorically speaking) which in the West was secured after hard struggle, was divinely bestowed here on holy Indian soil by the sacral Vedas and the concept of dharma. The Vedas thus visualized and applied the *mens rea* rule to realms of both sin and crime when modern distinctions between the two did not exist.

By setting dogs on saints, Indra once did,
An intentional sin commit indeed,
The saints on Indra did enjoin penance,
Who for counsel, to Brahma went, at once.
Do penance by rite of fire sacrifice,
Swift came for Indra, Creator's advice.
Wash sin intentional by penance due,
Indra episode, record keeps for you.
Some, for sake of one's sublimatiom,
Say, even unwilful sin, needs expiation.[31]

Raison d'etre of punishment by king or state-

Scofflaws, when die, like piopus to Heaven go,
Clean; if by king(state) they were punished so.[32]

Raison d'etre of self-punishment -(self-penalization like penance, redemption, expiation or claning, by whatever name called):

Self is the best witness of a crime, that knows whether crime was intentional or unintenrional; accidental or wittingly committed that is knowing the likely consequences of the act or the self was tricked into the crime by legerdemain or stratagems of others; by deception or hocus pocus. Further,

Self is part of supreme self and witness best,
Of self-crimes, so truth tell and act honest

The Higher Self, from which the self is born, is always witness to what one's self is doing. Therefore, self-punishment is more legitimate than any other form of punishment which may arise out of misuse of power by state or by mistake

30. Varma Satyakama, VEDIC STUDIES (1984).
31. M: XI - 45 and Commentary thereon by R. Bhatta, MANUSMRITI 311.
32. M : VIII -318.

(as in *Timothy John* case where the innocent was hanged to death). Self-punishment is more legitimate in view of the self being the best witness:-

'Self is part of Supreme Self, Witness best',
Tell no lies and live up to the right test.[33]

When in modern times, in some strict liability situations, burden of proof lies on the accused to prove that he had no *mens rea* the moral base is still retained in determination of criminal liability.

IV. Mind's Crime Role: *Mens Rea* Dissection By Manu

Premeditation, to proscribed act leads.
Mind as inciter, criminal act breeds.
Thus did Manu, mind's role in crime, dissect,
To be pioneer of *mens rea* concept.
Manashanishata Chintanam means that,[34]
Mind musing on malefaction, ere act.
Wealth by means unlawful, you must not long,
Muse not on wealth that to others belong.
To commit any crime, never meditate,
Notions bizarre you must not cultivate.[35]
These illustrate wrongful actions of mind,
That millennia back Manu did find.
Four wrongful actions from speech too arise,
which all men to be crime-free must misprize.
Back-biting lies, words of pugnacity,
Tall talks inapt, senseless loquacity.[36]
Let us ancient bodily crimes look at,
What is not given, by force to grab that.
Lawless violence and adultery,
From body arise these criminal acts three
All these ten acts were crimes in Manu's Age,
And as such were dissected by the sage.[37]
Manashanishta Chintanam begets,
Karma Bigarhitam; as he dissects.
For crimes true thence, mind is instigator,[38]

33. M : VIII -84.
34. M : XII: 3 to 7.
35. M : XII: 5.
36. M : XII: 6.
37. M : XII: 7.
38. M : XII: 4.

No one are him, x-rayed *mens rea* better.
Where does crime live before its commission?
In mind, tells aforesaid illustration.
Excellent is this *mens rea* dissection.
Locating crime before its commission.
Act Vicious, will vicious-the two.
When together concur, do the crime brew.
This is implied in the verse cited,
Probing mind's role, ere crime is committed.

CONSERVATION OF WETLANDS — LEGAL PERSPECTIVES

*Sanjeev Adlakha**
*Rajat Sethi**

I. Introduction

Wetlands have traditionally been viewed as Wastelands and for the better part of our civilisational experience, they have been shunned as breeding grounds of disease, death and despair. They have appeared as sinister and forbidding, with little economic value throughout most of recorded history. For example, Dante's Divine Comedy describes a marsh of the styx in the upper Hell as the final resting place for the wrathful:

> Thus we pursued our path round a wide arc of that ghost pool. Between the Soggy Marsh and arid shore. Still eyeing those who gulp the Marish (Marsh) foul.

At the outset, it would be pertinent to dispel the myth that wetlands are wastelands. Wetlands are, in fact, the most productive of all ecosystems, at times having a productivity even more than that of tropical rain forests. Wetlands provide a wide range of services to mankind, some of which are listed below :

1. Wetlands improve water quality by cleansing and detoxifying polluted water.
2. Wetlands play an important role in control of floods. They store the rain water and release its run-off evenly.
3. Wetlands located in the coastal areas play an important role in shoreline stabilization and storm protection.
4. Wetlands are a rich source of bio-diversity.
5. Wetlands have a key role to play in ground water recharge and discharge.
6. Many of the species of flora and fauna found in Wetlands act as bio-indicators, as they are extremely sensitive to any deterioration in their environment.
7. Many local communities depend on wetlands for their subsistence activities including livestock herding, hunting and fishing.

It is thus evident that far from being wastelands, wetlands are in fact

* Students, LL.B. III year, Campus Law Centre, University of Delhi, Delhi.

water-logged wealth, which need to be conserved for future generations.

The wetlands in India, and in other parts of the world are facing threats from a wide variety of sources, and are in an urgent need of protection. A detailed exposition of various threats faced by wetlands may be found in 'Water-logged Wealth' by Edward Maltby.[1]

The present paper is confined to the study of legislations and the Ramsar Convention relating to the use and conservation of wetlands.

II. Wetlands Defined

Wetlands are ecosystems transitional between terrestrial and aquatic, encompassing a wide variety of habitat types. Thus it has been difficult to come up with a precise definition of wetlands. In fact, the term 'Wetlands' has not even been defined in dictionaries.

Some of the definitions that have gained acceptability are described below:

(a) The Ramsar Convention of 1971 defines wetlands as 'areas of marsh, fen, peatland or water, whether natural or artificial, permanent or temporary, with water that is static or flowing, fresh, brackish or salt, including areas of marine water, the depth of which at low tide does not exceed six metres.'[2]

The Convention further provides that wetlands 'may incorporate riparian and coastal zones adjacent to the wetlands, and islands or bodies of marine water deeper than six metres at low tide lying within the wetlands.'[3]

(b) According to the US Fish and Wildlife Service, 'Wetlands are lands transitional between terrestrial and aquatic systems where the water table is usually at or near the surface, or the land is covered by shallow water'.[4]

Wetlands must have one or more of the following three attributes: (i) at least periodically, the land supports pre-dominantly hydrophytes; (ii) the substrate is predominantly undrained hydric soil; and (iii) the substrate is non-soil and is saturated with water or covered by shallow water at some time during the growing season of each year.

1. E. Maltby, Water-logged Wealth : Why waste the world's wet places? (1986).
2. Art. 1, Ramsar Convention on Wetlands of International Importance especially as Waterfowl Habitat, 1971.
3. *Id.*, Art. 2(1).
4. Federal Interagency Committee for Wetland Delineation, 1989. Federal Manual for Identifying and Delineating Jurisdictional Wetlands, US Army Corps of Engineers, US Environmental Protection Agency, US Fish and Wildlife Service and U.S.D.A. Soil Conservation Service, Washington, DC, Cooperative Technical publication.

(c) The US Corps of Engineers defines wetlands as 'those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.'[5]

The definition proposed by US Fish and Wildlife Service in 1979 has been accepted by India as the official definition of wetlands. The definition proposed by Ramsar Convention also finds acceptability in India.

It is evident from all the proposed definitions that they include three main components: (i) Wetlands are distinguished by the presence of water; (ii) Wetlands often have unique soils that differ from adjacent uplands; (iii) Wetlands support vegetation adapted to the wet conditions (hydrophytes), and conversely are characterized by an absence of flooding-intolerant vegetation.

These definitions also reveal that the term 'wetland ecosystem' encompasses a wide variety of habitat-types, for example, tanks, reservoirs, estuaries, freshwater lakes, deltaic wetlands, lagoons, marshes, floodplains, mangroves etc.

From a legal point of view, these definitions are of significance and importance at the national level to formulate a broad policy framework relating to protection and sustainable use of wetlands. However, so far as management and preservation of specific wetland types, or even specific wetland sites is concerned, such broad definitions may not be of much help.

It is submitted that keeping in mind the prevalent local conditions and problems afflicting wetlands, the State legislature should formulate legislations relating to specific wetlands types and sites within the State's jurisdiction.

III. Ramsar : A Convention On Wetlands Of International Importance Especially As Waterfowl Habitat

The Convention is so called because nations of the world got together in the Iranian town of Ramsar, and on February 2, 1971, signed a convention dedicated to the preservation of wetlands of international importance.

The Convention makes it obligatory on each contracting party to designate at least one site within its territory as a wetland of international importance.[6] These sites are also known as Ramsar sites.

5. *Ibid.*
6. Art. 2, Ramsar Convention.

As of June 1992, 565 wetlands covering an area of 6 million had been declared Ramsar sites. In 1981, when India ratified the convention, it designated Chilka lake (Orissa) and Keoladeo Ghana National Park (Rajasthan) as Ramsar sites. Four additional sites were designated in March, 1990. including Wular Lake (Kashmir), Harike Lake (Punjab), Loktak Lake (Manipur) and Sambhar Lake (Rajasthan).

Under the provisions of the Ramsar Convention, the contracting parties are under an obligation to formulate and implement their planning so as to promote the conservation of the wetlands included in the Ramsar list.[7]

The Convention also confers a right of information on the contracting parties and each contracting party is under an obligation to inform at the earliest possible time, if the ecological character of any wetland in its territory and included in the list has changed, is changing or is likely to change as a result of the technological developments, pollution or other human interference.[8]

The Convention further imposes an obligation on the contracting parties to promote conservation of wetlands and waterfowl by establishing nature reserves on wetlands, whether they are included in the list or not.[9]

It is submitted that though the convention is a step in the right direction, it lacks an effective legal mechanism for its enforcement.

It is submitted that the implementation of the provisions of this Convention is dependent on the will of the various contracting parties and that the Convention lacks teeth to enforce obligations under it against any of the contracting parties.

It is further submitted that right to information regarding the status of Ramsar sites under the convention has only been conferred upon the contracting parties. No such right accrues upon any non-governmental organization or even an individual interested in the cause of wetland conservation.

IV. Indian Legislative Measures

India abounds in various types of wetlands. However, most of these wetland sites are under threat from various sources. The National Conservation Strategy and Policy Statement on Environment and Development also recognizes the importance and significance of wetlands and threats faced by various wetland sites in India.

7. *Id.*, Art. 3(1).
8. *Id.*, Art. 3(2).
9. *Id.*, Art. 4.

Indian wetlands are facing threats from a wide variety of sources, but, even then, there is no one Central/State legislation relating to wetlands. However, there are legislations which have some bearing on wetlands protection and conservation.

A. The Wild Life Protection Act, 1972

It is an Act to provide for the protection of the wild animals, birds and plants and for matters connected therewith or ancillary or incidental thereto.[10]

The Act envisages the creation of National parks,[11] Game reserves,[12] Closed areas[13] and Sanctuaries[14] to attain its avowed objective of protecting wild animals, birds and plants. The Act also provides for an administrative regime to manage these protected areas, and in its various schedules lists many plant and animal species that are wholly or partially dependent on wetlands. It is these various species listed in the schedules that are accorded protection under the scheme envisaged by the Act.

Some of the sanctuaries and National parks that have been created by the state and central governments, after the enactment of this legislation, incorporated important wetland sites within their designated areas. The Act no doubt enacted with laudable motives, has fallen short of attaining its avowed objectives.

(a) The Act adopts a policing attitude towards the protection of wild flora and fauna. This entails massive input of resources which are not available. Therefore, most national parks and sanctuaries are under-staffed and security personnel are ill-equipped to discharge their onerous duties.

(b) The role of local communities in wild life protection has been slighted and they have been marginalised.

(c) Some of the provisions that permit hunting of wildlife, uprooting and cutting of wild plants are in a general phraseology and go against the overall spirit of the legislation.[15]

B. Water (Prevention And Control Of Pollution) Act, 1974

It is An Act to provide for the prevention and control of water pollution, and the maintaining or restoring of wholesomeness of water.[16] The Act provides for the establishment of Central and State Pollution Control Boards

10. Preamble to the WILDLIFE PROTECTION ACT, 1972.
11. Section 11, WILDLIFE PROTECTION ACT, 1972.
12. *Id.*, Sec. 36 .
13. *Id.*, Sec. 37.
14. *Id.*, Sec. 18, 38.
15. *Id.*, Sec. 11,12, 17B.
16. Preamble, WATER (PREVENTION AND CONTROL OF POLLUTION) ACT, 1974.

to achieve the above mentioned purposes.

The Act applies to wetlands, as wetlands would fall under the definition of 'stream' laid down in the Act.[17] Thus, the Central Pollution Control Board and the State Pollution Control Boards have the power to obtain information and to plan a comprehensive programme for the prevention, control or abatement of pollution in wetlands and to secure the execution thereof.

The Act clearly provides that it is the function of the Central Board to lay down, modify or annul, in consultation with the State Government concerned, the standards or level of wholesomeness of water for a 'Stream' defined in the Act,[18] which would also cover 'wetlands'. The Act itself does not lay down the standards in this respect but empowers the Central Board to determine the standards.

C. Coastal Regulation Zone Notification

By a notification dated 19 February 1991, under Section 3(1) and Section 3(2) (v) of the Environment (Protection) Act, 1986, and Rule 5(3) (d) of Environment Protection Rules, 1986, the coastal stretches of seas, bays, esturaries, creeks, rivers and backwaters which are influenced by tidal action (in the landward side) upto 500 metres from the High Tide Line (HTL) and the land between the Low Tide Line (LTL) and the HTL have been declared as *Coastal Regulation Zone (CRZ)*.

The CRZ notification classifies the coastal stretches within 500 meters of the HTL of the landward side into four categories.[19] One of these categories (viz. category I) includes:

(a) Areas that are ecologically sensitive and important, such as national parks/marine parks, sanctuaries, reserve forests, wildlife habitats, mangroves, corals/coral reefs, areas close to breeding and spawning grounds of fish and other marine life, areas of outstanding natural beauty/historical/heritage areas, areas rich in genetic diversity, areas likely to be inundated due to rising sea level consequent upon global warming and such other areas as may be declared by the Central Government or the concerned authorities of the State/Union Territory level from time to time.

(b) Area between Low Tide Line and the High Tide Line.

The CRZ notification clearly provides that no new construction shall be permitted within 500 meters of the High Tide Line in category I areas. Thus the highest level of protection is afforded to category I. It is also clear

17. *Id.*, Sec. 2(j).
18. –*Id.*, Sec. 16(q).
19. Para 6(1), Coastal Regulation Zone Notification, 1991.

from a cursory inspection of category I areas as specified under the notification that most of the important coastal wetland sites within 500 meters of HTL would fall within the purview of category I(CRZ - I).

D. Land Acquisition Act, 1894

Wetlands are a unique ecosystem, in the sense that both land and water laws apply to them. Wetlands also come under the purview of the Land Acquisition Act. The broad definition of 'land' given under the Act[20] includes 'Wetlands' within its ambit.

It is well settled that the term 'land' includes land covered with water. A pond or a pool of water comes under the caption 'land covered with water' and is 'land' for the purpose of the Act.[21]

The analogous position under English Law is contained in the definition of 'Land' under the Land Clauses Act, 1845 is all-embracing and includes other forms of property, mines, minerals, water and easements. The Acquisition of Land Act, 1919 (England) further extends the definition as 'including water and any interest in land or water, and any easement or right in or over land and water'.[22]

It is thus clear that 'wetlands' could come within the purview of the Land Acquisition Act of 1894 and can be acquired by the State for public purpose on payment of adequate compensation.

E. Legislations Pertaining To The Regulation Of Fishing In Wetlands

Fishing is one of the most visible and direct use of wetlands. Due to their unique status, fishing in wetlands is regulated by both Land and Water Laws. Fishing in most wetland areas is regulated through leases or permit systems. Parts of wetlands are either leased out to fisherfolk or a permit is granted to them to fish in these waters on payment of the prescribed fee. One of the important legislations through which the lease or licensing system operates is the Indian Fisheries Act, enacted in 1897, to 'regulate certain matters relating to fisheries.'[23] This Act has not been repealed by State/Central legislatures and, therefore, continues to be in operation. Some Indian States,

20. Sec. 3(a), LAND ACQUISITION ACT, 1894.
21. AIR 1940 Sindh 58.
22. Sec. 12(2), ENGLISH LAND ACQUISITION, 1919.
23. Preamble to the INDIAN FISHERIES ACT, 1897.

however, have adopted the Indian Fisheries Act with some modifications. This important legislation that deals with certain matters relating to fisheries in Indian waters (including wetlands) is remarkable for its brevity. The Act consists of only seven sections and delegates rule making powers unto State Governments.[24]

The Indian Fisheries Act also makes it unlawful to use dynamite, explosive substances, or other noxious material to catch or destroy the fish.[25] The Act is one of those legislations wherein the rules enacted under the authority of the Parent Act have become more important than the Parent Act itself. The general practice of most State Governments is to lease portions of areas/waters abounding in fish to individuals or communities for catching fish therein. The responsibility for issuing these licenses or lease deeds generally vests with the fisheries department of the state government or any other body that is authorized by the rules framed by the State Government to do so. Predictably, not all wetlands come under the purview of the Fisheries Act. In areas where the wetland sites are treated as 'land', the responsibility for issuing licenses etc., vests with the government department under whose purview that land falls.

Thus, in one state, so far as wetlands are concerned, there could be different legislations and different government departments that regulate fishing in these areas.

Some wetland sites exist along the Indian Coastline. These sites are important for their marine fisheries. Fishing in marine water is generally regulated through separate legislations enacted by the State Legislatures for the purpose. The Orissa Marine Fishing Regulation Act, 1981, is one such legislation. It is an 'Act to provide for the regulation of fishing by fishing vessels in the sea along the coastline of the state.'[26] The Act authorizes the State government to notify any area along the coastline of the state, though not exceeding the territorial waters, as 'specified areas'.[27] The government is authorized by the Act to regulate, restrict or prohibit:

(a) fishing in any specified area by such class or classes of fishing vessels as may be prescribed; or

(b) the number of fishing vessels which may be used for fishing in any specified area; or

(c) catching in any specified area of such species of fish and for such period as may be specified in the notification; or

24. *Id.*, Sec. 6.
25. *Id.*, Sec. 4,5.
26. Preamble, ORISSA MARINE FISHING REGULATION ACT, 1981.
27. *Id.*, Sec. 2.

(d) the use of such fishing gear in any specified area as may be prescribed.[28]

The Act further provides that a fisherman would need to have a license for fishing in the specified waters.[29]

The rules laid down under the Act specify the details relating to the issuance of such a license by the appropriate officer.

Indian legislations, therefore, endeavour to regulate fishing through a lease or licensing regime. This legal regime was evolved to ensure sustainable use of fisheries and to protect the interests of traditional fishermen. However, it has led to over-exploitation of fisheries and has not served the cause of traditional fishermen.

Some drawbacks of this system are :

1. The areas that are leased out are often not clearly demarcated and at times more area is leased out than what the official records indicate.

2. The licenses are at times granted on an irrational basis by officers who have no knowledge of fishing or fisheries or the ecology of the area.

3. Local communities or individuals who obtain lease or licenses on payment of a certain fee for the same, do not treat the fisheries as their 'own' common property resource. Their endeavour is to get maximum returns from their investments. This leads to over fishing and use of explosives or resort to other destructive practices for fishing.

4. There is no uniform policy for granting leases or licenses. Thus the interests of poor, traditional fishermen get marginalised.

V. Conclusion

The wetland conservation community must promote a five point argument.[30]

(a) In their natural, or only slightly modified state, many wetlands in the developing world are used daily by rural communities who depend upon them for their livelihood. The extent of this use should, therefore, be central to the argument for wetland conservation in the tropics.

(b) In some areas, e.g., the inner Niger delta, this dependence is so close that the annual calender of the rural population is tied to the movement of the river flood. These communities have great difficulty in adjusting to major changes in the wetland ecosystem and the idea that they can adapt readily to other forms of land use, especially intensive irrigated rice culture, has proved

28. *Id.*, Sec.4.

29. *Id.*, Sec. 5,6.

30. W.J. Mitsch and J.G. Gosselink, Wetlands 283-84 (1986).

erroneous.

(c) As efforts intensify to exploit the vast natural resources of Africa, Asia and Latin America, and apply these to the development of these continents, great care must be take in order to ensure that these wetland resources make their maximum sustainable contribution to the development process. Given the current heavy use made of these, much greater consideration must be given by the development community to the option that the best use to make of many of these systems might be to leave them as they are.

(d) Assessing the value to human society of water diversion or of wetland reclamation for agriculture or industrial uses, the value of current human use must be carefully assessed and compared with the net sustainable benefit to the same population of the modified wetland. The outcome of these analysis must figure strongly in the final decision to modify or to retain natural wetland ecosystem.

(e) Given the heavy dependence of tropical rural societies upon wetlands, efforts to conserve these systems must be developed and implemented in close collaboration with the rural communities concerned. Only by doing so will the required local support be forthcoming and only with this can the project be a long term success. By addressing these five issues, the conservation and development communities will have greater consideration to the fundamental point that in many parts of the world, human beings are the most important inhabitants of wetland ecosystems. In particular, it is to be hoped that by doing so the development community will give greater attention to the human cost of wetland loss, and the many direct benefits of wetland maintenance. Similarly it is necessary that the conservation community gives greater attention to the role of man in wetland ecosystems, and in the need to integrate the needs for human use of these with those of more traditional conservation goals.

It is in this light that the role of Indian rural communities as regards sustainable use and conservation of wetlands needs to be examined. Wetlands cannot be conserved and preserved unless substantial legal rights are given to rural communities to use and preserve wetlands as per their traditional customary norms and practices.

Article 243B of the Constitution of India makes it mandatory[31] upon the State governments to constitute in every state, institutions of local self-government called Panchayats at the village, intermediate and district levels in accordance with provisions of Part-IX of the Constitution. It is submitted that the Panchayats are best suited to maintain and conserve wetland eco-

31. Sec. 2, Gazette of India Extraordinary, Part-II Section 1 (20 April 1993).

systems.

It is submitted that for many of the small wetland sites, the state can only lay down a very broad policy framework for the entire habitat type but so far as specific wetland sites are concerned, planning at district/Panchayat level is the only solution.

Wetlands are one of the most productive ecosystems and an earnest effort should be made to conserve them. The legislative framework for the protection of wetlands consists of a myriad of legislations, and suffers from some deficiencies and drawbacks. The wetlands of India can only be protected by local communities which live along side them, and any legal strategy that is evolved to protect and preserve Indian wetlands must endow the local communities with power, ability and capability to conserve them.

LEGAL ASPECTS OF BIODIVERSITY CONVENTION

*Gurdip Singh**

The Convention on Biodiversity was negotiated under the auspices of the United Nations Environment Programme (UNEP). The discussions for the Biodiversity Convention were initiated by the UNEP's Governing Council in 1988 and concluded on 22 May 1992 in Nairobi. The issues of biodiversity and biotechnology were originally treated by separate working groups, but were merged to be handled by a single intergovernmental negotiating committee in 1991, over the objections of the United States and other Nations. The Convention was opened for signature in Rio. The Convention has three goals: the conservation and sustainable use of biological diversity, and fair sharing of products made from genestocks. To advance these goals, signatories must develop plans for protecting habitat and species; provide funds and technology to help developing countries provide protection; ensure commercial access to biological resources for development and share revenues fairly among source countries and developers and establish safety regulations and accept liability for risks associated with biotechnology development. Financial assistance, initially set at U.S. $200 million, will ultimately be channelled through some mechanism under the control of signatories but will be administered by the Global Environmental Facility on an interim basis.

At Rio, the negotiations for the conclusion of a Biodiversity Convention were plagued by conflict over the financial mechanism, the sharing of benefits, and biotechnology regulation. France originally threatened not to sign the Convention because it did not include a list of global Biodiversity-rich regions. Japan threatened not to sign because it feared biotechnology regulation. At the last moment, both France as well as Japan signed. However, the United States refused to sign the Convention because it felt that the financial mechanism of the Convention represented an open-ended commitment with insufficient oversight and control; that the benefit sharing provisions were incompatible with existing international regimes for intellectual property rights; and that the requirement to regulate the biotechnology industry would needlessly stifle innovation. Although only 30 ratifications were needed for the Convention to enter into force, 153 States signed the Convention in Rio. Later on, the United States has also signed the Convention. In December, 1993, the Convention entered into force.

* Reader, Faculty of Law, University of Delhi, Delhi.

I. Biological Diversity & Biotechnology

Biological Diversity means the variability among living organisms from all sources including, *inter alia*, terrestrial, marine and other aquatic eco-systems and the ecological complexes of which they are part.[1] Biological Diversity includes diversity within species, between species and of ecosystems.[2] The value of biological diversity for the mankind is traceable from the Darwin theory for the survival of species. It was Charles Darwin who first identified the full significance of man's relationship to other species. Biological diversity plays a crucial role in the global environment, economically as well as ethically.

Biotechnology means any technological application that uses biological systems, living organisms, or derivatives thereof, to make or modify products or processes for specific use.[3] Biological Diversity is of considerable value to human society, particularly in the biotechnology industry. Biotechnology, which incorporates a combination of the principles and techniques of biology, biochemistry, engineering, chemistry, physics and mathematics is now being applied in the manipulation of living organisms by altering their hereditary characteristics through the application of recombinant DNA technology. DNA (Deoxyribonucleic Acid) is the genetic material which carries the information for all inherited characteristics. The basic unit of hereditary material is the gene, a small piece of DNA that contains sufficient information for a specific function such as the composition of a particular protein. A single DNA molecule may contain several thousand genes depending upon the complexity of the organism. Biological diversity has enormous value in the biotechnology industry especially agriculture sector, pharmaceutical sector and pollution control. In the agricultural sector, examples of crops saved or made more productive by interbreeding with wild species are numerous,[4] as are examples of valuable medicines that have been derived from wild plants.[5]

Biotechnology offers efficient methods for the fermentation industries (including production of pharmaceuticals such as hormones, vaccines and antibiotics), agriculture (including breeding of plants and animals, biofertilisers and growth factors), pollution control industries (including microbes that degrade environmental pollutants), extraction of metals from ores using micro-

1. Convention on Biological Diversity, Art. 2, Reprinted in 31 International Legal Materials 822 (1992).
2. *Ibid.*
3. *Ibid.*
4. T. Dobson, *Loss of Biodiversity : An International Policy Perspective*, 29 Carohna Journal of International Law and Commercial Regulation 277 (1992).
5. *Id.* at 283.

organisms, and possibility of curing certain genetically related diseases in humans and animals[6]. Biotechnology has resulted in the development of new pollution control technologies. Dr. Anand Chakraborthy, an Indian born scientist working in the United States developed and got patented an oil degrading microbe which could eat up the oil spill. The genetic engineering activities, however, need regulation and control in view of the fact that genetically engineered micro-organism might pose environmental problems after its release into the atmosphere. Accordingly, safeguards must be developed not only for the conservation and sustainable use of biodiversity but also to prevent the intentional or accidental release of environmentally harmful genetically engineered micro-organism.

II. Transboundary Harm

Article 3 of the Convention recognizes the sovereign rights of the States to exploit their own resources in accordance with their environmental policies but imposes responsibility on the States to ensure that activities within their jurisdiction and control do not cause environmental damage to the other States. The principle of state responsibility for transboundary environmental damage originates from the maxim *sic utero tuo ut alienum laedas* which envisages the use of property in such a manner as not to injure the property of another. The maxim found application in the *Trail Smelter Arbitration*[7] over a dispute between United States and Canada which covered a period of thirteen years from 1928 to 1941. The Arbitration Tribunal declared:

> no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the property of persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.

The maxim also finds expression in principle 21 of the Stockholm Declaration adopted at the 1972 United Nations Conference on Human Environment which confers responsibility on States to ensure that activities within their jurisdiction and control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction. The principle is often cited by the publicists and consistently adopted by the States in practice with the belief that it has legal force. It has, therefore crystallised into customary norm of international law.

6. 214 Science (Biotechnology Issue) 609 (1983).
7. Trail Smelter Arbitration, 3 United Nations Reports of International Arbitral Awards 1920 (1949).

III. Conservation And Sustainable Use

The impact of the human activity on the loss of biological diversity is significant. The primary cause of species extinction is habitat destruction, directly through land use changes, urbanisation and industrialisation, and indirectly through the effects of other environmental problems such as pollution and global warming.[8] The continued destruction of rainforests and other undisturbed areas, most of which are situated in the developing countries, is expected to result in an incalculable loss of currently unknown medical and agricultural resources. Conservation of these areas, particularly rain forests, which are home to the majority of the world's species, combined with the rational use of the resources they contain is of fundamental importance.

Biodiversity Convention requires each Contracting State Party to develop national strategies, plans or programmes for the conservation and sustainable use of biological diversity.[9] Each Party is under an obligation to identify and monitor the components of biological diversity important for its conservation and sustainable use.[10] Moreover, the Party shall identify processes and categories of activities which have significant adverse impact on conservation and sustainable use of biological diversity, and monitor their effects through sampling and other techniques.[11]

The Convention imposes an obligation on the parties to establish a system of protected areas where special measures need to be taken to conserve biological diversity.[12] The Parties shall promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings.[13]

The Parties shall establish the means to regulate, manage or control the risks associated with the use and release of living modified organisms resulting from biotechnology which are likely to have adverse environmental impacts that could affect the conservation and sustainable use of biological diversity, taking into account the risks to human health.[14] The provision constitutes a safeguard to prevent the likelihood of environmental damage as a result of release of living modified organism.

The Parties shall respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional

8. C. Perrings *et al*, *The Ecology and Economics of Biodiversity Loss : The Research Agenda*, 21 Ambio 201 (1992).
9. Biodiversity Convention, Art. 6.
10. *Id.*, Art.7.
11. *Ibid.*
12. *Id.*, Art. 8(a).
13. *Id.*, Art. 8(d).
14. *Id.*, Art. 8(g).

lifestyles relevant for the conservation and use of biological diversity.[15]

In addition to the above mentioned *in-situ* measures, the Parties are under an obligation to adopt *ex-situ* conservation measures also. The Parties shall adopt measures for the *ex-situ* conservation of components of biological diversity (for example in gene banks) preferably in the country of origin.[16] The parties shall also establish facilities for the *ex-situ* conservation of and research on plants, animals, and micro-organisms, preferably in the country of origin of genetic resources.[17]

The Parties shall give incentives and promote public education and awareness for the conservation and sustainable use of biological resources.[18] The Parties shall introduce procedures requiring *Environmental Impact Assessment* of its proposed projects that are likely to have adverse effects on biological diversity.[19]

The Parties are to facilitate the exchange of information relevant to the conservation and sustainable use of biodiversity, especially to developing countries, including exchange of results of technological, scientific and socio-economic research.[20] The Parties are to promote international technical and scientific cooperation in the field of conservation and sustainable use of biological diversity, with special attention to be given to the development of national capabilities.[21]

The above mentioned provisions of the Convention demonstrate that the Convention adopts an ecosystem approach to the conservation of biodiversity by focussing on managing the whole ecosystem rather than protecting individual species. The conservation commitments have been criticized for their generality and lack of strength.[22] The criticism, however, loses its force in view of the fact that the conservation commitments of the Convention are very sensitive because these require countries to set aside specific regions which are important from a conservation perspective. This might be viewed by the States as giving up part of their territory often rich with resources ripe for development. Especially, the developing countries were averse to strengthening the conservation commitments of the Convention. The industrialized countries wanted the Convention to include a list of areas of global importance that Nations would be required to protect, but the developing

15. *Id.*, Art. 8(j).
16. *Id.*, Art. 9(a).
17. *Id.*, Art. 9(b).
18. *Id.*, Art. 11, 13.
19. *Id.*, Art. 14.
20. *Id.*, Art. 17.
21. *Id.*, Art. 18.
22. J. Barton, *Biodiversity at Rio*, 42 Bioscience 773 (1992).

countries opposed these lists and termed them as examples of global eco-imperialism.[23]

IV. Access To Genetic Resources

Recognizing the sovereign rights of the States over their natural resources, the Convention requires each Party to endeavour to create conditions to facilitate access to genetic resources for environmentally sound uses by other Parties and not to impose restrictions that run counter to the objectives of the Convention.[24] The Convention, however, gives authority to the national governments to determine access to genetic resources.[25] Access where granted is to be on mutually agreed terms[26] and subject to prior informed consent of the Party providing the resources.[27] The access provisions are not retroactive and do not apply to genetic resources already removed from a State, for example germplasm already in international gene banks.

The strategy in relation to genetic resources in the past has to remove germplasm from its natural site to a germplasm bank, and then to provide free access to the collection. Unlike the Biodiversity Convention, the Source States did not have sovereign rights over their genetic resources which were treated as common heritage of mankind. The majority of the States providing biological resources were developing countries which seldom received any compensation for providing these resources. The developing countries were deprived of their biological assets because they lacked technical and financial capacity to develop their own biotechnology.

The Biodiversity Convention attempts to protect the sovereign rights of the developing counries by treating the genetic resources not as common heritage of mankind but as property owned by the country of origin. However, the genetic resources are treated as common concern of mankind. The access provisions of the Biodiversity Convention, though falling short of affording intellectual property status to genetic resources, do effectively legitimise the use of genetic resources for economic gain. Of late, there has been increase in agreements such as the agreement between Merck Pharmaceuticals and Costa Rica negotiated in 1992 wherein Merck Pharmaceuticals agreed to pay an amount of US $1.3 million as well as royalties to Costa Rica's National Biodiversity Institute in return for screening rights for genetic material and

23. F. Pearce, *Third World Fights to Retain its Natural Rights*, New Scientist 4 (23 May 1992).
24. Biodiversity Convention, Art. 15(1), 15(2).
25. *Id.*, Art. 15(1).
26. *Id.*, Art. 15(4).
27. *Id.*, Art. 15(5).

all patent rights in any resulting marketable product.[28]

The Convention permits the developing countries to legitimately charge for access to germplasm situated in their territory. The multinational corporations will be willing to pay for the access to the genetic resources in expectation of the guaranteed return in the form of lucrative patent monopolies over products or processes resulting from genetic engineering of such genetic resources. The developing countries will, therefore, be tempted to sell off genetic resources to earn funds which may be used to pay off debts in the pursuit of economic independence and the eradication of poverty.[29] Thus, the conservation provisions of the Convention may lead to over exploitation of the biological resources which will exacerbate the problem that the Convention seeks to address.[30]

V. Benefit Sharing

The Biodiversity Convention imposes specific obligation on each State to share, in a fair and equitable way, the results of research and development with the party providing the genetic resources.[31] Moreover, the benefits arising from the commercial utilization of the genetic resources shall also be fairly and equitably shared by the developed countries with the countries providing the resources.[32] However, such sharing shall be on mutually agreed terms. Thus, the benefits arising from the use of genetic resources commercially, in the research and development and in biotechnological applications, are to be shared on mutually agreed terms with the parties providing the resources. The Parties providing the resources are to be given the opportunity to participate in biotechnological research.

VI. Transfer Of Technology

The Convention stipulates that both access to and transfer of technology among the Parties are essential elements for the attainment of the objectives of the Convention.[33] Accordingly, each Party undertakes to provide and/or facilitate access for and transfer to other Parties of environmentally friendly

28. Barton, *Supra* note 22, 776.
29. D. Cole, *Debt-Equity Conversions, Debt for Nature Swaps, and the Continuing World Debt Crisis*, 30 Columbia Journal of Transnational Law 57 (1992).
30. H. Georgina, *The Implications of the Conventions on Climate Change and Biological Diversity on Development and the Transfer of Technology*, Lawasia 112 (September, 1993).
31. Biodiversity Convention, Art. 15 (7).
32. *Ibid.*
33. *Id.*, Art. 16 (1).

technologies that are relevant to the conservation and sustainable use of biological diversity or that make use of genetic resources.[34] The Convention specifically states that technology includes biotechnology.[35]

The access to and transfer of technology to the developing countries shall be provided and/or facilitated under fair and most favourable terms, including on concessional and preferential terms where mutually agreed.[36] Each Party is to take legislative, administrative or policy measures to ensure that developing countries which provide genetic resources are provided access to and transfer of technology which makes use of those resources on mutually agreed terms.[37]

The State Parties are to take legislative, administrative or policy measures with the aim that the private sector facilitates access to joint development and transfer of technology for the benefit of both governmental institutions and the private sector of developing countries.[38]

The provisions of the Convention governing transfer of technology are ambiguous in their treatment of intellectual property rights. Clearly contemplating the use of licensing agreements, the Convention requires the access and transfer to be provided on fair and most favourable terms, including on mutually agreed concessional and preferential terms, consistently with the adequate and effective protection of intellectual property rights.[39] Parties are, however to co-operate to ensure that the intellectual property rights are supportive of and do not run counter to its objectives.[40]

VII. Biotechnology-Participation And Benefit Sharing

The Convention imposes an obligation on each Party to take legislative, administrative or policy measure to provide for the effective participation in biotechnological research activities by those developing States which provide the genetic resources for such research.[41] Each Party shall also advance priority access to developing States providing the genetic resources, on a fair and equitable basis, to the results and benefits arising from biotechnologies based upon such genetic resources.[42]

34. *Ibid.*
35. *Ibid.*
36. *Id.*, Art. 16(2).
37. *Id.*, Art. 16(3).
38. *Id.*, Art. 16(4).
39. *Id.*, Art. 16(2).
40. *Ibid.*
41. *Id.*, Art. 19(1).
42. *Id.*, Art. 19(20).

The Convention also calls upon the Parties to consider the need for and the modalities of a Protocol setting out appropriate procedures, including in particular, advance informed agreement, in the field of safe transfer, handling and use of any living modified organism resulting from biotechnology that may have adverse effect on the conservation and sustainable use of biological diversity.[43]

VIII. Financial Resources And Mechanism

A. *Financial Resources*

The Convention requires the developed countries to provide *new and additional* financial resources to the developing countries to enable them to fulfil their obligations under the Convention.[44] The extent to which the developing countries will effectively implement their commitments under the Convention will depend on the effective implementation by developed countries of their commitments under the Convention related to financial resources and transfer of technology.[45] The Convention also stipulates that the effective implementation of the obligations of the developing countries under the Convention will also take into account the fact that economic and social development and eradication of poverty are the first and overriding priorities of the developing countries.[46] Thus, the Convention gives paramount importance to the priorities of the developing countries for economic and social development and eradication of poverty.

The Convention allows the developed countries also to provide and the developing countries to avail themselves of the financial resources related to the implementation of the Convention through bilateral, regional and other multilateral channels.[47]

B. *Financial Mechanism*

The Convention stipulates that there shall be a financial mechanism to provide the financial resources to the developing countries on a grant or concessional basis.[48] The institutional structure for the operation of the

43. *Id.*, Art. 19(3).
44. *Id.*, Art. 20(1).
45. *Id.*, Art. 20(4).
46. *Ibid.*
47. *Id.*, Art. 20(3).
48. *Id.*, Art. 21(1).

mechanism shall be decided by the Conference of the Parties established under the Convention.[49] The mechanism shall function under the authority and guidance of the Conference of the Parties and shall also be accountable to it.[50] The Conference of Parties shall also determine the eligibility criteria relating to the access to and utilization of such resources.[51] The contributions shall be made by the developed countries taking into account the amount of resources needed and the burden sharing among the contributing Parties.[52] The amount of resources needed shall be determined periodically by the Conference of Parties.[53] The Convention states that the financial mechanism shall operate within a democratic and transparent system of governance.[54]

C. *Financial Interim Arrangements*

In the interim period between the entry into force of this Convention and the first meeting of the Conference of the Parties or until the Conference of the Parties designates the institutional structure, the Global Environment Facility (GEF) of the UNDP, UNEP and the IBRD shall be the institutional structure on an interim basis.[55]

IX. Institutional Infrastructure

A. *Conference Of The Parties*

The Convention establishes a Conference of the Parties.[56] The first meeting of the Conference of the Parties shall be convened by the Executive Director of the UNEP not later than one year after the entry into force of the Convention and thereafter ordinary meetings of the Conference of Parties shall be held at regular intervals to be determined by the Conference at its first meeting.[57]

The Conference of Parties shall by consensus adopt rules of procedure for itself and for any subsidiary body it may establish.[58] The Conference of the Parties shall review the implementation of the Convention and for this

49. *Ibid.*
50. *Ibid.*
51. *Ibid.*
52. *Ibid.*
53. *Ibid.*
54. *Ibid.*
55. *Id.*, Art. 39.
56. *Id.*, Art. 23(1).
57. *Ibid.*
58. *Id.*, Art. 23(3).

purpose, *inter alia*, shall :

(a) review the reports submitted by each Party on measures which it has taken for the implementation of the provisions of this Convention and their effectiveness in meeting the objectives of this Convention,[59]

(b) review scientific, technical and technological advice on biological diversity provided by the Subsidiary Body on Scientific, Technical and Technological Advice established under the Convention ;[60]

(c) consider and adopt protocols to this Convention ;[61]

(d) consider and adopt amendments to this Convention and its annexes;[62]

(e) consider and recommend adoption of the amendments to any protocol as well as to any annexes relating thereto ;[63]

(f) consider and adopt additional annexes to this Convention ;[64]

(g) establish such subsidiary bodies, particularly to provide scientific and technical advice for the implementation of this Convention.[65]

The United Nations, its specialized agencies and the International Atomic Energy Agency (IAEA) as well as any state not a Party to this Convention may be represented as observers at meetings of the Conference of the Parties. Any other body or agency, whether governmental or non-governmental, qualified in fields relating to conservation and sustainable use of biodiversity, which has informed the secretariat of its wish to be represented as an observer at a meeting of the Conference of the Parties, may be admitted unless at least one third of the Parties present object.[66]

B. *Scientific Body On Scientific, Technical And Technological Advice*

The Convention provides for the establishment of a subsidiary body to provide scientific, technical and technological advice to the Conference of the Parties.[67] The subsidiary body, *inter alia*, shall :[68]

(i) provide scientific and technical assessments of the status of the biological diversity;

59. *Id.*, Art. 23 (4)(a), 26.
60. *Id.*, Art. 23 (4)(b), 25.
61. *Id.*, Art. 23 (4)(c), 28.
62. *Id.*, Art. 23 (4)(d), 29, 30.
63. *Id.*, Art. 23 (4)(e).
64. *Id.*, Art. 23 (4)(f), 30.
65. *Id.*, Art. 23 (4) (g).
66. *Id.*, Art. 23 (5).
67. *Id.*, Art. 25 (1).
68. *Id.*, Art. 25 (2).

(ii) prepare scientific and technical assessments of the effects of types of measures taken in accordance with the provisions of this Convention ;

(iii) identify innovative, efficient and status-of-the-art technologies and know-how relating to the conservation and sustainable use of biological diversity and advice on the ways and means of promoting development and /or transfering such technologies;

(iv) provide advice on scientific programmes and international co-operation in research and development related to conservation and sustainable use of biological diversity.

The Convention makes it clear that the subsidiary body shall comprise government representatives competent in the relevant field of expertise.[69] Since the subsidiary body is declared open only to government representatives, each government will decide who may or may not serve from within its borders, and it will be difficult for non-government officials to serve at all. This approach contrasts starkly with the scientific and technical review panels established by the Montreal Protocol on Substances that Deplete the Ozone Layer which were open to experts without governmental approval. These panels were highly effective at promoting consensus on scientific controversies and at uncovering creative solutions. Because Biodiversity Convention gives governments more control over choosing the panels, chances are that panel members will be expected to carry specific government briefs and to refrain from the type of open minded give and take that makes learning and problem-solving possible.[70]

X. National Reports

The Convention imposes an obligation on each Party to submit to the Conference of the Parties, reports on measures which it has taken for the implementation of the provisions of this Convention and their effectiveness in meeting the objectives of this Convention.[71] The reports shall be submitted by the Parties at intervals to be determined by the Conference of the Parties.

The provision of mandatory national reports puts enormous pursuasive force on the States Parties to take measures to effectively implement the Convention provisions.

Biodiversity is a valuable resource and is being eroded at an alarming rate. Therefore greater effort is needed to quantify and understand its patterns,

69. *Id., Supra* note 67.
70. P.M. Haas *et al, Earth Summit*, 34 Environment 7 (1992).
71. Biodiversity Convention, Art. 26.

to combat threats to its erosion, and find ways to exploit it in a sustainable way. The Biodiversity Convention is not the end of the road but a crucial milestone along the road. The Convention commits the States to binding obligations to manage national affairs to common international benefit. It launches the process to promote international cooperation in technology and techniques for the conservation and sustainable use of biological resources and to help stimulate benefit sharing arrangements between countries. To fulfil these tasks, the Convention demands effective follow-up actions at the national and international levels.

The developed countries have to take lead to help the developing countries not only to formulate and publish national plans for action on biodiversity but also to implement the plans. The biological diversity can be effectively protected through constant vigilance and relentless effort by States, international agencies, private companies, academic institutions, learned and professional societies, the voluntary sector, and many others.

CAN THERE BE A FUNDAMENTAL RIGHT TO DIE ?*

*M.P. Singh***

I. Supreme Court Answers

On 26 April 1994 a two judge bench of the Supreme Court through Justice B.L. Hansaria (the other judge being Justice R.M. Sahai) invalidated section 309 of the Penal Code which made attempt to commit suicide an offence on the ground that it violated the fundamental right to life under Article 21 of the Constitution. The Court held that 'right to live of which Article 21 speaks of can be said to bring in its trail the right not to live a forced life.'[1] The Court arrived at this conclusion after considering the decisions of the Bombay, Delhi and Andhra Pradesh High Courts. While the Delhi High Court had mainly expressed its views against the validity of section 309 and quashed a large number of pending proceedings under it, the Bombay High Court in a wellreasoned judgement invalidated section 309 as violative of Articles 14 and 21. The Andhra Pradesh High Court, however, upheld the validity of the section both under Articles 14 and 21. The Supreme Court agreed with the Andhra Pradesh High Court so far as the validity of the section vis a vis Article 14 was concerned but agreed with the Bombay High Court in respect of its validity under Article 21. Apart from adopting the reasoning of the Bombay High Court in support of its conclusions the Court went into several questions such as the object of a law, basis of criminal liability, prevention of crime, reasons for committing suicide, secularisation of crime, dealing with suicide prone persons, relationship of suicide with religion, morality and public policy, sociological effects of suicide, etc. Our concern, however, is confined to the question whether an individual, or as the Court has formulated it, 'a person residing in India', has the right to die ? The Court answered it in affirmative.

The Court, referred to the reasoning of the Bombay High Court that just as the rights such as of speech, association, business, etc. in Article 19(1) include the rights not to speak, not to associate or not to do business, right to life in Article 21 also includes the right not to live. It also referred to the doubts

* This note was prepared for a symposium organised by my colleague Professor B.B. Pande on 6 August 1994. On this theme Professor Pande has already published his views in *Right to Life or Death? For Bharat Both Cannot be 'Right'*, (1994) 4 SCC 19 (J.) Much of what I have said in this note and far more has already been covered in Professor Pande's above paper and an earlier paper *Creating a Right to Die—An Excercise in Futility*, 7 Islamic And Comparative Law Quarterly 112 (1987). Since some of the arguments in this note further support and fortify his stand, I have decided to publish it.

** Professor, Dean and Head, Faculty of Law, University of Delhi, Delhi.

1. Rathinam v. Union of India, (1994) 3SCC 394, 410.

expressed by some critics about that reasoning and admitted that the criticism was 'partially correct inasmuch as though the negative aspect may not be inferable on the analogy of the rights conferred by different clauses of Article 19. Yet it held that 'one may refuse to live, if his living be not according to the person concerned worth living or if the richness and fullness of life were not to demand living further. One may rightly think that having achieved all worldly pleasure or happiness, he has something to achieve beyond this life. This desire for communion with God may very rightly lead even a very healthy mind to think that he would forego his right to live and would rather choose not to live. In any case, a person cannot be *forced* to enjoy right to life to his detriment, disadvangtage or disliking.'[2] It clarified that it should not be understood to be laying down that the rights conferred by Article 21 could be waived. But posing the question whether one could take 'advantage of the right conferred by Article 21', came to the conclusion already noted in the begining, i.e. the 'right to live of which Article 21 speaks of can be said to bring in its trail the right not to live a forced life'. The Court did not give any further reasons to support its conclusion. Although the Court has narrowed the right to 'not to live a forced life', it has not clarified its position insofar as it comes to the general conclusion that the right to life includes the right to commit suicide and thus a general right to die.

II. Concept Of Right

Even if the Court has conceded only a limited right to die in the sense that a person cannot be compelled to live an unwanted life, the question still arises whether such right comes under Article 21. Of course, as the Court has noted, Article 21 has both positive and negative content and like in Salman Rushdie's *Haroun and the Sea of Stories* it has become an inexhaustible source of new rights. But all such rights recognised so far enrich life and its content. None of them narrows down or robs its content or scope or seeks to or facilitates its termination. All of them assume that life is the core value for whose preservation and enrichment all these and many other rights must be available. Among the basic values in all societies from time immemorial life has been considered the first value. Its existence and continuation is necessary for the realisation of all other values and social goods. It is for this reason that all societies have always prohibited killing and ensured procreation and preservation of life. They have also provided for resuscination of suicide.[3] How can, therefore, there be a right to terminate life? Since the answer to this question has been

2. *Ibid.*
3. See, *e.g.* John Finnis, Natural Law and Natural Rights 86 (1980).

obvious, even the limited question of a woman's right to abortion and of a terminally ill person's right to dignified end of his life is a highly contested question. Of course, subject to specified conditions,taking of life is permitted in selfdefence. But that again establishes the importance of life.

If life is such an absolute value how can there be a right against it ? In other words, how can taking away or elimination of life be right ? It must always be wrong subject to the foregoing clarification about selfdefence. Naturally, something that is wrong cannot simultaneously be right. This is the very basic concept of a right. Long back Salmond has told us that 'a right is an interest the violation of which is a wrong.'[4] He added:[5]

> Every right corresponds to a rule of right, from which it proceeds, and it is from this source that it derives its name. That I have *right* to a thing means that it is *right* that I should have that thing... In the words of Windscheid . . . "*Das* Recht ist *sein* Recht geworden"

Salmond also emphasised the distinction between the legal and moral rights to establish the existence of right and wrong irrespective of their recognition by the state or its laws.[6]

Today we seem to agree that rights represent moral ideas.[7] When we believe or get convinced that certain things are morally right we protect them and when on the other hand we believe that certain things are morally wrong we prohibit them. For example, we believe that taking away of human life is morally wrong, therefore, we prohibit homicide. Conversely, we morally believe that preservation of human life is necessary and good. Therefore, we recognise and guarantee the right to life. Of course there may be grey areas where we are not morally convinced whether something is right or wrong or where the moral arguments on both sides are equally strong. But the essence of the argument is that at the back of every right there is always a moral argument in its support. In the absence of such argument it cannot be a right. This is much more so in the case of the fundamental rights guaranteed in the Constitution which definitely are moral rights converted into legal rights. These rights are so regarded because it is right for the individual to do what is guaranteed to him under them and wrong for the state to prevent him from doing so. We agree with Ronald Dworkin that :[8]

> The institution of the rights against the Government is not a gift of God, or an ancient ritual, or a national sport. It is a complex and troublesome practice that makes the Government's job of securing the general benefit more difficult and more expensive, and it would be a frivolous and wrongful practice unless it served some point. Anyone who professes to take rights seriously ... must have some sense of what that point is.

4. G. Williams, SALMOND ON JURISPRUDENCE 261 (11th ed., 1957).
5. *Id.* at 262.
6. *Ibid.*
7. J. Waldron, THE LAW 93 (1990). Also J. Waldron (ed.), THEORIES OF RIGHTS (1984).
8. R. Dworkin, TAKING RIGHTS SERIOUSLY 198 (1977).

Quoting these words, Jeremy Waldron articulates the same point even more explicitly. He says :[9]

> If we expect our officials and politicians to respect individual rights, we have got to be prepared to articulate the values and concerns that underlie them. Otherwise, rights will be seen as mere nuisances, to be shoved aside as irrelevant in the pursuit of policy objectives.

Futher, explaining that point in terms of human dignity in Kantian sense and the idea of political equality, he says :[10]

> It makes sense to say that a man has a fundamental right against the Government ... if that right is necessary to protect his dignity, or his standing as equally entitled to concern and respect, or some other personal value of like consequence. It does not make sense otherwise.

It is this perspective in which we have to ask whether the act of committing suicide deserves to be included in the category of fundamental rights. Does it serve any of the objectives or values which the rights are meant to serve? The Court does not seem to have addressed itself to this question. Nowhere does it speak of any values that this right would serve. The most it says is that one should be free to end his life when either one does not find it worth living or is satisfied with the achievements in this life and wants to proceed to the next. The rest of its arguments are of negative character that the act of suicide does not have any baneful effect on the society and is not against religion, morality and public policy. Definitely these arguments are not adequate to support any of the propositions mentioned above on which any fundamental right can be based.

Where else do we look for guidance whether the act of committing suicide deserves to be a fundamental right under Article 21 or any other provision of Part III of the Constitution? The existing literature on rights and basic goods to the individual or even to the society do not mention anywhere even incidentally or exceptionally that death is one of the basic values to be achieved, preserved or protected. On the contrary all efforts of man are directed towards delaying or, if possible, even eliminating death. Nowhere in the human rights documents or discussions death or suicide is mentioned either as a right or as object of any such right. Of course some legal systems do not punish for attempt to commit suicide and some others which provided such punishment have abolished it. But from that it cannot be concluded that they recognise a right to

9. *Supra* note 7, THE LAW at 96.
10. *Ibid.*

die or commit suicide. There are many acts which a society does not consider to be right yet it does not always punish for them. For example, sexual relationship between two consenting adults of opposite sex is not an offence in most societies. Yet it is not considered right. The same may be said about adultry, wherever it is not punished, about much of lying and dishonesty, and about many other things. So mere absence of criminal liability is no test of something being right. We have to ask what is so sacrosanct about such act for the individual and in the ultimate analysis for the society that it must rise to the level of right. In simple terms one may ask who stands to gain from recognising a particular act as right — either the individual or their collectivity, i.e., the society? The Court does not seem to be addressing itself to this question. It is not simply the wish or liking of an individual and absence of baneful effect on the society which should settle the issue. But we should ask what value for the individual or the society is going to be served by the recognition of an act as right. Judged from that standard, perhaps no value either for the individual or for the society is served by the act of committing suicide. If that is the case, the act of committing suicide cannot acquire the status of a right much less of a fundamental right.

There is nothing novel in the arguments given above. They are always raised whenever the question of the existence of a right or of determining its content arises. For example, it is this question which is posed when right to pornography is claimed under the right to speech. It has arisen more explicitly in respect of gambling and liquor trade and also in respect of exploitative moneylending.[11] We cannot escape this question when the existence of a right has to be determined. Unfortunatly the Court has not paid adequate attention to this question while reading a right to die in Article 21.

Further the Court also did not explain clearly how even at the level of plain logic life includes death. Apparently the two cannot coexist. Death is the absence of life. Perhaps the Court had it in mind and therefore, it did not follow *Dubal*[12] on the point that just as speech includes silence, life also includes death. Perhaps the Court wanted to say that life means a dignified life and, therefore, one cannot be compelled to live an indignified life. But it is absured to claim that dignified life includes absence of life or death. Even the claim for euthanasia and abortion is made, as we will see below, as part of liberty and not of life. On the contrary right to life is claimed for the foetus against the liberty of abortion of the woman carrying it and has been so upheld in some countries.[13]

11. See Bharucha v. Excise Commr, AIR 1954 SC 220; Bombay v. RMDC, AIR 1957 SC 699; Fateh Chand v. Maharshtra, AIR 1970 SC 1825.

12. Dubal v. Maharashtra, (1986) Bom LR 589.

13. *E.g.* in Germany.

III. Religion And Right To Die

On the question of religion after mentioning that 'Every individual enjoys freedom of religion under our Constitution, vide Article 25', the Court basically moves to say that there is nothing against religion in the act of committing suicide. This statement may be relevant to justify a state action in support of committing suicide and not for recognising a right in the individual to commit suicide. For recognising a right to commit suicide we will have to establish that one's religion requires him to commit suicide and therefore an act of committing suicide is an essential part of his religious freedom guaranteed in Article 25. If one can establish such a right then subject to the state's power to regulate religion a right to commit suicide comes under Article 25 and not under Article 21. It is on such grounds that some of the examples given by Justice Sawant in his Bombay decision such as of Jains of ending their life in old age by abstaining from taking anything may be justified and a state action of force feeding or of punishing the person for resorting to suicide may be contested. There are some religions which, for example, prohibit blood transfusion. There may be others which prohibit all kinds of medication or surgery. Believers of such religions may resist forced blood transfusion, medication or surgery even if such resistance results in death. But these are the cases where the concerned individual is claiming his right to religion guaranteed in Article 25 and not a right to die in Article 21. Here death is only a consequence, even if direct and immediate, of the exercise of the right to religion and not a right in itself or in its own right.

Looking even from the Court's point of view whether religion prohibits commission of suicide, we find that the available indegenous Indian religions and Indian scriptures condemn suicide in no uncertain terms. 'The Dharmasastra writers,' says P.V. Kane 'generally condemn suicide or an attempt to commit suicide as a great sin.'[14] Kautilaya's *Arthashastra* is quite emphatic when it says:[15]

> If any person under the passion or anger, or any woman captivated by sin, were to commit suicide (by hanging, a weapon or poison), the body shall neither be cremated with rites nor shall the relatives perform the subsequent ceremonies. The body shall be dragged by a Candala on a royal highway.
>
> Any kinsman performing the funeral rites shall meet the same fate [i.e. no rites, body dragged through the streets] on his death or be declared an outcaste by his relatives.

Of course, Kane refers to some exceptions 'in the smrtis, the epics and puranas

14. P.V. Kane, History of Dhrmasashtra 924 Vol II, Part II (2 ed., 1974).

15. Kautilya, The Arthashastra 466 (L.N. Rangarajan ed, 1989).

permitting suicide but adds that 'Some put forward a Vedic passage "one who desires heaven should not (seek to) die before the appointed span of life is at an end (of itself)", as opposed to the permission for suicide given by the smrtis.'[16] Most of the instances given by the Court in support of the right to die or commit suicide fall within these exceptions.

As regards other religions the Court itself says that 'At English Common Law suicide was taken as felony so much so that a person who had met his end after committing suicide was not allowed Christian burial, but would have to be done in a public highway. Not only this, the property of the person concerned used to get forfeited to the Crown.' [17] Similar injunctions are available in Islam. It is doubtful whether any religion permits, much less sanctions, suicide as such.

This universality of approach towards suicide *vis a vis* life in all religions clearly supports that while life and its preservation is universally recognised value and social good, taking one's life like taking anybody else's life is a universally condemned social evil. Even if some minor exceptions to this proposition are found in some religions, as Kane admits, one will have to enquire whether they are adequate to deny power to the state to prohibit or regulate the comission of suicide. The Court does not seem to have examined that question.

IV. Judicial Creation Of Rights

The Supreme Court, particularly since 1977, has been giving liberal interpretation to the fundamental rights and has observed on more than one occasion that there is a penumbra of rights around the named fundamental rights or that within the specified rights are included unspecified rights which partake of the same character. With respect to right to life guaranteed under Article 21, among other things, it has been held that. [18]

> the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and comingling with fellow human beings.

Similarly in respect of personal liberty, from *Gopalan*[19] until this day it is being said that it includes all sorts of innumerable liberties of the individual including those which are covered under Article 19.[20] The Court itself has pointed out

16. *Supra* note 14 at 927.
17. *Supra* note 1 at 428.
18. Francis Coralie v. Union Territory of Delhi, AIR 1981 SC 746.
19. Gopalan v. Madras, AIR 1951 SC 27.
20. For details see M.P. Singh, Shukla's Constitution Of India 164 (9 ed., 1994).

some of these developments. In the present case, as we have already noted, the Court has read the right to die in the right to life under Article 21. As we have also noted the Court has not given adequate reasons for arriving at this conclusion. We do not have any precedents, either Indian or foreign to support the conclusion that life includes death or right to live includes right to die. The right to life is guaranteed in almost all the constitutions that have a bill of rights as well as in all international human rights documents. But inspite of the continuing intense debate on dignified death, the right to die has not been recognised under any of them, under the right to life. For example, the oldest of them, the Constitution of the United States in its famous due process clause under the Fifth Amendment guarantees the right to life against the Federal Government which is available against the State governments also through the Fourteenth Amendment. Until now no general right to die has been recognised under those or any other provision in the United States. Of course in some cases state laws providing for removal of life saving devices in the case of comotised persons who have no chance of survival have been upheld but no general right to end one's life has yet been recognised. On the contrary doctors are under an obligation to treat and operate even those persons who refuse to give their consent for such treatment or operations if the treatment or operation is necessary or is imminent for the survival of the person concerned. Moreover, whatever little right has been conceded by the U.S. Supreme Court, it has been conceded as 'liberty interest' which is subject to compelling state interest.[21] Similarly under Article 2(2) of the German Constitution right to life does not include the right to die and to commit suicide because life and death are two contradictory things.[22] It is, however, true that discussions on dignified death are going on in that country also and under Article 1 generally an argument is made for dignified death.[23] Thus no basis is found either in the constitutional text or the judicial precedents to recognise a right to die in the right to life.

V. Consequences Of Recognising A Right To Die

In support of its conclusion the Supreme Court, among others, relies upon the Law Commission's recommendation for the repeal of section 309 of the Penal Code. The Law Commission's recommendation is only a recommendation which the Government in its own wisdom may or may not accept. It is true that this recommendation of the Commission was not accepted by the Govern-

21. See, Cruzan v. Director, Mo. Health Dept., 497 US 261 (1990).
22. See, I. von Muench, Grundgesetz — Kommentar 125 (2 ed., 1981).
23. *Id* 65 ff.

ment while many others from the same report, including the one associated with suicide, was accepted. The recommendation itself admits that the opinion on the question of repeal of section 309 was equally divided. That could be one reason for not accepting it. Should the Court take the responsibility of implementing it even though there is no adequate opportunity of looking into all the implications of such implementation?

Undoubtly there is a material difference between the legislature repealing section309 and the Court invalidating it because it is inconsistent with a fundamental right. In the former case no right is created in the individual even though the act of suicide is no more punishable while in the latter a fundamental right is created which has several implications. Firstly, it becomes a right thing to commit suicide. Secondly, the state loses the power to create any exceptions to the commission of suicide. The act of suicide may be a one time quick affair or it may be a slow process like giving up food and other life saving and preserving nutrition or slow poisoning through drugs or otherwise. It may also extend to life risking activities such as driving a motorcycle or scooter without crash helmet or driving a car withous safety belt. Since in all these and similar cases the individual may claim a fundamental right to commit suicide, the state is prohibited from regulating any of these activities. Thirdly, a fundamental right imposes a corresponding duty on the state. This duty may be both negative and positive. Under the former, the state must refrain from interfering with the commission of suicide. This seems to be simple. But it is not. One may try to commit suicide in public by burning or by falling from a highrising building. He might undertake a fast unto death in a public place not for any cause but just to end his life. Should the state be a helpless witness to all this howsoever inconvenience or disgust it might cause to others? If we say that the state may exercise its police powers in such cases then perhaps we are not serious about this right and in the course may end up in diluting the importance of other fundamental rights also. Moreover, in respect of Article 21, it has been recognised and accepted and the Court expressly admits it that though Article 21 is couched in negative language it creates positive rights. Many such rights like right to livelihood, health, shelter and education have been recognised as aspects of right to life. That is, all that which is necessary to sustain life is included in that right. It means state is under an obligation to provide all these amenities to the individual. The same analogy must apply to the right to die. The individual may demand from the state all that is necessary for the effective exercise of his right to die. Although it is not clear from the judgment of the Court, one may hope that all these points have been taken into account by the Court.

Further, only recently we have passed the law against *Sati*.[24] What

24. The Commission of Sati (Prevention) Act, 1987.

would happen to this law? It is already under challenge before the Court. Creation of the right to die and drawing support from the example of *Sati* for such right adds a powerful weapon in the armoury of the petitioners. It means the state loses the power to control the social evils even though no clear justification is established for the right to die. Could we justify such an approach to Article 21?

VI. Limits Of Judicial Law Making

It is too late in the day to ask whether judges make law. They do and they have to. However, the technique of judicial law making is different from the legislative law making. It also has its limitations which do not apply to the legislature. One such limitation is that the judge has to remain confined to the issue in dispute and even if he ventures to go beyond it , his venture does not have much consequence except perhaps to the extent that in India even the considered obiter of the Supreme Court is binding on other courts. In that situation the judge cannot lay down an exhaustive general scheme of law as the legislature can do. Of course lately in the constitutional area the courts, particularly the Supreme Court, have been laying down schemes for the enforcement of law declared or made by them. But such schemes also are basically confined to the specific issue before the courts and do not acquire the character of full fledged legislative schemes dealing with all the associated issues. In the case of Supreme Court these schemes may be justified, among others, under Article 142 of the Constitution which gives power to that Court to do complete justice in the matter before it. But otherwise if they go beyond the issue before the Court they may not have any effect whatsoever.

In view of this limitation of the judicial law making, a comprehensive scheme of law is drawn in instalments and one has to wait until a series of related issues is brought before the court. Otherwise the picture remains incomplete and truncated and that is why the need of legislative action. Let me explain my point with reference to the present case. The Court has held that an individual has a fundamental right to die under Article 21 and therefore, section 309 of the Penal Code which makes attempt to commit suicide is invalid. Even if Court's ruling is confined to *forced* life or miserable life, it has removed section 309 from the statute book. Under our law no one can be deprived of his life or personal liberty except according to procedure established by law. Law here means state made law and not customary or common law. Therefore, state cannot interfere with anybody's liberty or right to take away his life unless and until the state makes a law providing exceptions to the Court's ruling and the Court upholds such exceptions. Of course this judgement might force the legislature to act and make legislation laying down in detail when and how a

person can or cannot take his life. But, as we have already noted, even an admission on the part of the legislature that one can take his life may not be agreeable. And even if an agreement is reached on that issue, the Court's ruling will come in the way. In any case the legislature is the right forum where this kind of issue may be discussed more intelligently and thoroughly. This kind of discussion is not possible in the Court. The only merit of the ruling may be that it will accelerate such debate. But otherwise the courts suffer from inherent limitations in this regard and they should therefore be slow in entering into that arena.

VII. Summing Up

To sum up, *Rathinam* decriminalises attempt to commit suicide. But in doing so it naturally goes far beyond and raises questions which need to be examined more seriously and more thoroughly than what the Court has done. To some of these questions attention has been drawn in the foregoing pages. But they and many more need to be further examined firstly, in the context of overall expanding domain of life and liberty ; secondly, in the context of the direction which such domain must take ; and finally,in the context of life and liberty conditions in India. By specifiying the question : 'Has a person residing in India right to die ?' and answering it in the affirmative with reference to *inter alia* the inhuman and miserable life many Indians live, the Court willy nilly leaves the impression that the people should exercise their fundamental right to die to get rid of such life. It does not confine the issue to its narrow and well defined boundaries within which it is being discussed in the West, i.e. of dignified death in case the person is suffering from a terminal disease with no possibility of survival inspite of best medical support and wants to bring an early end to his suffering. This narrow question clearly excludes the wider claim to end one's life at will even if it is 'forced' or miserable life. Accordingly, *Rathinam* must also be narrowed down to similar limits .

Even within those limits it is arguable whether in terms of accessiblilty, expertise and rectitude, our medical facilities are camparable to those in the West and in view of that whether it is not too early to enter into this debate while much more pressing and vital issues need to be attended immediately .

Postscript

After this paper had been sent to press, the Supreme Court, on March 21,1996 in *Gian Kaur v. State of Punjab* (Criminal Appeal No. 274 of 1984) has overruled *Rathinam* and has upheld the validity of sec. 309 of the Penal code. Some of the reasons given by the Supreme Court for its decision coincide with the arguements taken in this paper.

HUMAN RIGHTS AND CRIMINAL JUSTICE ADMINISTRATION IN INDIA : RHETORIC AND REALITY

*B.B. Pande**

I. Introduction

From the point of view of Criminal Justice Administration the essence of human rights is enshrined in three great principles, under each of which may fall number of sub-principles. First in order is the *principle of legality*, which implies that substantive norms relating to behaviour and sanctions as well as procedural norms are fixed by pre determined laws and that limitations and restrictions applicable to substantive procedural laws, in the interest of human rights, shall be sufficiently clear and precise to exclude arbitrary executive action. It futher implies that persons subjected to the criminal process shall be treated equally without regard to rank or wealth. Legality also requires that individual freedom restricting procedures must be based on some law, both emanating from the exercise of statutory power or through judicial process. The second is the *principle of due respect to the person involved in the criminal process*, which implies that both at the substantive as well as procedural levels regard must be paid to the dignity of the accused, the victim as well as witness etc. This means a prohibition against measures that involve torture, inhuman and degrading treatment or punishment. It requires that interests of both the accused as well as the victims be safeguarded. It also requires that till guilt is established by applying legal rules, accused is presumed to be innocent.

Third is the *principle of quality of Criminal Justice*, which implies compliance with certain minimum standards that would be followed in various criminal processes such as independent and impartial judiciary, trial in an open court, equal access to legal counsel and free legal aid in case of poor, knowledge about grounds of arrest and charge and access to evidence, right to be released on bail and speedy trial etc.

The three principles ennunciated above are carried into effect in India through a wide range of specific human rights guarantees enshrined in the diverse national laws such as the Constitution of India 1950, the Code of Criminal Procedure 1973, the Indian Evidence Act 1872 etc. .

* Professor, Faculty of Law, University of Delhi, Delhi.

II. Judicial Evolution Of A Human Rights-Friendly Criminal Justice Administration

Though the basic legal frame-work for human rights within criminal justice administration is provided by a wide range of legislative measures of diverse kinds, but in the recent times judiciary, particularly at the appellate level, has played a vital role in not only vigorously enforcing human rights measures but also giving creative interpretations leading to broadening and evolving new concepts of human rights. Such a judicial role is a marked feature of the post-emergency period judicial process, particularly emanating from the Supreme Court. In this vein it would be useful to refer to certain judicial enunciations that go in to make the character of contemporary criminal justice administration. Such enunciations relate to certain vital processes of criminal justice administration.

A. Limitations On The Power Of Arrest

The Code of Criminal Procedure confers fairly extensive powers of arrest mainly to the police, which exercises powers of arrest in persuance to a warrant, or as a part of general powers under sections 41, 42 and 151 of the Code. Often the conferment of such wide powers becomes the cause for the abuse and invasion of the liberties of the citizens who might become the victims either because they dare to offend the authorities or because their arrest can yield some monetary benefit or just because they are too weak and powerless to oppose, in any way, the designs of those who enjoy power. There are also techniques of screening arrest by either not recording arrest or describing the deprivation of liberty merely as *prolonged interrogation*. The Supreme Court in *Joginder Kumar v. State*[1] fully appreciated the dynamics of misuse of the power to arrest. This unusual case involved the arrest of an active practicing lawyer, who still remains to be the primary agency that can challenge the abuse of power of arrest. The situation of arrest are equally curious as the concerned lawyer was called to the Police Station in connection with a case under enquiry on 7.1.1994. On not receiving any satisfactory account of his whereabouts the family members of the detained lawyer preferred a petition before the Supreme Court on 11.1.1994, and in compliance with the notice the lawyer was produced on 14.1.1994 before the Supreme Court. The Police version was that during 7.1.94 and 14.1.94 the lawyer was not in detention at all, and was only helping the police in detecting some cases. The Supreme Court had little difficulty in appreciating why such situations of gross abuse arise and were quick to

1. (1994) 4SCC 260. Coram : M.N. Venkatchaliah C.J. and S. Mohan and Dr. A.S. Anand, J.J.

observe :[2]

> The horizon of human rights is expanding. At the same time, the crime rate is also increasing. Of late, this Court has been receiving complaints about violations of human rights because of indiscriminate arrests. How are we to strike a balance between the two ?
>
> A realistic approach should be made in this direction. The law of arrest is one of balancing individual rights, liberties and privileges, on the one hand, and individual duties, obligations and responsibilities on the other.

The Court in their order categorically laid down that :[3]

> No arrest can be made because it is lawful for the police officer to do so. The existence of the power of arrest is one thing. The justification for the exercise of it is quite another .... No arrest should be made without a reasonable satisfaction reached after some investigation about the genuineness and bonafides of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest. Denying a person his liberty is a serious matter.

Finally, the Court treated the right against indiscriminate arrest as an attribute of Article 21 and 22(1) of the Constitution and with a view to effective enforcement of these Fundamental Rights laid down as follows :[4]

> 1. An arrested person being held in custody is entitled, if he so requests to have any friend, relative or other person who is known to him or likely to take an interest in his welfare told as far as practicable that he has been arrested and where he is being detained.
>
> 2. The Police Officer shall inform the arrested person when he is brought to the police station of this right.
>
> 3. An entry shall be required to be made in the diary of the arrest. These protections from power must be held to flow from Article 21 and 22(1) and enforced strictly. It shall be the duty of the Magistrate, before whom the arrested peron is produced, to satisfy himself that these requirements have been complied with.

B. Ensuring Humane Conditions Of Investigations

The worst violations of human rights take place in the course of investigation, when the police under pressure to secure most clinching evidence often resorts to third degree methods and torture. Cases of police torture and

2. Id. at 263.
3. Id. at 267.
4. Id. at 268.

custodial death are increasingly coming to light now a days. The courts have not only exposed the seamy side of police investigation process but have in several cases dished out exemplary punishments to ensure humane conditions of investigation. In *Gauri Shankar Sharma v. State*[5] three members of police force were charged for custodial death in the course of a dacoity investigation. It was revealed that the deceased was taken into custody without recording arrest in the general diary, on the actual day of arrest, and this way the injuries given in the course of investigation were shown to have been incurred in the pre-arrest period.

The Supreme Court not only restored the conviction under Section 304 II but in the words of Justice Ahmadi (as he then was) observed : [6]

> The offence is of a serious nature aggravated by the fact that it was committed by a person who is supposed to protect the citizens and not to misuse his uniform and authority to brutally assault them while in his custody. Death in Police custody must be seriously viewed for otherwise we will help take a stride in the direction of Police Raj. It must be curbed with a heavy hand. The punishment be such as would deter others from indulging in such behaviour.

Punitive strategy for dealing with cases of gross abuse of investigation power may be an effective way of dealing with offending officals, but that alone does not provide adequate relief to one who has himself been a victim of torture or abuse of power or the other who has suffered the loss of life of a bread-earner or a near relative . The Supreme Court has responded to this felt need by creating a constitutional right of compensation in all such situations where abuse of power violates any of the fundamental rights of the citizen. Notable in this context are the Supreme Court decisions in *Nilabati Behra v. State,*[7] *Peoples' Union for Civil Liberties v. State of U.P (Pilibhit Encounter case)*,[8] *S. Sharanjit Singh v. Delhi Admn.,*[9] *Inder Singh v. State,*[10] *State of M.P. v. S.S. Trivedi.*[11]

C. Restrictions On Indiscriminate Prosecution And Fabrication Of False Evidence

Though prosecution and investigation are the functions of two distinct wings of criminal justice administration, but often the investigating agency

5. 1991 S C C (Cri.)67.
6. Id. at 78.
7. (1993) 2 SCC 746.
8. W.P. No. 1118/91 and W.P. No. 1141/91 decided on 22/11/94. Unreported.
9. W.P. No. 632/92 decided on 31/3/1995. Unreported.
10. (1995) 3 SCC 702.
11. (1995) 4 SCC 602.

develops a commonality of interest with the prosecution and, at times, resorts to foul and underhand means to forge evidence to somehow secure convictions. This tendency becomes most pronounced in cases having political or communal over-tones. *Dilawar Hussain v. State*[12] provides an apt example of partisan role of investigation and prosecution agencies. This case relates to outbreak of communal violence in Gujarat, in which 8 members of one community were allegedly killed by a mob belonging to another community. Keeping in mind the sentiments of the population, strong punitive action was resorted to by arresting 2000 members of the mob. Reacting to the whole process of arrest, detention and prosecution, Justice R.M. Sahai (speaking for B.C. Ray, S.R. Pandian JJ) observed : [13]

> Still sadder was the manner in which the machinery of law moved. From accusation in the charge sheet that accused were part of unlawful assembly of 1500 to 2000 the number came down to 150 to 200 in evidence and the charge was framed against 63 under Terrorist and Disruptive Activities (Prevention) Act, 1985 and various offences including section 302 under Indian Penal Code. Even from them 56 were acquitted either because there was no evidence, and if there was evidence against some, it was not sufficient to warrant their conviction. What an affront to fundamental rights and human dignity. Liberty and freedom of these persons were in chains for more than a year, for no reasons. One even died in confinement.

Similarly, the following observations of Justice K. Ramaswamy (P.B. Sawant J. concurring) in *Kishore Chand v. State*[14] highlights the over-zeal of investigation agencies and its dangers for the liberty of the individual.

> It is necessary to state that from the facts and circumstances of the case it would appear that the investigating officer has taken the appellant, a peon, the driver and the cleaner for a ride and trampelled upon their fundamental personal liberty and lugged them in the capital offence punishable under section 302 IPC, by freely fabricating evidence against the innocent. Undoubtedly, henious crimes are committed under great secrecy and that investigation of the crime is a difficult and tedious task. At the same time the liberty of a citizen is a precious one guaranteed by Article 3 of Universal Declaration of Human Rights and also Article 21 of the Constitution of India and its deprivation shall be only in accordance with law.[15]

12. 1991 S C C (Cri.) 163.
13. Id. at 164.
14. 1991 S C C (Cri.) 172.
15. Id. at 182-83.

Being aware of the investigating agencies' undue interest in cooking-up evidence, the Court advises extreme caution in admitting any evidence that comes from tainted sources. In a recent decision *Shivappa v. State*[16] Justice Dr. A.S. Anand declined to admit in evidence a confession under Section 164, mainly because the facts in the case displayed a real possibility of police influence over the Magistrate and absence of any assurance about the voluntariness of the confession.

D. New Rationalization Of A Right To Bail

Right to bail is an important guarantee concerning the personal liberty of the accused. The late seventies euphoria concerning this right has considerably died down in the eighties and nineties in the wake of terrorism and new forms of criminality like dowry violence, atrocities against S.C. and S.T. and sexual crimes against women etc. However, still there have been some leading judicial decisions in the recent times that aim at balancing the liberty of the accused with the prosecution interest of making the accused available for investigation and trial.

In *Hitendra Vishnu Thakur v. State*[17] the Supreme Court while construing section 20(4) (bb) of TADA in the light of section 167 of Code of Criminal Procedure held that :

> With the amendment of clause (b) of sub-section (4) of section 20 read with the proviso to sub-section (2) of section 167 of Cr. P.C. an indefeasible right to be enlarged on bail accrues in favour of the accused if the police fails to complete the investigation and put up a challan against him in accordance with law under section 173 Cr. P.C.[18]

The court also underscored that the court is under an obligation in such case, (a) to decline police request for further remand in all cases where the assigned period has expired and no formal extension of period is granted, and (b) to inform the accused of his right to bail and also enable him to file an application on that behalf. The liberal bail right conferred even in TADA cases in *Hitendra Vishnu Thakur* case has been re-considered by the Full Bench in *Sanjay Dutt v. State.*[19] The judgement of Justice J.S. Verma, (Ahmadi C.J. and P.B. Sawant, B.P. Jeevan Reddy and N.P. Singh J.J. concurring) has limited the import of *Hitendra Vishnu Thakur* case in as much as the "indefeasible right" of the accused to be released on bail is enforceable by the accused only

16. (1995) 2 SCC 76.
17. (1994) 4 SCC 602.
18. Per Justice A.S. Anand at 626-28 in Hitendra Vishnu Thakur case.
19. (1993) 5SCC 410.

from the time of default till the filing of the challan and it does not survive or remain enforceable on the challan being filed. According to this decision for extension of investigation period under section 20(4) (bb) no written notice need be given to the accused, mere production at the time of fresh remand and information to him about the proposal of extension is enough.

E. Limiting Police Remand

Realising that worst kinds of human rights violation take place in the course of police remand the Court have been unduly sensitive to police request for remand. In *C.B.I. v. Anupam J.Kulkarni*[20] the Supreme Court refused to hand over the accused to the police on remand after his initial custody in judicial remand. Giving reasons for such a view Justice K. Jaychand Reddy [A.M Ahmadi J. (as he then was) concurring] laid down : [21]

> There cannot be any detention in police custody after the expiry of first fiteen days even in a case where some more offence either serious or otherwise committed by him in the same transaction come to light at a later stage.

Giving the reasons for such a rule the court observed : [22]

> The proviso to section 167 is explict on this aspect. The detention in police custody is generally disfavoured by law. The provisions of law lay down that such detention can be allowed only in special circumstances and that can be only by a remand granted by a Magistrate for reasons judicially scrutinized and for such limited purposes as the necessities of the case may require. The scheme of section 167 is obvious and is intended to protect the accused from the methods that may be adopted by some overzealous and unscrupulous police officers.

Similarly, the Supreme Court in *Union of India v. Thamisarasi & Ors.*[23] disfavoured the continued remand detention beyond the period of 90 days even in a case of arrest under the Narcotics Drugs and Psychotropic Substances Act 1985. The court ruled that the limitation witnessed in sec. 37(1) (b) of the NDPS Act applied only in case of bail on merits but not in cases of bail on default in filing complaint within the period specified in sec. 167 (2) of the Cr.P.C.

20. (1992) 3 SCC 141.
21. Id. at 158.
22. Id. at 155.
23. (1995) 4 SCC 190.

F. Recognizing A Pre-sentence Hearing Right

Sentencing has remained the most neglected area of criminal justice administration. However, there have been some welcome developments in this area in the recent times. The first is recognizing the statutory right of pre-sentence hearing and elaborating its implications for the accused. Certain decisions of Chief Justice Ahmadi handed down during 1989 to 1991 period are notable in this respect. In *Allauddin Mian v. State*[24] (followed by *Suryamoorthi v. Govindaswamy*[25], Justice M.A. Ahmadi (as he then was) laid down : [26]

> We think as a general rule the trial courts should after recording the conviction adjourn the matter to a future date and call upon both the prosecution as well as the defence to place the relevant material before it thereafter pronounce the sentence to be imposed on the offendor.

In *Malkiat Singh v. State*[27] Justice K. Ramaswamy (A.M.Ahmadi and V. Ramaswamy J.J. concurring) re-iterated the separate hearing after an adjournment and also outlined the role of prosecution and defence in the separate hearing. However, there are certain other decisions of the Supreme Court such as *Jumman Khan v. State*[28] and *Sevaka Perumal v. State*[29] that find the same day sentence hearing as sufficent compliance with the pre-sentence hearing provision.

G. Restitutive Sentencing

There is a new concern for the human rights of the victims of crime. Such a concern is amply reflected in the sentencing decisions of the courts that are more inclined to punish with view to compensating the victim for his losses. *Dr. Jacob George v. State*[30] is one such case in which the Supreme Court while upholding conviction under section 314, I.P.C. declined to restore the four year prison term awarded by the High Court, instead they imposed a fine of rupees 1 lakh to be paid to the only surviving minor son. Yet in another recent case *State of Punjab v. Ajaib Singh*[31] the Supreme Court Bench of Justice Sawant and Justice R.M. Sahai have directed the respondent to pay a compensation of rupees 5 lakhs to the families of two deceased even while dismissing the appeal of the state and recording acquittal on ground of private defence. This is a

24. (1989) 3 SCC 5.
25. (1989) 3 SCC 24.
26. *Supra* note 24 at 21.
27. 1991 SCC(Cri.) 976.
28. 1991 SCC(Cri.) 283.
29. 1991 SCC(Cri.) 724.
30. (1994) 3 SCC 430; Also see Baldev Singh v. State , (1995) 6 SCC 593 (compensation considered appropriate even in a case homicidal death).
31. (1995) 2 SCC 486.

classical case of non-punitive or pure restitution, because it requires a non-offender (one who is entitled to right of private defence) to compensate the victim family for the harms actually suffered.

III. Criminal Justice Administration : Human Rights Blind-Spots

A. Excessive Powers Of Arrest

There is a prevailing myth that greater exercise of power of arrest largely contributes towards an effective crime control system. However researches have revealed that there is little scientific evidence of clear relationship between wide arrest powers and crime control objectives. That is why in many non-common law systems of the world the power of arrest is sparingly deployed. An excellent survey of the pre-trial laws and practice in several countries has appeared in a compilation titled as *Waiting For Trial*[32] which sums up the conclusion about the arrest power as follows : [33]

> In most jurisdictions arrest and interrogation is neither an automatic response to the detection of a suspect, nor even necessarily the most common way in which suspects are dealt with. Procedures in many countries exist for minor offences to be dealt with by alternative means, such as the use of summons, or for voluntary attendance at a police station for questioning (in which case, if the suspect is charged with an offence, an arrest is often a formality immediately followed by pre-trial release).

Adverting on the theme of arrest, the *Third Report of the National Police Commission* opined that a large percentage of arrests are superfluous and in a way counter productive. The Report observes thus : [34]

> It is obvious that a major portion of arrests are connected with very minor prosecutions and cannot, therefore, be regarded as quite necessary from the point of view of crime prevention. Continued detention in jail of the persons so arrested has also meant avoidable expenditure on their maintenance. In the above period it was estimated that 43.2 per cent of the expenditure in the connected jails was over such prisoners only who in the ultimate analysis need not have been arrested at all.

The same report lists out four situations under which arrest may be justified even for cognizable offences, namely (1) to infuse cofidence on victims of

32. Freider Dunkel et al. (Ed.) Waiting for Trial, Max - Planck Institute for Foreign and International Criminal Law, Freiburg im. Br. (1994).
33. Id. at 926.
34. Third Report of the National Police Commission 32 (1981).

serious crime like murder, dacoity, robbery and rape etc. (2) to counter accused's design of evading the process of law, (3) to check further violent activites of the accused (4) to check the repetition of the offence by a habitual offender.

B. Taking Citizen's Liberty Lightly

Arrest and interrogation involves interference with the liberties of the citizens, therefore, they have to be justified only in the interest of larger social good reflected in clearly formulated rules of law. However, when it comes to laws authorising deprivation of liberty of the citizen, Article 22(1), 22(2) and sections 56 and 57 of the code of criminal procedure read along with Article 21 constitute a complete code. The essence of the code is contained in Article 21 which lays down that only a just and fair procedure can justify the deprivation of liberty of any citizen. To ensure fairness and justness Article 22(1) and 22(2) along with sections 56 and 57 then lay down safeguards. Section 56 lays down that without unnecessary delay the arrested person should be taken before a Magistrate or superior police officer. Section 57 says that within 24 hours the person detained without warrant should be produced before a Magistrate in court. What is the purpose of taking a person without delay before a superior officer? Is the superior officer only to receive infromation about arrest or can he also order that the person be released forthwith ? Is section 56 not the first channel of diversion ? Now once a person's initial arrest is ratified by superior officer, section 57 requires that within 24 hours the arrest ought to be reviewed by a Magistrate in his court or a Magistrate applying his judicial mind to the executive action of arrest. Unless there are sufficent reasons justifying arrest the Magistrate ought to order release of the arrested person after a preliminary hearing under section 57. Only where the Magistrate finds sufficient justifications for arrest and the police has asked for the custody for the purposes of investigation, the Magistrate can pass a remand order, otherwise the detenue has to be set at liberty. This way the arrested person can be diverted from the formal system either after proceedings under section 56 or after proceedings under section 57. However, in actual practise person tends to lose his liberty once he is subjected to the initial process of arrest. That is why in *Directorate of Enforcement v. Deepak Mahajan*[35] the court faced the following question that was left unanswered in these words : [36] .

> A doubtful question may arise as to whether the Magistrate can detain the accused person for further period beyond the prescribed period of ninety or sixty days if the accused is not prepared to and does not furnish bail. This doubt is cleared by Explanation I of section 167(2) stating that *notwithstanding the expiry of the period specified in paragraph (a), the accused shall be detained in custody so long as he does not furnish bail.*

35.(1994) 3 SSC 440.
36.Id. at 458.

In the Indian societal context which category of persons are not in a postion to furnish bail? Often poor under-trials languish in jail even after grant of bail, because they are in no position to fulfill bail conditions.

In the context of the liberty of the citizen a notable Supreme Court decision deserves some attention. In *Dhananjay Sharma v. State of Haryana*,[37] the Court accepted the petitioners case that they were illegally detained by the police for two days and that [38]

> the state must be held responsible for the unlawful acts of its officers and it must repair the damage done to citizens by its officers for violating their indefeasible fundamental right of personal liberty without any authority of law in absolutely high handed manner.

However, it is curious that the Court thought it just to deny any compensation to the detenue because they had indulged in falsehood and exaggeration in describing the incident. If compensation to the detenue for violation of a fundamental right is a recognised constitutional remedy (after the Nilabati Bahera case) can it be subjected to a new limitation of judicial pleasure ? It is understandable that seekers of justice must come before the court with clean hands and that in the event of any kind of deviation they can be subjected to appropriate legal action under perjury or contempt of court of law. But once compensation by the state officials for violations of a fundamental right has crystallized into a legal right, can a collatral misbehaviour by the petitioner disqualify him from availing the right? Rights of the citizens have to be taken seriously by every institution.

C. Sentencing Power Sans Guidelines

Subjecting the various processes of criminal justice administration to a rigorous and effective legal scrutiny is the best guarantee against individual and system deviance. But when it comes to sentencing function we realise that neither we have adequate guidelines nor other method of ensuring conformity and compliance. This point was most tellingly highlighted by N.Lacey as follows : [39]

37. (1995) 3 SCC 757.
38. Id. at 779.
39. N.Lacey, *Discretion and Due Process at the Post-Conviction Stage*, in I. Dennis, CRIMINAL LAW AND JUSTICE (1989).

> Decisions at the sentencing stage affect the fundamental interests of the offender in just as coercive and intrusive a way as the decisions at the conviction stage affect the defendant. Indeed the possibility of the ultimate application of a sanction which deprives an offender of some of her most valued goods and freedoms is one of the most important reasons underpenning the need for certainty and procedural safeguards in the criminal law itself.... Once we have conceived criminal justice as an integrated process with some complex social functions, it almost amounts to bad faith to place so much emphasis on these doctrinal values at one stage of the process while virtually ignoring them at others.

D. Differential Enforcement Of Criminal Laws

After a comparative view of arrest realities even in the relatively affluent and advanced countries *Waiting For Trial* has arrived at this conclusion :[40]

> Whatever the legal situation, it is true every where that arrest is used disproportionately against those who are economically and socially marginal, who often also include ethnic minorities. The chapter on *Hungary* refers to the disproportionate use of arrest against gypsies; that on *England*, to the arrest of blacks; and many other countries have other ethnic minorities who similarly have arrest rates much higher than the general population. One reason for this may be that offences are committed disproportionately by young or socially disadvantaged persons who are, for demographic or economic reasons, over represented in those groups. But this simply raises broader questions about the social impact of law enforcement. And it suggests that action to promote economic, social and cultural rights-such as the right to fair wages and non-discrimination on racial and cultural grounds might result in a less disproportionate use of criminal justice system against disadvantaged groups.

The criminal law enforcement reality in India is unfortunately no different. The criminal justice functionaries appear obsessed with the stereotype image of the 'criminal' who is often identified by his low economic standing and marginalized status. That is the reason why the slum-dwellers, the unemployed and under-employed, tribals and migrant population bear the brunt of police action, constitute the bulk of accused who face criminal trials without adequate representation and comprise the highest percentage of prison population, both as under-trial as well as convict.

40. WAITING FOR TRIAL *op.cit.* at 925-26.

IV. CONCLUSION

Despite proliferation in the legislative[41], administrative[42] and judicial[43] initiatives in the human rights field in the recent times, the human rights rhetoric has hardly been able to transform the concrete reality. At times one tends to feel that the large army of criminal justice administration functionaries, particularly in the lower rungs has remained untouched and unmoved by human rights ideology and is more tuned to crude, coercive adhocism that is supposed to produce best crime control results. To some extent lack of human rights culture and education is responsible for the present state of affairs and as larger number of functionaries get exposure and training in human rights thought, there might come some change. But there are certain inherent features of human rights legal discourse that must be appreciated before passing any kind of judgement on human rights performance. First, human rights, like other legal rights, are endowments of abstract legal and political individual. Such abstraction of human rights is an anti-thesis of the real lives of concrete individuals, which gives rise to a 'miraculous contradiction' arising on account of disjuncture between human rights rhetoric and reality. Such a disjuncture is the main reason (or argument) of conflict between 'lawman's' ways and 'policeman's' ways. The policeman focuses on the concrete reality of lawless behaviour of terrorist, or insolent criminal who poses real threat to peace and order of the society. The same situational reality of the lower strata criminal underlies the uncaring and callous attitude of the police and prison officials towards them. In the case of first category of criminals one could easily argue rationalization of judicial individualism in the light of the experience of concrete individuality that tallys more with the Hobbesian portrayal of 'nasty, dwarf and brutish' man.[44] But when it comes to the second category criminal one could hardly dispute the desirability of juridical individualism. Second, the individual-oriented human rights are matched by the impersonal abstraction of state power governed by law. In abstract sense, the state power must respect individual freedom and equality and power must be exercised under the rule of law. But there always remains a contradiction between abstract juridical state and the concrete state which is also the locus of political power of the dominant class. In such a dispensation, state's concern for safeguarding individual human

41. THE PROTECTION OF HUMAN RIGHTS ACT, 1993; THE NATIONAL COMMISSION ON WOMAN ACT, 1990; THE NATIONAL COMMISSION FOR MINORITIES ACT, 1991.

42. The National Commission for Woman, the National Commission for Minorities, the National Human Rights Commissions have been constituted and have been functioning ever since.

43. The Judicial initiatives fall in two broad categories : (a) Those involving enforcement of existing human rights' provisions, particularly against lawless state officials, and (b) those involving creation of new human rights'. concepts or inventing new remedies against violation of human rights.

44. T.Hobbes, LEVIATHAN (C. Mac Pherson ed. 1968) ; Also see J. Watkins, HOBBES'S SYSTEM OF IDEAS (1973).

rights can never be more than conditional, because the state is more often motivated by interests other than protection of human rights of the individual. The instances of state lawlessness and repressive control of the marginalized and under-class population are clear examples of contradictions between juridical reality of state and concrete nature of state power. Third, human rights as a tool for struggle has only limited potential. It is true that in certain situations of arbitrary and abusive exercise of state power human rights discourse may succeed in engendering some restraint. But not much change in the situation is expected unless the basic developmental needs of a majority of our population are met first. Perhaps it is the realization of this aspect of concrete existential reality that impelled Justice T.K. Thommen to observe : [45]

> It is the primary responsibility of the state to initate affirmative action of redeem the poverty striken, illiterate and helpless masses of people who have been for generations discriminated against and exploited by those in positions of power and affluence. Any failure on the part of any organ of state in discharging its duties will be subject matter for immediate remedial action by the proposed National Commission on Human Rights. This commission is intended to be dedicated to the helpless, poverty-striken citizens of this country.

Justice Thommen's wish to impart new meaning to human rights, and underscore certain priorities for the National Human Rights Commission[46] raises concern for those sections of the society who often are the vicitms of the criminal justice administrations in our country. Human rights may not have much meaning for them today, but certainly they can serve as the rallying point for political and social movements, necessary for transforming the social condition itself.

45. *Human Rights Commission*, 18 COCHIN UNIVERSITY LAW REVIEW 4 (1993).

46. At the time of writing this article the Commission had not been constituted. Justice Thommen later became one of the first members of the Commission. However, so far the National Human Rights Commission has not been able to dedicate its efforts to the service of the 'poverty striken citizens of this country.'

INDIAN PUBLIC INTEREST LITIGATION
LOCATING JUSTICE IN STATE LAW

*Aman Hingorani**

I. INTRODUCTION

Such is the disillusionment with the state (formal) legal system that it is no longer demanded of law to do justice; if justice perchance is done, we congratulate ourselves for being fortunate. The Court is perceived as an arena for quibbling for men who can afford it while legality is feared as a complex notion that rents state power to legitimatise the taking away of something.

But then, we are informed by Marxists[1] that law in a liberal capitalist society was never meant to do justice; rather it is a political tool used by the dominant class to replicate prevailing economic relations or alter them to its advantage. State ideology views an individual both as an abstract self-determining personality voluntarily entering into transactions as well as an 'empirical being' constituted by a bundle of capacities - an alienable commodity. Empirical beings possess equal formal rights but since they are situated in different socio-economic classes and possess unequal resources and opportunities, the rights they enjoy are necessarily unequal. Individuals, under the illusion of neutrality of law, abide by abstract and supposedly impersonal rules applied by the state (an impersonal institution distinct from civil society possessing centralised authority and monopoly of violence; the purported impersonality being, of course, purely academic) that cater to the need of 'free market' for stability, predictability and security of ownership of property.

It was this concept of law that was 'gifted' to the colonies in order to 'civilise' the 'primitive natives', who were presumed to be living in barbaric and chaotic conditions without a history of their own. Since the 'primitive natives' were viewed as legal non-persons, law made the whole of the native society deviant, or always potentially deviant, never secure in any aspect from supervision, direction or correction'.[2] If we summon the audacity to analyse the Rule of Law from the stand-point of the colonised, it is apparent that law was an instrument of injustice. This was less evident in nascent western

* Advocate, Phd. Student, Faculty of Law, University of Delhi, Delhi.

1. For Marxist approaches see generally M. Cain & A. Hunt, MARX AND ENGELS ON LAW (1979); T. Campbell, THE LEFT AND RIGHTS : A CONCEPTUAL ANALYSIS OF THE IDEA OF SOCIALIST RIGHTS (1983); H. Collins, MARXISM AND LAW (1982); P. Phillipps, MARX AND ENGELS ON LAW AND LAWS (1980).

2. P. Fitzpatrick, THE MYTHOLOGY OF MODERN LAW 111 (1992).

capitalist democracies being nourished by colonialism where abundant wealth assuaged social disharmony and conflict. However, with the gap between the 'haves' and 'have-nots' increasing even in Western societies today, the role of law in cementing prevailing economic relations has surfaced. Ironically, the first reaction in some countries[3] to administrative and legislative sclerosis was to approach the Court to undertake institutional reform. The Court's purported virtues of innocence of politics, of bureaucratic rigidity, of self-serving discretion and of partiality to dominant class interests captured the imagination of liberal thinkers who pleaded for judicial activism to cure institutional malaise. However, once the Court stepped out from behind the protective shield of the 'limits of the law', it made itself vulnerable to charges of corruption, nepotism and political bias. The loss of credibility forced it to return to its traditional impersonal role, but only after having underscored the need of locating the site of social reform outside the formal legal system.

The late 1970's marked a discernible shift from legal centralism to legal pluralism.[4] Having realised that social conduct was regulated by the interaction of normative orders (both formal and informal), notions of popular justice, community justice and distributive (social) justice (simplistically denoted in this article by the term 'informal justice') were sought to be institutionalised though outside the sphere of the formal legal system and in opposition to it. It was reasoned that 'just as health is not found primarily in hospitals...so justice is not primarily to be found in official justice-dispensing institutions'.[5] This approach unsettled several assumptions underlying the institution of law.

3. For example, in the U.S., the notion of using state law as an instrument of social change was in early 1960's 'a sober manifestation of the movement of social reform based on progressive values - social meliorism, optimism and confidence in the efficacy of change introduced from the top of the social structure' (R. Gaskins, *Second Thoughts on 'Law As An Instrument of Social Change,'* 6/2 LAW AND HUMAN BEHAVIOUR 153 (1982)). This optimism was shortlived : by late 1970's, scholarly, journalistic and political commentary became increasingly skeptical of the legitimacy of judicial activism as a strategy to usurp administrative, legislative and policy functions. Moreover, the Court had, in its attempt to cure institutional malaise, itself started to exhibit the features of the very institutions it had set out to check.

4. Legal pluralism, the study of different social orders which interact to create what B. D. S. Santos (*Law: A Map of Misreading : Towards a Postmodern conception of law,* 14 JOURNAL OF LAW & SOCIETY 279 (1987)) terms as 'interlegality' that governs, in practice, the conduct of individuals, is not a new discipline: from early twentieth century onwards, the curious European mind has been baffled as to how the 'primitive natives' could possibly have maintained any form of social order without the 'civilising effect' of European colonial law. These studies, however, focussed on the impact of the introduction of European law in reshaping social orders in colonised societies by superimposing itself on 'customary, folk or indigenous' law, the latter being a construction of colonialism itself. Such law was a distorted interpretation of normative orders regulating the colonised society; the distortions occurring often by its very codification or at times by the 'repugnancy clause' (S.E. Merry, *Legal Pluralism,* 22/5 LAW & SOCIETY REVIEW 875 (1988)). For an account of the distortions created in the highly developed ancient Indian legal system, see M. Galanter, LAW AND SOCIETY IN MODERN INDIA 21-25 (1989).

5. M. Galanter, *Justice in Many Rooms : Courts, Private Ordering and Indigenous Law,* 19/2 JOURNAL OF LEGAL PLURALISM 17 (1981).

Health is not created solely by doctors, rather it flourishes in their absence. Doctors seem to restore health knowing that they have an imperfect understanding of what causes and sustains health; despite good intentions, the work of doctors may be inimical to health. The extension of this metaphorical logic to law reinforced the view that legal centralism was part of the problem perpetuating social wrongs rather than their solution.[6]

Proponents of informal justice view it as an alternative to state law; several states responded to this perception by sanctioning the establishment of alternative dispute resolution mechanisms such as community courts or neighbourhood courts. Such resolution of disputes takes into account the socio-economic context of the parties, thus bringing into consideration what was abstracted by state law. Procedures are flexible and are intended to aid resolution rather than insist on adherence to technical formalities.

Others share a less charitable view of informal justice as an alternative to state administered justice. Informal justice, it is alleged, is merely an agent of state law which fills in the inadequacies of legal formalism so as to prevent the undermining of state law.[7] It operates in a sphere delimited by state law, does what is denied to state law and at the same time conveys an impression of autonomy from and resistance to state law. Though informal justice is identified in opposition to state law; it is just as integral to it.[8]

The necessity of informal justice, whether as an alternative to state law or as its agent, to find its identity in opposition to state law stems from the nature of Anglo-Saxon law prescribing legal formalism. It was the failure of the formal legal system, modelled on Anglo-Saxon jurisprudence, to deliver justice that forced informal justice to take on a separate identity from state law. But then, there is nothing sacred about Anglo-Saxon law nor do there seem any compelling reasons why states, particularly former colonies, must necessarily retain Anglo-Saxon law as state law. Simply put, if state law is made to possess precisely those features which are denied to Anglo-Saxon law, notions of informal justice could be located within the formal legal system in contradistinction to outside it. In other words, there is nothing conceptually or jurisprudentially incoherent about such state law institutionalising the content of informal justice within the formal legal system rather than in opposition to it; such institutionalisation being possible, of course, only under specific cultural, ideological, political and socio-economic conditions.

6. C.D.Cunningham, *Why American Lawyers should go to India : Retracing Galanter's Intellectual Odyssey,* 16/4 LAW & SOCIAL ENQUIRY 794 (1991).

7. S. Hedge, *Limits to Reform : A Critique of the Contemporary Discourse to judicial reform in India,* 29 (2) JOURNAL OF INDIAN LAW INSTITUTE 161 (1987).

8. P.Fitzpatrick, *Supra* note 2 at 169.

Public Interest Litigation (referred to PIL for the sake of brevity), in the form it exists today in India, offers precisely such a paradigm of law which locates the content of informal justice within the formal legal system. PIL is a non Anglo-Saxon jurisprudence that directs the Court to transcend the traditional judicial function of adjudication in order to provide remedies for social wrongs. Since its inception in 1979, it has been used to mould state law into an instrument of socio-economic justice by discarding from the formal legal system precisely those elements which induce legal formalism and 'neutrality' of law.[9]

Current literature on informal justice and its impact on the transformation of the state focuses on issues such as the challenge of informal justice to state monopoly of production and distribution of law and justice and the 'trivialisation' or 'relativization' of 'official' formal law by informal justice. Questions are raised as to whether notions of informal justice are part of the expansion or retraction of state in form of civil society. Given that the very possibility of locating the notion of informal justice within state law alters the terms of the debate, an attempt has been made in this article to analyse the jurisprudence of Indian PIL and the judicial role entailed by it. Such an analysis would be invaluable in evaluating the premises underlying the conceptualisation of informal justice.

Several developing states (like Malaysia and Philippines) have made efforts to incorporate Indian PIL in their formal legal system; such efforts have been only partially, if at all, successful. PIL is unique to India. Hence, any study on PIL must first appreciate the political and socio-economic milieu of the country. Accordingly, the second section of this article presents an overview of Indian PIL while describing the legal, political, economic and social conditions in which it evolved. The third section evaluates the jurisprudence of PIL with its strengths and limitations.

II. An Overview Of Public Interest Litigation

A. Evolution Of PIL

Before 1979, the Indian Supreme Court professed to be a neutral umpire resolving disputes litigated before it. In other words, it moulded itself into the traditional judicial role prescribed by Anglo-Saxon jurisprudence. As it functioned on the Anglo-Saxon model, it adopted the adversarial system of litigation; insisted on observance of procedural technicalities such as locus standi and adhered to traditional rules of practice evolved in public interest such as res judicata and laches. Further, the Court,[10] like any other Anglo-Saxon Court, swung in its approach to justicing between positivism and natural law tradition. Starting on a positivist note in 1950;[11] it suscribed to natural law school of thought by 1967;[12] only to return to positivism by 1976[13] and then adopt the natural law approach by 1978.[14]

On 8 and 9 January 1979, the Indian Express published two articles by Rustamji, a member of the National Police Commission, which were based on his tour note highlighting the plight of undertrial prisoners languishing in various jails in Bihar for cruelly long periods of time for no crime other than their poverty. The tour note reported that many prisoners had been languishing in jail for over ten years without trial for simple offences like ticketless travel. There were cases where children had been born and brought up in jail. Then there were cases where witnesses or victims of a crime had been put in jail for decades in order to facilitate their presence during trial. Women who had complained of rape were being sent to jail so that they may be easily available as witnesses. There were girls and children who had been imprisoned because the Ashram where they had lived had to be closed down; they were now kept in jail in 'protective custody' : tearful, unwilling and positively wanting no protection at all.[15]

Nirmal Hingorani, a Supreme Court lawyer, happened to read the second article. He and his lawyer - wife, Kapila Hingorani, were 'so shocked by the depiction of the horror of the situation as to move the Supreme Court for *habeas corpus*, something which neither the Express nor Rustamji expected to happen'.[16] The Supreme Court Registry, duty bound, took objection to the petition, *Hussainara Khatoon v. State of Bihar*,[17] filed under Art. 32 of the Constitution by Kapila Hingorani as a citizen of the country and officer of the

9. A. Hingorani, *Public Interest Litigation*, Hindustan Times (27 January 1994).

10. It may be noted that most of the decisions are referred to as having been laid down by the 'Court' rather than with reference to the Judges constituting the Bench. This approach has been adopted purely for the sake of clarity; it should not be construed as suggesting that the Judges of the Supreme Court shared identical views and perceptions on various legal issues. Secondly, the focus throughout the article shall be on the Supreme Court decisions since they are, by virtue of Art. 141 of the Constitution, the law of the land. No doubt High Court decisions merit attention; however, due to paucity of space, they shall be referred to only when necessary.

11. A.K.Gopalan v. State of Madras, A I R 1950 SC 27.

12. Golak Nath v. State of Punjab, A I R 1967 SC 1643.

13. A D M Jabalpur v. Shivkant Shukla, A I R 1976 SC 1207.

14. Maneka Gandhi v. Union of India, A I R 1978 SC 597; Sunil Batra v. Delhi Administration, A I R 1978 SC 1675.

15. K. Hingorani, N. Hingorani & A. Hingorani, *The Evolution and Development of Public Interest Litigation : An Analysis*, Law Asia'93 (15 September 1993).

16. U. Baxi, *The Supreme Court Under Trial : Undertrials and the Supreme Court*, 1 S C C 35 (1980); *A lawyer's shock at undertrial's plight*, Indian Express (7 February 1979).

17. A I R 1979 SC 1360, 1369, 1377.

Court in public interest noting that she did not have the power of attorney to approach the Court nor was she the next friend of the prisoners and thus had failed to comply with the relevant Supreme Court Rules.[18] However, it agreed, on request, to place the matter before the Court accompanied by an office report recording its objections. The Court entertained the petition that led to a chain of proceedings which resulted in the immediate release of over 40000 undertrial prisoners on personal or no bond. The Court, while declaring that it was a 'crying shame' on the judicial system which permits such incarceration of the poor and expressing its anger and anguish at the 'shocking state of affairs' that betrayed 'complete lack of concern for human values'[19] read a right to speedy trial as an integral and essential part of the fundamental right to life and liberty enshrined in Art. 21 of the Constitution. Relying on the unenforceable[20] Directive Principle of State Policy contained in Art. 39A of the Constitution, which obliges the State to secure the operation of the legal system to promote justice and to provide free legal aid, it held that every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty or indigence has a right to a lawyer at state expense. It warned the State that if it fails to provide legal services at state expense to such persons, 'the trial may itself run the risk of being vitiated as contravening Art. 21'.[21] Nor could the State avoid its constitutional obligation to provide speedy trial to the accused by pleading financial or administrative inability. The Court justified its affirmative action by reasoning that it was its own constitutional obligation, 'as guardian of the fundamental rights of the people, as a sentinel on the *qui vive*',[22] to enforce the fundamental right of the accused to speedy trial by issuing necessary directions to the State which may include positive action. The Court declared that it was high time that public conscience is awakened and that it is realised that the impoverished [23]

> have always come across 'law for the poor' rather than 'law of the poor'. The law is regarded by them as something mysterious and forbidding - always taking away something from them and not as positive and constructive social device for changing the social economic order and improving their life conditions by conferring rights and benefits on them. It is, therefore, necessary that we should inject equal justice into legality.

The characteristics of PIL have crystallized as a reaction to the difficulties faced by the Court in its attempt to 'inject equal justice into legality'. For example, the Court in the present case, while requesting petitioner to prepare charts of thousands of prisoners placing them in different categories,[24] directed the state counsel to assist her as she has 'undertaken this public interest litigation as a matter of public duty and her resources are, therefore, bound to be limited'.[25] Thus was established the collaborative nature of PIL where there is a co-operative effort on the part of the petitioner, the State and the Court to secure observance of the constitutional or legal rights of the vulnerable sections of the community and to reach social justice to them.

Hussainara Khatoon's case set the pattern which was adopted by the Court in subsequent cases. In addition to the non-adversarial nature of this litigation and absence of the traditional lis, other characteristics of PIL exemplified by *Hussainara Khatoon's* case include the typical sprawling and amorphous structure of parties to the litigation; the active role of the Judge; the releasing of the petitioner from the burden of proving the alleged facts; the acceptance of press reports as the basis of petitions; the grant of immediate and interim remedial relief once a *prima facie* case is made out; the reliance on unenforceable Directive Principles of State Policy contained in Part IV of the Constitution to read new rights into Fundamental Rights guaranteed under Part III of the Constitution, particularly into the right to life and personal liberty guaranteed under Art. 21; the relaxation of the rule of *locus standi* to confer standing on any person, acting *bona fide*, to approach the Court for the vindication of rights of the disadvantaged sections of society or, as subsequently held, for the vindication of diffuse rights.

Hussainara Khatoon's case led to perhaps the most horrifying PIL case of *Anil Yadav v. State of Bihar*.[26] On 28 September 1980, Kapila Hingorani received a letter from a lawyer in Bhagalpur District of Bihar stating that many suspected criminals have been blinded by the police 'through acid put into their eyes after apprehension (arrest)'.[27] Allowing the writ petition filed on the basis of this letter, the Court deputed its Registrar to visit Bhagalpur to investigate whether the contents of the letter were true. It was found that at least 33 persons

---

18. A. Loomba, *Fight Against Appalling Injustice to Undertrials*, NEW AGE 4 (11 February 1979).
19. *82000 Undertrials Awaiting Justice*, INDIAN EXPRESS (5 February 1979).
20. Art. 37 of the Constitution provides, inter alia, that the Directive Principles of State Policy contained in Part IV of the Constitution, which primarily are social and economic rights, are not enforceable in any Court but nevertheless are fundamental in governance of the country and it shall be the duty of the State to apply them in making laws.
21. *Supra* note 14 at 1381.
22. *Id.* at 1376.
23. *Id.* at 1375.
24. It is shocking to note that there were undertrials who had been in prison for periods longer than the maximum term for which they could have been sentenced, if tried and convicted; those accused of multiple offences, who had suffered imprisonment for longer periods of time than they would have even if it is presumed that the State would have been able to secure their conviction in all offences and the maximum sentences would have been imposed for each offence and such sentences would have run consecutively rather than concurrently as is the usual practice.
25. *Supra* note 17 at 1378.
26. A I R 1982 SC 1008. See also Khatri v. State of Bihar, AIR 1981 SC 928, 1068.
27. A. Sethi. *Her Crusade Against Tyranny*, PROBE INDIA 22 (February 1981).

had been blinded by the police using needles and acid and that the burnt eyes would then be bandaged with acid soaked cotton and left to rot. The sheer horror of the situation shook the Court. The confirmation by the medical doctor of the agent and mode of blinding spurred it to declare that it would 'shock the conscience of mankind'[28] and that it shows to what depths of depravity the administrators of law can sink in Bihar. In judgements seething with anger and anguish, the Court condemned the policemen for having perpetrated what it aptly described as 'a crime against the very essence of humanity'. It, through interim orders,[29] quashed the trial of the blinded prisoners and directed the State of Bihar to bring them to New Delhi, fund their medical treatment and formulate a scheme for their rehabilitation. It ordered the speedy prosecution of the guilty policemen and doctors involved in the 'barbaric act for which there is no parallel in civilised society'. Astonished that no legal representation had been provided to the blinded prisoners simply because they did not ask for it, the Court reiterated that the State is under a constitutional mandate under Art. 39A of the Constitution to provide free legal aid. It imposed a positive constitutional obligation on every Magistrate and Sessions Judge throughout the country to inform each accused brought before them of his right to free legal aid as otherwise[30]

> even this right to free legal services would be illusionary for an indigent accused.. It is common knowledge that about 70% of the people in rural areas are illiterate and even more than that percentage of people are not aware of the rights conferred upon them by law. It would make a mockery of legal aid if it were to be left to a poor, ignorant and illiterate accused to ask for free legal service.

Anil Yadav's case established another aspect of non- adversarial nature of PIL; that is, of investigative litigation. In PIL actions, the Court shoulders the responsibility of investigating into facts; a function performed in *Anil Yadav's* case by the Supreme Court Registrar.

The insensitivity and callousness of the State Government came to light when it was discovered that it had been aware of the blindings before the Court had been moved; it did not deem it fit to intervene as the police were, in its

28. *Supra* note 26 at 1009.

29. Each blinded was given, at the instance of the Court, Rs 15,000 by the State and Rs 15,000 from the Prime Minister's Relief Fund. They were also awarded expenses incurred for their travel, medical and vocational training. The Court, by its order dated 8.5.1990, directed the quashing of prosecution against the blinded and the release of those convicted. It also awarded a monthly pension for life of Rs 500 to each blinded which has been increased to Rs 750 from 1.4.1995 onwards.

30. Khatri v. State of Bihar, A I R 1981 SC 928, 931.

opinion, doing a good job in containing crime.[31] 'It is reported that at least two sub- inspectors, who were among the 15 suspended (subsequently), were given gallantry awards for 'outstanding service'.[32] Indians were already aware of the criminalisation of politics; a trend that was institutionalised during the Emergency in 1975. Nomination of known criminals by invariably every political party to stand in elections, nurturing of armed hoodlums and goondas to capture votes, rampant corruption pervading the political structure from top to bottom and the almost invincible nexus between the politicians, the police and hardened criminals had become so systemic over the period of time that it had assumed (and still assumes) the visage of being natural in politics. *Anil Yadav's* case was a painful reminder of this grim reality. Its impact in conscientising the public and the Court was stupendous. When the Court indicated its willingness to check administrative sclerosis and governmental lawlessness, it was stormed by petitions from all sections of society. An immediate consequence of the lowering of the barriers between the Court and the common man was the energising of social activists, journalists and a handful of lawyers and legal academicians into action, who now ceaselessly strove to expose governmental lawlessness. To illustrate, three journalists seeking to expose a thriving market in women actually bought a woman and filed a petition praying for the prohibition of this practice.[33] Newspaper or magazine articles pertaining to children put in jail notwithstanding the law prohibiting imprisonment of children;[34] employment of children in carpet industries in violation of labour laws;[35] bonded child labour;[36] inhuman conditions in Children Remand Homes[37] workers of slate pencil manufacturing industries dying at a young age due to accumulation of soot in their lungs in absence of safety measures;[38]

31. *Bihar Govt. Turned Blind Eye to Blindings*, TIMES OF INDIA (3 December 1980). The unrepentant attitude of the State Government was evident in Court, when it, contesting the submission of the petitioner for compensation as being implicit in violation of Art. 21, argued that even if the blindings had been done by the police and there was violation of the constitutional right enshrined in Art. 21, the State could not be held liable to pay compensation to the person wronged. For the first time since its inception, the Court had to consider whether its power to enforce fundamental rights was merely injunctive in nature or also remedial. Accepting the argument of the petitioner, it ruled that it was prepared to forge new tools and devise new remedies" for the vindication of fundamental rights (see *supra* note 30 at 930).

32. A. Sethi, *supra* note 27 at 24.

33. Comi Kapoor, Aswini Sarin & Arun Shourie v. State of Madhya Pradesh, Writ Petition No. 2229 of 1981. Unreported.

34. Yugal Kishore v. Chief Commissioner, Chandigarh, Writ Petition No. 7465-7466 of 1981. Unreported. Vijay Kumar v. The Chief Commissioner, Chandigarh, Writ Petition No. 7467 of 1981. Unreported.

35. Workmen of Carpet Industries in the District of Mirzapur, U.P. v. State of Uttar Pradesh, Writ Petition No. 2115 of 1985.Unreported.

36. Aman Hingorani v. Union of India & Ors, Writ Petition No. 166 of 1995.Unreported.

37. Momin Ali v. Shukla, Writ Petition No. 1965-68 of 1984.Unreported.

38. Workmen of Slate Pencil Manufacturing Industries v. State of Madhya Pradesh, Writ Petition No. 5143 of 1980. Unreported.

sexual exploitation of tribal girls in public units;[39] the suffering of 25 million people from fluorosis caused by drinking polluted water in absence of potable water;[40] the inhuman conditions prevailing in Ranchi, Agra and Gwalior Mental Asylums[41] and hundreds more of such articles have formed the basis of PIL actions. In 1982, a petition,[42] which was filed on basis of an UNDP report stating that due to lack of iodine in diet, about 60 million people are suffering from goitre and another 300 million are potential victims, resulted in the Court successfully requiring 18 states and the National Capital Territory of Delhi to produce iodised salt. Similarly, details of the barbaric conditions of detention at the Agra Protective Home for Women collected by two law professors;[43] a social activist's discovery of undertrial children at Kanpur Central Jail who were being supplied to convicts for their sexual gratification and of a boy named Munna who was in agony because 'after the way he was used, he was unable to sit ;[44] the information collected by a women's organization on the practice of *Devdasi* in Karnataka[45] led to other PIL actions.

One of earliest PIL actions which impinged on policy issues was *Kamlesh v. Union of India*[46] which was filed in 1981 on behalf of victims of dowry crimes after randomly picking up 11 cases registered with the police. The petition prayed for ensuring speedy prosecution of those accused of such crimes as they often enjoyed political and police patronage, and that prolonged investigation and time consuming trials have resulted in great agony, frustration and a feeling of helplessness to the victims of torture.[47] The Court reviewed the stage at which investigation had progressed in the specified cases and 'suggested' the setting up of Special Police Cells to deal exclusively with crime against women. It required the petitioner to collaborate with the Commissioner of Police, Delhi in evolving a scheme which prescribed guide-lines as to what needs to be done to check dowry crimes and 'recommended' the submitted scheme to the executive for its consideration while introducing legislation in

39. Radhini v. Union of India, Writ Petition No. 760 of 1987. Unreported.

40. Aman Hingorani v. Union of India & Ors, Writ Petition No. 436 of 1992.Unreported.

41. R C Narain v. State of Bihar, 1986 (Supp) S C C 576; A I R 1995 SC 208; Aman Hingorani v. Union of India, A I R 1995 SC 215; Kamini Devi through Aman Hingorani v. Union of India & Ors, A I R 1995 SC 204.

42. Residents of Well Defined Goitre Endemic Area v. State of Jammu & Kashmir, Writ Petition No. 5047 of 1982.Unreported.

43. Upendra Baxi v. State of Uttar Pradesh, 1981 (3) SCALE 1136.

44. Munna v. State of Uttar Pradesh, A IR 1982 SC 806.

45. Guavavva v. State of Karnataka, Writ Petition No. 476-487 of 1983.Unreported.

46. Writ Petition No. 8145 of 1981. Unreported. See K. Hingorani, *Legal Struggle for Women*, 30 Religion and Society 74 (1983).

47. J. Kapoor, *The Guilty Shall be Punished*, Femina (23 May- 7 June 1982).

Parliament to deal with the dowry menace; needless to say, these suggestions and recommendations were duly complied with.

Many more such cases[48] can easily be listed and shall be referred to subsequently. It will, at present, suffice to note that though PIL has taken a distinct shape, its contours are still being defined by cases being brought before the Court. The norms of PIL have emerged over the years and are still developing. The next sub- section summarises the main features of PIL teased out from various cases.

B. The Jurisprudence Of Public Interest Litigation

As Art. 32 of the Constitution vests original jurisdiction in the Supreme Court to enforce fundamental rights, the jurisprudence of PIL revolves on the language of this constitutional provision; or rather on what is not prohibited by it.

Art. 32 provides that

(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

(2) The Supreme Court shall have the power to issue directions or orders or writs including writs in the nature of *habeas corpus, mandamus, prohibition, quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of any of the rights conferred in this Part.

The Court interpreted 'appropriate proceedings' in Art. 32(1) to mean appropriate not in terms of any form of proceeding but with reference to the purpose of the proceedings. Hence, even a letter, postcard or telex to the Court could be considered as appropriate proceedings and the Court may convert it into a writ petition (this has come to be known as epistolary jurisdiction of the Court).

Similarly, there is no limitation in Art. 32(1) as to who may move the Court for the enforcement of a fundamental right. Thus, any member of society, acting pro bono publico, has the standing to do so in view of the socio-economic reality in India. The Court has, at times, even acted suo moto on the basis of news paper reports.

In consonance with its interpretation of Art. 32(1), the Court held the language of Art. 32(2) reflects the anxiety of the Constitution-makers not to allow any technicality stand in the way of the enforcement of the fundamental rights. Hence, the Court reasoned that not only did it have the power to issue

48. This must not be taken to suggest that the Court will entertain every matter relating to policy issues. In Sachidanand Pandey v. State of West Bengal, A I R 1987 SC 1471 the Court ruled that while it may review a policy decision to examine whether appropriate considerations have been taken into account, it will not attempt to nicely balance relevant considerations as that is the decision of the concerned authority.

the five traditional writs, but also to issue any order or direction in the nature of the five writs which it considered appropriate with reference to the purpose of the proceeding. The remedial approach taken by the Court stems from this interpretation of its powers under Art. 32(2) which are meant to facilitate the discharge of its constitutional obligation under Art. 32(1) to enforce fundamental rights. Further, Art. 142 empowers the Supreme Court to pass any decree or make any order as is necessary for doing complete justice in any cause or matter pending before it.

The Constitution, vide Art. 226, vests concurrent writ jurisdiction in the High Courts to enforce fundamental rights and 'for any other purpose'. Since the interpretation of the language of Art. 32 applies equally to that of Art. 226, the High Court too can entertain PIL for the enforcement of fundamental rights. As the writ jurisdiction of the High Court under Art. 226 is wider than that of the Supreme Court under Art. 32, PIL can also be entertained by the High Court 'for any other purpose', that is, for the enforcement of any legal right.

The three aspects of PIL, namely the epistolary jurisdiction, relaxation of the strict rule of locus standi and the remedial nature of PIL shall now be discussed, though in the reverse order.

(i) Remedial Nature Of PIL

The Court in a PIL action, expressly departs from Anglo-Saxon jurisprudence and the 'impartial' judicial role entailed by it. Not only has it rejected in PIL actions the principles of neutrality underlying adjudication but has sought to transcend the judicial function of adjudication in order to provide remedies for social wrongs. The Court, while observing that the Constitution is a document of social revolution which casts an obligation on the judiciary to transform the *status quo ante* into a just human order, has ruled that the judiciary has to become an arm of the socio- economic revolution. It cannot remain content to act merely as an umpire; rather it must be functionally involved to bring socio- economic justice within the reach of the common man. The Court reasoned that Anglo-Saxon concept of justicing where 'the business of a Judge is to hold his tongue until the last possible moment and try to be as wise as he is paid to look'[49] may be all right for a stable society but not for a society pulsating with urges of gender justice, worker justice, minorities justice and equal justice between chronic unequals. Where the contest is between those who are socially or economically unequal, the judicial process may prove disastrous from the point of view of social justice, if the Judge does not adopt

49. S. P. Gupta v. Union of India, A I R 1982 SC 149, 196.

a positive and creative role. The Court asserted that though its reasoning may conflict with a formalistic and doctrinaire view of equality before the law, it would almost always conform to the principle of equality before the law in its total magnitude and dimension, since the 'equality clause' in the Constitution did not speak of formal equality but embodied the concept of real and substantive equality which strikes at inequalities arising on account of vast social and economic differentials.

Several cases[50] before 1979 established that the unenforceable Directive Principles of State Policy contained in Part IV of the Constitution are to be used as a standard while judging the reasonableness of a restriction imposed on a fundamental right; for, a law enacted for the purpose of giving effect to the Directive Principles could not be said to be unreasonable or against public interest. However, since 1979 the Court has adopted three distinct strategies to enforce the non- justificiable Directive Principles in its attempt to use law as an instrument of social and distributive justice:

(1) By reading the aspirations of unenforceable Part IV into enforceable fundamental rights thereby widening the ambit of the specified fundamental rights to include new rights. Obvious examples of this strategy are the *Hussainara Khatoon's* case and *Anil Yadav's* case where the Court relied on the Directive Principle contained in Art. 39A to read a right to free legal aid into the right to life guaranteed under Art. 21. Similarly in *Bandhua Mukti Morcha v. Union of India,*[51] the Court ruled that right to live with human dignity enshrined in right to life under Art. 21 derives its 'life breath' from Part IV, and in particular from Articles 39(e)(f), 41 and 42, and therefore, includes the minimum requirements that must exist in order to enable a person to live with human dignity, such as protection of the health and strength of workers - men and women - just and humane conditions of work and maternity relief. Significantly, the Court bolstered its approach in the said case by ruling that though the State cannot be ordered enforce Part IV made expressly unjustificable by Art. 37 of the Constitution, it can be directed to enforce existing legislation enacted in pursuance of Part IV since the non enforcement of such legislation would amount to violation of Art. 21. As India is a welfare state, legislation already exists on most matters. Hence, the Court circumvented the bar under Art. 37 by enforcing not Part IV, but laws enacted to give effect to

50. For example see State of Bombay v. Balsara, A I R 1951 SC 318; State of Bihar v. Kameshwar Singh, A I R 1952 SC 352; Bijay Cotton Mills v. State of Ajmer, A I R 1955 SC 33; Mohd. Hanif Qureshi v. State of Bihar, A I R 1958 SC 731; Pathak v. Union of India, A I R 1978 SC 803. In C.B. Board & Lodging v. State of Mysore, A I R 1970 SC 2042 and Keshavananda Bharati v. State of Kerala, A I R 1973 SC 1461 the Court ruled that Part III and Part IV are meant to complement and supplement each other; they together form the 'conscience of the Constitution'.

51. A I R 1984 SC 802.

Part IV.

(2) By recognising a right to be a fundamental right if it has independent existence from Part IV. For example, in *State of Bombay v. Bharatiya,*[52] the Court recognised a right to equal pay for equal work as being implicit in the equality clause contained in Art. 14, notwithstanding the inclusion of this right in Part IV {Art. 39(d)}. The Court reasoned that Part III and Part IV are complementary, and not exclusionary, of each other and hence the inclusion of a right in one does not necessarily exclude its existence in the other.

(3) By holding that a time-bound Directive Principle itself matures into a fundamental right on expiry of the prescribed period. For example, Art. 45, provides, *inter alia*, that the State shall endeavour to provide, within a period of ten years from the commencement of the Constitution, for free and compulsory primary education. The Court, in *Unnikrishnan v. State of Andhra Pradesh,*[53] ruled in 1993 that the passage of 44 years - more than four times the period stipulated in Art. 45 - 'converts' the unenforceable obligation created by Art. 45 into an enforceable fundamental right to free and compulsory primary education.

Given that PIL is a remedial jurisprudence, the Court departs from the adversarial system of litigation. The non-adversarial nature of PIL has two aspects : collaborative and investigative.

As stated earlier, PIL is a collaborative effort of the petitioner, the Court and the State to secure the constitutional and legal rights of the poor and to ensure observance of social and economic rescue programmes, legislative and executive, framed for their benefit. It is the constitutional duty of the executive under Art. 256 to enforce the laws enacted by the legislature. Thus, PIL 'helps' the executive discharge its constitutional obligations by providing it 'an opportunity' to examine whether the poor are actually receiving their socio-economic entitlements. Hence, when the Court entertains PIL, it does not, atleast ostensibly, do so in a 'confrontational mood or with a view to tilting at executive authority or seeking to usurp it'; rather it is merely 'assisting' the executive in the realisation of its constitutional obligations.

It is to 'assist' the State that the Court, as mentioned earlier, takes an active role in investigating into facts. The rationale for this investigative function stems from the need to evolve a new procedure which enables 'the poor and the weak to bring the necessary material before the Court for the purpose of securing enforcement of their fundamental rights'.[54]

52. (1993) 1 S C C 539.
53. (1993) 1 S C C 645.
54. *Supra* note 51 at 815.

The Court has resorted to different mechanisms to perform the investigative function that vary from deputing the Registrar of the Court or District Court Judges and Magistrates to constituting Commissions at state expense. Experts or specialists like sociologists, doctors, psychiatrists, scientists, scholars or journalists may be appointed on the Commission if the Court deems it necessary. The veracity of the reports of such Commissions are open to challenge, but not their evidentiary value. While the facts alleged invariably prove to be true, the Court may, in case of disputed facts, constitute another Commission to perform the investigative function. In addition to fact-finding missions, the Commissions have been used for other functions such as to propose remedial relief and monitor its compliance and, in rare instances, to actually decide factual issues on authority delegated by the Court.[55] Significantly, senior government officials are often appointed on the Monitoring or Management Committees. Apart from its immense educative value, this involves the State in providing relief to the poor and thus facilitates the smooth implementation of the Court's directions.

A crucial aspect of the remedial nature of PIL is the flexibility introduced in the adherence to procedural laws. For example, in a subsequent application filed in *Rural Litigation and Entitlement Kendra v. State of Uttar Pradesh*[56] the Court held that every technicality in procedural law is not available as a defence when a matter of great public importance is before the Court for consideration and therefore overruled the defence of *res judicata*. Another divergence from procedural law is the usual exemption granted to the petitioners in PIL actions from paying Court Fee. Further, once a PIL action is initiated in the Court, it cannot be withdrawn for the simple reason that the petitioner is not *dominus litis*. The 'rights' of those who bring the action on behalf of others must necessarily be subordinate to the 'interests' of those for whose benefit the action is brought.[57]

It may be recalled that the remedial powers under Art. 32(2) include the grant of compensation to the aggrieved persons. Such grant of compensation would not preclude the aggrieved from bringing a civil suit for damages. Though the question of compensation under Art. 32 arose first in *Anil Yadav's* case, the first case in which compensation was actually awarded was *Rudul Sah*

55. Olga Tellis v. Bombay Municipal Corporation, A I R 1986 SC 180. This action was filed on behalf of Bombay pavement and slum dwellers who pleaded that eviction from pavements and slums would, in the absence of legal housing, result in the deprivation of their right to livelihood under Art. 21. During interim proceedings, the Court appointed a High Court officer to determine whether specific dwellings were obstructing traffic and whether they were built after the effective date of the Court's interim stay on eviction. The finding of this officer was to be binding on the parties for the purpose of implementing the Court's interim orders.
56. A.I.R. 1988 SC 2187, 2195.
57. Sheela Barse v. Union of India, A I R 1988 SC 2211.

v. State of Bihar,[58] an offshoot of *Hussainara Khatoon's* case. Rudul Sah was arrested in 1953 on the charge of murder and was acquitted by the Sessions Judge in 1968, to be released on further orders. These orders never came for over 14 years after his acquittal. By the time Rudul Sah was released in 1982, he had spent 29 years in prison for a crime he never committed. The Court awarded a compensation of Rs 35,000 holding that it is 'some palliative for the unlawful acts of instrumentalities which act in the name of public interest and which present for their protection the powers of the State as a shield'.[59]

Finally, without being exhaustive, the remedial nature of PIL has resulted in separation of the 'remedy' granted from the 'right' violated. In PIL actions, immediate remedial relief is granted through interim orders even before the final determination of rights. This stands in sharp contrast to the Anglo-Saxon model where interim injunctive relief is limited to preserving status quo pending final decision, though Courts have recently developed a broader discretion to order affirmative action on a preliminary finding of probability of success on merits.[60]

The rationale for the Court to grant immediate interim relief stems from the necessity of circumventing delay. It will be readily accepted that lack of personnel, resources and space (and in the lower courts, even furniture and stationary) have a part to play in delaying relief to a litigant, at times, for decades. The need for such a strategy is exemplified by the fact that though the Court in *Hussainara Khatoon's* case had granted immediate interim relief in 1979 to the undertrials, the case was finally disposed off only on 4 August 1995 with directions to each High Court to collect statistical information on undertrials in jails within their jurisdiction and implement the guidelines laid down by the Supreme Court.

The divergence from the Anglo-Saxon model becomes more marked when the Court prescribes system-wide reform instead of granting individual relief. To illustrate, in *R.C. Narain v. State of Bihar,*[61] the complaint pertained to inhuman conditions existing in the Ranchi Mental Hospital, Bihar resulting in the death of a mentally ill patient every two days. The Court, after perusing reports of Commissioners appointed by it, first sought to grant specific reliefs regarding the management of the hospital - it ordered that the allocation of funds for provision of meals for each patient be increased from Rs 3.50 to Rs 10 per day; that adequate supply of drinking water be supplied to the hospital; that all

58. A I R 1983 SC 1086.
59. *Id.* at 1089.
60. C. D. Cunningham, *Public Interest Litigation in Indian Supreme Court : A Study in Light of the American Experience,* 29 Journal of Indian Law Institute 494, 511 (1987).
61. R. C. Narain v. State of Bihar, 1986 (Supp). S C C 576; A I R 1995 SC 208.

patients in the hospital be provided with blankets and mattresses within 15 days and so on so forth. On reports that the conditions at the hospital are not improving, the Court, by its Order dated 8.9.1994, 'legislated' Rules to run the hospital which also provided for the constitution of an autonomous Management Committee to govern the hospital. The State Government was required to promulgate these Rules and the Union Health Secretary was directed to periodically report to the Court on the new set-up. Similar Rules have been 'legislated' by the Court to govern Agra Mental Asylum and Gwalior Mental Asylum.[62] In *Sheela Barse v. State of Maharashtra,*[63] in response to the complaint of custodial violence to five women in the Bombay city jail, the Court issued guide-lines applicable to the whole State of Maharashtra requiring that only police women be used to guard or interrogate women suspects; that pamphlets be distributed to the prisoners on their right to bail; that free legal aid be provided by the collaboration of the State with district legal aid committees and so on so forth. Another example is *Laxmikant Pandey v. Union of India*[64] where the relief claimed was that private agencies should be barred from arranging foreign adoptions as a magazine article had reported that 'some Indian children sent abroad for adoption ended up as beggars or prostitutes'.[65] However the Court issued notice to the Union of India and two major public child welfare agencies to[66]

> assist the Court in laying down principles and norms which should be followed in determining whether a child should be allowed to be adopted by foreign parents, and if so, the procedure to be followed for that purpose, with the object of ensuring the welfare of the child.

The Court, after allowing intervention by private adoption agencies, soliciting views of experts and the State, reviewing legislation and policies adopted by other jurisdictions and studying sociological materials, issued binding comprehensive guide-lines detailing the procedure to govern the adoption of Indian children.

In *M. C. Mehta v. Union of India,*[67] the petitioner pleaded that Kanpur Municipality and tanneries be restrained from discharging sewage and untreated effluents into the river Ganges resulting in severe pollution of the river, and that the authorities be ordered to enforce the Water (Prevention and Control of Pollution) Act 1974. The Court directed that all tanneries must install effluent

62. Aman Hingorani v. Union of India, A I R 1995 SC 215; Kamini Devi through Aman Hingorani v. Union of India & Ors, A I R 1995 SC 204.
63. Sheela Barse v. State of Maharashtra, A I R 1983 SC 378.
64. A I R 1984 SC 469.
65. C. D. Cunningham, *supra* note 56 at 514.
66. *Supra* note 64 at 471.
67. A I R 1988 SC 1037.

treating equipment or, in the alternative, close down. Further, it held that the financial capacity of the tanneries to install such equipment was irrelevant; for, 'just like an industry which cannot pay minimum wages to its workers cannot be allowed to exist, a tannery which cannot set up a primary treatment plant' cannot be permitted to operate.[68] The municipal authorities were directed to comply with the statutory provisions. In addition, the Court addressed specific problems causing pollution such as removal of waste from dairies at the municipal corporation's expense, increase in the capacity of sewers in labour colonies or provision of public latrines and urinals. It held that it was the duty of Central Government to direct all educational institutions throughout India to teach for one hour in a week lessons relating to the protection and improvement of the natural environment and to distribute text books to the educational institutions free of cost.[69]

These cases are typical of what has been described as the 'creeping jurisdiction' of the Court that enables it 'creep' into the arena reserved for the executive or legislature and hijack their functions. The creeping jurisdiction of the Court has been subjected to severe criticism, as will be discussed in the next Section.

(ii) Relaxation Of Strict Rule Of *Locus Standi*

The rule of *locus standi* has been liberalised in two directions : representative standing (for example, *Hussainara Khatoon's* case) and citizen standing (for example, *M. C. Mehta's* case). The former enables any member of society, acting bona fide, to move the Supreme Court under Art. 32 or the High Court under Art. 226 on behalf of a person or a determinate class of persons who, by reason of poverty, helplessness, disability or socially and economically disadvantaged position, is unable to approach the Court for the enforcement of constitutional or legal rights.

The Court, in *S.P.Gupta's case*,[70] noted that the task of national reconstruction has brought about an enormous increase of developmental activities which require the active intervention of the State and public authorities resulting in increased imposition of public duties on them. In case of a breach of a public duty causing a public injury, the act or acts complained of

68. *Id.* at 1045.

69. *Id.* at 1127. The Central Government was also 'requested' to consider the desirability of observing a 'Keep the town (or city or village) week' in every town, city and village throughout India at least once a year during which all citizens including members of the Government, legislatures and the judiciary would be requested to co-operate with the local authorities in order to create national consciousness on environment pollution.

70. *Supra* note 49 at 31.

cannot necessarily be shown to affect the rights of any determinate or identifiable class of persons; for example, in case of environmental pollution. In order to protect such 'diffuse, collective and meta-individual' rights of the public at large and to provide redress for the breach of the public duties owed to them, the Court ruled that any member of the public, acting *bona fide*, has standing to approach the Supreme Court or the High Courts. This standing has now come to be known as citizen standing. Interestingly, the Court, in *S.P. Gupta's* case upheld the standing of practising lawyers to challenge a governmental policy to transfer High Court Judges since undermining of judicial independence would result in loss of faith in the rule of law and consequently in the democratic institutions of government.

In *Chaitanya Kumar .v. State of Karnataka*,[71] traditional litigation had been initiated against the Chief Minister of Karnataka by unsuccessful applications of the bottling of arrack liquor rights alleging nepotism and corruption; however, this action was withdrawn by the applicants for reasons best known to them. Subsequently, two person filed a PIL action in the High Court as citizens of Karnataka and successfully claimed an interest in seeing that public business was conducted lawfully; an indictment in this action resulted in the resignation of the Chief Minister.

The distinction between citizen standing and representative standing becomes relevant insofar the latter, unlike the former, need not necessarily relate to the breach of a collective right resulting into a public injury. An action brought through representative standing may relate to a collective right of a determinate class of persons (*Hussainara Khatoon's* case) or simply to a particular right of an individual (*Rudul Sah's* case).[72]

It is relevant to note that most PIL analysts consider the expanded concept of locus standi to be the distinguishing feature of Indian PIL from other public interest actions; some commentators[73] even consider it to be the core of Indian

71. (1986) 2 S C C 594.

72. The Court, however, observed in S P Gupta's case that as a matter of prudence and not of law, Courts should, as far as possible, encourage actions relating to collective or diffuse rights rather than individual rights if effective legal aid is present.

73. See J. Cottrell, *Third Generation Rights and Social Action Litigation*, in Adelman & Paliwala (ed.), LAW AND CRISES IN THE THIRD WORLD 102 (1993). This notion resulted in confusing PIL actions with cases falling under the traditional exceptions in common law to the strict rule of *locus standi*. For example, in Maharaj Singh v. State of Uttar Pradesh, A I R 1976 SC 2602 where the issue pertained to the competence of the State to carry an appeal against the dismissal of the suit in absence of the statutory body vested with the suit estate, and in Mumbai Kamgar Sabha v. Abdulbhai, A I R 1976 SC 1455 where the objection related to technical deficiencies and misdescriptions in drafting pleadings, the Court liberally construed the rule of locus standi in order to prevent injustice being caused to the appellant. Since these matters did not relate to fundamental rights nor were they remedial in nature and nor could they have been filed under the writ jurisdiction of the Court, the paradigm in which the Court functioned was necessarily Anglo-Saxon and hence these matters were not PIL actions. Again, Ratlam Municipality v. Vardichand, A I R 1980 SC 1622, where the Court upheld the complaint of the residents of a locality who moved the Magistrate under Section 133 of the Code of Criminal Procedure to require the Municipality to remove the nuisance caused by the existence of drains, pit and public excretion by humans, the matter was not moved under the writ jurisdiction of the Court and hence cannot be characterised as a PIL matter.

PIL. While the relaxation of the strict rule of locus standi is certainly an important feature of PIL, it is doubtful whether it can be considered as its core - rather it is a necessary corollary of the remedial nature of PIL and has evolved in the absence of any restriction in Art. 32 in respect of the person who may move the Court for the vindication of fundamental rights of another person.

(iii) Epistolary Jurisdiction

The doors of the Court were effectively barred to large masses of people who, on account of poverty and ignorance, could not utilise the judicial process. The Court has overcome this difficulty by evolving the epistolary jurisdiction; that is, by holding that a letter to the Court informing it of the infringement of a constitutional right could constitute appropriate proceedings so as to activate the judicial process under Art. 32 or Art. 226. However, the Court will treat such a letter as a writ petition only if it is addressed by or on behalf a person or class of persons for enforcement of a constitutional or legal right of the weaker sections of society or for the enforcement of diffuse and collective rights.

The spurge of litigation after the evolution of epistolary jurisdiction is a measure of the Court becoming a Court for the common man. Some High Courts are reported to receive 50 to 60 PIL letters per day while the Supreme Court received 23,772 letters in fifteen months from 1.12.1987 to 31.3.1988.[74] At the Chief Justices Conference in 1987 at New Delhi, it was resolved that the Supreme Court and each High Court would have a PIL cell dealing exclusively with PIL matters. The PIL cells in the Supreme Court and in most High Courts have been in existence for some years now. These cells screen the letters received, winnow out frivolous or inappropriate matters and prepare the files for the Chief Justice, which are then assigned in the ordinary way.

Before concluding this sub-section on the jurisprudence of PIL, it would be useful to bring out the distinctiveness of PIL by comparing it with class action used in most common law countries to vindicate public interest. It is unfortunate that at times, even Indian commentators[75] confuse PIL with class action. PIL is not class action; class action exists in India too as representative action (not to be confused with representative standing) under Order 1 Rule 8 Code of Civil Procedure. PIL is distinct from class action (and representative action

74. J. Cassels, *Judicial Activism and Public Interest Litigation in India : Attempting the Impossible?* 37 The American Journal of Comparative Law 495, 508 (1989).

75. S. Sorabjee, *Class Actions in Public Interest - The Indian Perspective*, 33 Indian Advocate 22, 25 (1991).

in India) inasmuch it requires the Court to transcend the traditional function of adjudication to provide remedies for social wrongs; it lacks a lis; it can be maintained even if the plaintiff has no personal stake in the matter but is any member of the public acting pro bono - it can be maintained without a power of attorney; it is not adversarial in nature; it enables the Judge to play an active role and even develop legal issues not directly raised in the original action; it enables the Court to take action on the basis of newspaper reports or letters or to act suo moto; it entails flexibility of procedural law; it is not prescribed by statute and has evolved under the writ jurisdiction of the Court and therefore can only be filed in the Supreme Court and High Courts. Class action is, on the other hand, litigated within the traditional Anglo-Saxon model; it requires the Judge to be a neutral umpire in the action involving a *lis*; it cannot be maintained if the plaintiff does not have a personal stake in the matter; it is adversarial in nature; it requires the Court to consider only those legal issues which are raised before it; it mandates that the Court must observe procedural technicalities such as issuing notice to all the community members; it is prescribed by statute and must be filed in the first instance in the trial court and requires development of detailed evidentiary evidence at that level.

III. Evaluating Indian Public Interest Litigation

A jurisprudence, like an ideology, always has a strong inclination to endorse itself. By trivialising its weaknesses or lacunas and highlighting its strengths and potentialities, it tends to obscure the presence of vital conditions necessary for its very existence and sustenance. PIL is no exception to this general rule. While most of the weaknesses and lacunas of PIL as perceived by some PIL analysts are unjustified, PIL is indeed circumscribed by numerous limitations and pre-requisites without appreciating which it could soon be unceremoniously buried in history books as judicial aberration. But before discussing these, it would be necessary to consider the judicial role entailed by PIL and permitted by the Constitution.

A. Judicial Role : Umpire Or Empire?

The dominant understanding of the judicial function in common law jurisdictions is that the Judge does not make law; rather he applies the existing law. In other words, the essence of the judicial function is adjudication, not legislation nor administration. Thus, the judiciary, being limited by the doctrine of separation of powers, must respect the autonomy of the legislature and the executive.

Not surprisingly, the main plank of criticism directed against PIL by a cross-section of Indian Judges, lawyers, scholars, social activists and, needless

to say, politicians stems from this perception of the judicial role - a role that is guided by voices from the grave rather than being moulded by wants and needs of society. It is asked : is it legitimate for the Supreme Court to 'usurp' the powers of the executive and legislature? Does not the 'creeping jurisdiction' of the 'power-hungry' Court negate the doctrine of separation of powers? This indignation about the deviance of the Court from the traditional role is shared by others who allege that political and ideological limitations on judicial activism will anyway render PIL ineffective as a remedial strategy. Rather, it is argued, PIL is merely a strategy adopted by the Court to retrieve the legitimacy[76] it lost during Emergency due to its infamous decision in *ADM Jabalpur v. Shivkant Shukla*[77] that would have put even hard-core positivists to shame.

Let us consider these criticisms under three headings: PIL as a power usurping strategy; political and ideological limits on PIL and PIL as an institution-legitimatizing strategy.

(i) PIL As A Power-Usurping Strategy

The doctrine of separation of powers has a pleasing and somewhat mechanistic appearance suggesting some objective invisible hand which holds the Constitution in perpetual equilibrium. It is presumed that there can exist crystal clear demarcation of institutional roles or of adjudication and legislation, notwithstanding the burgeoning literature to prove to the contrary. Even a careless student of jurisprudence is aware of the pitfalls in accepting the superficial distinction between Kelsen's norm creation and norm application; for, the very 'application' of a general and abstract norm by a Judge to the facts of a particular case results in the 'creation' of a new, specific and individuated norm.[78] Ronald Dworkin brilliantly argues that while both legislation and adjudication are political decisions, the legislature ought to justify its decision in terms of 'policy', that is, to advance 'some collective goal of the community as a whole' and the Court ought to justify its decision in terms of 'principles', that is to secure 'some individual or group rights'.[79] But he himself admits that his distinction between principles and policies can be collapsed by 'construing policy as stating a principle'.[80]

---

76. S. Hegde, *supra* note 7 at 162.
77. A I R 1976 SC 1207.
78. H. Kelsen, General Theory of Law and State 113-114 (1961).
79. R. Dworkin, Taking Rights Seriously 82-83 (1977).
80. See U. Baxi, *On how not to judge the Judges : Notes towards evaluation of the judicial role,* 25 Journal of Indian Law Institute 211, 229 (1983).

Theory aside, is not the entire evolution of common law a shining example of judicial law-making; unless, of course, the Judge or, to quote Blackstone, 'the living oracle of law' had developed a highly specialised pipeline directly to the Creator. Are not 'precedents' or 'rules of statutory construction' illustrations of Judge-made law ? Hence, even if at a prescriptive level, Judges ought not to make law, at an empirical level, Judges have and will continue to make law. No amount of intellectual gymnastics can change this finding. It would be relevant to quote the Supreme Court on the issue of judicial law-making :[81]

> The Court must do away with 'childish fiction' that law is not made by the judiciary. The Court under Art. 141..is enjoined to declare law. The expression 'declared' is wider than the words 'found' or 'made'. To declare is to announce an opinion. Indeed, the latter involves the process, while the former expresses the result. Interpretation, ascertainment and evolution are parts of the process, while that interpreted, ascertained or evolved is declared as law.

Happily, most common law jurisdictions today accept[82] that judicial decisions are not babies brought by constitutional storks. It is conceded that the Judges legislate, even if only interstitially; though whether the entire common law tradition can be characterised as mere interstitial or molecular legislation is a questionable proposition.

Having noted that the traditional judicial role is as mythical as the neutrality of law, let us consider the Indian situation.

The critics, while relying on their notions of the judicial role to condemn the Court for negating the doctrine of separation of powers, erroneously presume that the said doctrine is strictly applicable to India. The Court has ruled in *Ram Jawaya v. State of Punjab*[83] as far back as in 1955 that the Constitution does not envisage a strict application of the doctrine of separation of powers. On the contrary, it provides for an independent judiciary having extensive jurisdiction over the acts of the legislature and the executive.[84]

---

81. D.T.C. Transport Corporation v. D.T.C. Mazdoor Congress (1991) 1 S C C (Supp). 600.
82. See generally H.J. Abraham, The Judicial Process 338 (1980); M.Berlins & C. Dyer, The Law Machine (1986); R.N. Clinton, *Judges must make law : A realistic appraisal of the judicial function in a democracy,* 67 Iowa Law Review 711 (1982); D.Forte, The Supreme Court in American Politics (1972); J.A.G. Griffiths, The Politics of the Judiciary (1978); S.C. Halpern & C.M. Lamb, Supreme Court Activism and Restraint (1982); W. F. Murphy & C.H.Pritchell, Court, Judges and Politics (1961); M.Rebell, *Judicial Activism and the Court's new role,* 12/4 Social Policy 24 (1982).
83. A I R 1955 SC 549.
84. See Chandra Mohan v. State of Uttar Pradesh, A I R 1967 SC 1987. Nor can such a constitutional scheme negate the characterisation of India as a democracy. The Preamble to the Constitution states 'We the People of India...enact and give to ourselves this Constitution...'. Hence if the people of India have chosen, and reiterated their choice through the ballot, to vest in non-elected Judges of the Supreme Court the power to be the final arbiter of what the Constitution says, the society does not cease to be democratic.

Such a constitutional scheme brings into question whether there is or can be a universal conception of the judicial role, particularly in view of varying political, social and economic milieux in developed and developing states. Are the problems and issues addressed by the Court in the affluent Western societies the same as those addressed by the Court in India? Can the concerns, and hence the response, of the Court be the same? As there is a difference in kind and not merely of degree between affluent developed states and subsistence-level developing states, the modes of political and social action by the judiciary will necessarily vary in these societies. As Baxi observes.[85]

> Despite similarities in underlying principles of structuring of ways of governance, the manners in which these underlying principles are grasped and actually operate vary enormously. For theorists of judicial process in contemporary England and United States, the issues of fundamental importance may be those relating to the nature, incidence and function of the appellate judicial discretion. For India, and other developing common law countries, the main problems of appellate judicial process may be those of institutionalisation of power and authority of the judiciary, and at times even of its survival.

To approach the point differently, even hardened critics will concede that the doctrine of separation of powers and the distinction between adjudication and legislation presupposes that the executive and legislature are themselves vested with legitimacy and popular support. But, what if politicians are viewed as commodities regulated by the laws of supply and demand? Would the function of the Court in a such a situation be the same as that in a society where Parliament does its job ?

Given that law is nothing but politics, the question ceases to be whether the Court should indulge in politics. Rather, the question arises as to what kind of politics it should indulge in. The issue is not whether or not the Court makes law; for it does. It would be more worthwhile debating what kind of law-making activity it should engage in. This law-making judicial function, as we have seen, will necessarily be contexualised in a democracy by the constitutional framework within which the judiciary operates. As far as PIL is concerned, the only standard to judge whether the active political role of the Court is justified is whether it enjoys the constitutional sanction. Such role of the Court cannot be termed as illegitimate if it falls squarely within the ambit of Articles 32, 142 and 226 of the Constitution. There is no limitation in these Articles requiring the Court to cling on to Anglo-Saxon jurisprudence and the resultant formalism. Rather, they confer the widest possible powers on the Supreme Court to enforce

85. U. Baxi, *supra* note 80 at 234.

fundamental rights and in case of High Courts, any legal right. In other words, the Constitution specifies the function of enforcing such rights; it does not prescribe the means to perform the function. Hence, if the Court opines that legal formalism and procedural technicalities are impeding its attempt to perform its function, it is justified, nay, under a constitutional obligation to adopt new tools and remedies to achieve the specified end. It will be obvious to any one familiar with Indian bureaucracy that if the Court did not play an active role in ensuring the implementation of its orders, the orders would soon be reduced to pious exhortations. Hence, if the new tools and remedies necessarily include assuming a supervisory role in curing institutional malaise and consequently performing administrative functions, so be it.[86] Similarly, if the Court has to impinge on policy issues for constitutional or legal rights to be vindicated, it must do so.[87] The only qualification is that such intervention in administrative or policy issues must be only to the extent necessary for the enforcement of fundamental rights, in the case of the Supreme Court, and of any legal right in the case of High Courts; if the Court succumbs to the temptation of crossing this line, it would indeed be guilty of usurping powers of the executive or the legislature.

It is unfortunate that the Supreme Court has, in some of its recent decisions, consistently overlooked the above caveat that its writ jurisdiction under Art. 32 can be invoked only for the enforcement of the fundamental rights (whether they be individual, collective or diffuse rights). The Court has entertained matters where the infringement of fundamental rights is not even involved, let alone established. For example, in *D. C. Wadhwa v. State of Bihar*,[88] the Court allowed a PIL brought by a Professor of Political Science challenging as unconstitutional the practice of repromulgation of Ordinances by the Governor of Bihar from time to time without getting them replaced by Acts. In *All India*

86. For a dissenting opinion, see V. D. Tulzapurkar, *Judiciary : Attacks and Survivals*, 1983 A I R (J.) 9.

87. The Court may 'legislate' within the parameters of the constitutional policy or the constitutionally valid legal policy; it cannot however initiate a policy de novo. To illustrate, in Mohini Jain v. State of Karnataka, (1992) 3 S C C 666, the Supreme Court had declared that as the right to education flows from right to life enshrined in Art. 21, a citizen could demand the State to provide him with education, primary or higher, of his choice. In Unnikrishnan v. State of Andhra Pradesh, (1993) 1 S C C 645, the Supreme Court overruled Mohini Jain's case to the extent that as Part III operates within the framework of Part IV, the right to education is not absolute; rather it is to be construed in light of Part IV. Hence, as far as the right to primary education is concerned, it is absolute in view of the time-bound Directive Principle in Art. 45. However, Art. 41, which also speaks of right to education, is qualified by the words 'within the limits of its economic capacity and development'. Thus, once a citizen has availed of the right to free primary education, his right to further education is subject to the limits of economic capacity and development of the State. Reference may also be made to Vincent v. Union of India, A I R 1987 SC 990 where the action entailed a claim to ban 7000 drugs; the Supreme Court declined to issue directions to the State as, in its opinion, it could not lay down the drug policy of the State.

88. A I R 1987 SC 579.

Judge's Association v. Union of India,[89] the Court allowed the PIL seeking the setting up of an All India Judicial Service and for bringing uniform service conditions for members of subordinate judiciary throughout the country. The Court has even entertained a PIL matter relating to allotment of petroleum product agencies by the State under its discretionary quota and has laid down extensive guidelines for the same.[90] In *Shiv Sagar Tiwari v. Union of India*,[91] the Court took the State to task for making irregular allotments of government houses to favoured politicians and for permitting former ministers to continue to cling on to the allotted residential premises. By its Order dated 4 September 1995, the Court directed the eviction of numerous former ministers and high ranking politicians from government houses.[92] Recently, the Court has entertained a PIL seeking action against national political parties for their failure to file the mandatory income tax returns since 1979 under the Income Tax Act.[93] Under the existing constitutional provisions, the Supreme Court simply lacks the competence to entertain such petitions howsoever desirable or necessary the objective may be. Even in respect of the current Hawala scandal[94] the Court may find it difficult to justify its directive to the Central Bureau of Investigation to prosecute all persons guilty, including senior politicians, of accepting bribes and kickbacks, often channelled in foreign currency through unofficial sources, unless the Court formulates its role in such a manner that its directive relates to the fact that the destruction of the economic and political system of the country will in turn result in the deprivation of the fundamental rights of the citizens.

Such 'judicial activism' seeking to cure institutional malaise may in the long run actually impair the credibility of the Court, and of PIL, particularly, in view of the bad experience of the U.S. judiciary in entertaining institutional litigation.[95] If the Court overlooks its constitutional limitations, it will become impossible to draw a line between matters that should be entertained as PIL and those which should not. Absence of rules to govern the exercise of power by the Court will result in contradictory and subjective exercise of power, and hence of discretion, by the Court. To illustrate, the same Court which is so active in monitoring and securing compliance of its Orders in the Hawala scandal declined, by its Order dated 9.2.1996, to entertain an application seeking a

89. A I R 1992 SC 165.
90. See *SC rules for petroleum agencies*, INDIAN EXPRESS (1 April 1995).
91. Writ Petition No. 585/94.Unreported.
92. See *SC directs Pant to vacate Govt house*, INDIAN EXPRESS (5 September 1995).
93. See *SC grants last chance to parties on I-T*, INDIAN EXPRESS (22 January 1996).
94. *Supra* note 3.
95. See *The naked and the corrupt and When hawala acquires explosive dimensions*, INDIAN EXPRESS (18 January 1996).

direction to the State of Uttar Pradesh to comply with the Order dated 8.9.1994 of the Court mandating the setting up of the autonomous Management Committee by 1.10.1994 to govern the Agra Mental Asylum.[96] Further, the Court will utilise its scarce infrastructure, funds and staff to monitor cases which clearly fall outside their jurisdiction at the expense of deserving cases, both traditional and PIL. Then there is the spectre of corruption in the judiciary which is evidenced by the Ramaswami episode and has been candidly acknowledged in discussions between the members of the Supreme Court Bench and the Bar.[97] These issues give rise to further question as to the accountability of Judges - while the Ramaswami scandal underscored 'the need for a standing judicial body with its own investigative machinery, armed with the power to investigate charges of misbehaviour against judges',[98] the repeated demand now is that it is '(t)ime for the judges to set their own house in order'[99] and that 'the Judges ethic code, which was drafted for years back by the Supreme Court Judges themselves but not enforced and made public so far, must be put into operation' because 'can morality be enforced by a legal process of asking all to be so without the institution ordering this, taking corresponding measures itself'.[100] Already in the Hawala scandal, where the Court is monitoring the investigation of the CBI behind closed doors, 'bothersome but necessary' questions are being asked as to 'whether the Court has asked the CBI as to why certain individuals, mentioned in the diary before it, have been investigated and not other' and 'if so, has the Court monitored the investigation of those the CBI has chosen to leave out.[101] In other words, the Court is getting into controversies which may raise doubts, no matter how unjustified, about its bonafides and impartiality to nab the prime culprits in the scandal. Never in its history has the Supreme Court, which has enjoyed immense affection from the public in general, been subjected to such volatile comments as : the Supreme Court Judges need 'pyschiatric treatment',[102] 'It will be unfortunate if the judiciary oversteps its constitutional role and seems to pander to populism';[103] the Supreme Court is 'exceeding is constitutional brief'[104] and 'it seems our justice system is moving towards absurdism'.[105] Such criticisms of the Court

96. Aman Hingorani v. Union of India, AIR 1995 SC 215; Order dated 9.2.1996.
97. K. Mahajan, *Time for the judges to set their own house in order*, INDIAN EXPRESS (11 December 1995).
98. S.K.Pande, *Revulsion all around*, FRONTLINE 24 (4 June 1993).
99. K. Mahajan, *supra* note 97.
100. K. Mahajan, *Corruption cases force changes in SC functioning*, INDIAN EXPRESS (12 February 1996).
101. *Ibid.*
102. *SC pulls up Editor, Management*, INDIAN EXPRESS(6 February 1996).
103. See Editorial, *A 'third chamber'?* HINDUSTAN TIMES (28 December 1995).
104. *Ibid.*
105. V.N.Narayan, *Is Justice Stayed Justice Denied*, HINDUSTAN TIMES (24 December 1995).

bear an uncanny resemblance to those lashed out against the U.S. Supreme Court forcing it to retreat to its traditional impersonal judicial role. The Court would do well to recall its observation in *Bandhua Mukti Morcha v. Union of India* that[106]

> Where the Court embarks upon affirmative action in the attempt to remedy a constitutional imbalance within the social order, few critics will find fault with it so long as it confines itself to the scope of its legitimate authority. But there is always the possibility in public interest litigation of succumbing to the temptation of crossing into the territory which properly pertains to the legislature or to the Executive...in every case the Court should determine the true limits of its jurisdiction and having done so, it should take care to remain within the restraints of its jurisdiction.

To summarise, the Court has the constitutional sanction to 'creep' into the jurisdiction of the executive and legislature but only to the extent that is necessary to enforce fundamental rights in the case of Supreme Court, and any legal right in the case of High Courts. Moreover, the executive is obliged under Art. 256 of the Constitution to enforce the law. Hence, when the Court reminds the government of its constitutional obligations, is such a reminder 'usurpation' of power or is it a struggle to dispute the reading of the Constitution by the executive who sees in nothing by the codification of power, privilege and patronage? Is it not a necessary challenge to the abuse of power or governmental lawlessness when police connive to traffic in women, when women are raped by policemen in police custody, when incarceration and torture of prisoners has become institutionalised, when children are born as bonded labourers or are supplied to convicts for sexual satisfaction with the active connivance of the administration, when mental patients are dying daily due to inhuman living conditions, when dowry deaths are on the increase, when all these and many more situations involve a clear violation of the law ? In such hard cases, it is impossible for the Court not to take sides; for, here it does not enjoy the luxury of academicians of indulging in 'buts' and 'ifs'. It must either respond to such situations or ignore them. If it responds to fulfil its own constitutional obligations, is it 'usurping' the powers of the executive or the legislature ?

(ii) Political And Ideological Limits On PIL

The political checks on judicial activism stem from the realisation that the Court does not control the sword nor the purse. Hence, the executive could

106. *Supra* note 51 at 843.

simply refuse to enforce judicial decisions and the legislature could nullify the effect of such decisions, by passing a law or a constitutional amendment. Hence, critics argue that the Court is not in a position to actually deliver remedial relief; rather it would soon be reduced to simply making speeches.

The criticism fails to distinguish PIL from judicial activism in cases having the traditional lis. The purpose of PIL actions is to ensure that the executive and the legislature discharge their constitutional obligations. Hence, when the Court directs the State to perform the functions it is supposed to under the Constitution, the State is in a 'no-win' situation; if it complies with the direction of the Court, it underscores its incompetence and complicity. Yet it cannot refuse to comply with the Court's direction without appearing to justify tyranny, governmental lawlessness and administrative sclerosis; hardly the signals any government, much less an elected government, would want to convey to a increasingly impatient public, powerful non-governmental organisations and an independent Press. Notwithstanding the criminalisation of politics, politicians must still woo the voters by promising to realise constitutional mandates; if the State now chooses to ignores a PIL order directing it to realise such mandates, it does so at its own peril.

Similarly, if Parliament seeks to nullify a PIL decision by passing a constitutional amendment, it can do so only by admitting its inability to fulfil the constitutional goals. Moreover, such an amendment must not pertain to that part of the Constitution which is held by the Court to affect the basic structure of the Constitution. It is true that the 13 Judge Bench decision of *Keshavananda Bharati v. State of Kerala*[107] enunciating the basic structure doctrine can be overruled by a larger Bench. However, it seems unlikely that such a large number of Judges would concur, at any point of time, in gifting away their constituent power to Parliament.

The only political limitations on PIL are those prescribed by the constitutional scheme itself. PIL is restricted to the writ jurisdiction of the Court[108] as

107. A I R 1973 SC 1461.

108. It may however be noted that the principles and philosophy of PIL become the law of the land by virtue of Art. 141 and permeate every branch of law thus making state law 'a law of the poor'. For example, in Bhim Singh v. Union of India, A I R 1981 SC 234, the Court upheld the URBAN LAND CEILING ACT 1976 observing that the proprietariat will no doubt suffer but the country cannot defer transformation as then hunger will know no law; in Sanjit Roy v. State of Rajasthan, A I R 1983 SC 328, the Court struck down the RAJASTHAN FINANCE RELIEF WORK EMPLOYEES ACT 1964 as being violative of Art. 23 of the Constitution inasmuch as it exempted the application of the MINIMUM WAGES ACT 1948 to certain employees. The Court ruled that forced labour prohibited by Art. 23 includes not only physical or legal force but also force arising out of economic compulsions as capitalism often exerts such economic pressure that the poor are compelled to provide labour even though the remuneration received for it is less than the minimum wages. Similarly, Sadhuram Bansal v. Pulin Behari Sarkar, A I R 1984 SC 1471, the Court ruled that it would lean in the favour of the weaker sections of society notwithstanding that it might detract from some technical rule in favour of the opposite party; in Lingappa v. State of Uttar Pradesh, A I R 1988 SC 389, the Court upheld the Act which restored land to tribals, ruling that law should be based on the principle - from each according to his capacity to each according to his need; in Prabhakaran Nair v. State of Tamil Nadu, A I R 1987 SC 2117, the Court recognised a fundamental right to shelter.

it is here that the Court can depart from Anglo-Saxon jurisprudence. On the same basis, PIL cannot be filed in Courts lacking writ jurisdiction, namely, the Courts subordinate to the High Courts.[109] Though trial courts cannot, under the existing constitutional scheme, entertain PIL actions, it does not follow that they cannot be involved in the implementation and monitoring of the orders of the Supreme Court or the High Courts. The Supreme Court has, in exercise of its power under Art. 142, directed Magistrates or District Sessions Judges to undertake follow-up actions in several PIL cases.

The criticism regarding the existence of ideological limitations on PIL too overlooks the purpose of PIL. There is no clash of ideology between the State and the Court, rather the ideology has already been concretised in Part IV of the Constitution, adopted by the Court and suscribed to, at least in election manifestos, by all political parties. PIL is a 'collaborative effort' on part of the Court and petitioner to prod the State to move in the direction which the State itself professes to move in.

(iii) PIL As An Institution-Legitimatizing Strategy

This criticism questions the motives for the Court in assuming such an activist role. Given that it had lost its credibility with the masses by upholding the Emergency, is the Court not merely augmenting its support base and moral authority in the nation at a time when other institutions of governance are facing a legitimatization crisis?[110]

The initial exercise of power by the Court in aid of the disadvantaged sections of society was perhaps a natural response to the extremely hard cases (*Hussainara Khatoon's* case, *Anil Yadav's* case) involving blatant violation of fundamental rights - before 1979, the Court simply was not confronted with such cases. More important, this exercise of judicial power bore constitutional sanction : the failure of the Court in such hard cases to deliver immediate relief

109. Few Commentators (J. Cottrell, *supra* note 73 at 120; N. Suryawanshi, *Social Action Litigation under Section 91 Civil Procedure Code*, THE LAWYERS, 20 (January 1987) have recommended that PIL can and should be taken up in lower courts. This however is not permissible under the constitutional scheme. Suryawanshi proposes Sec. 91 of the Civil Procedure Code to be the enabling provision. Sec. 91 provides that in case of public nuisance, the Advocate-General, or two or more persons having obtained the consent in writing of the Advocate-General, may institute a suit, though no special damage has been caused, for a declaration and injunction or for such other relief as may be appropriate to the circumstances of the case. However, such a proposition overlooks that Sec. 91 is intended to operate within the adversarial system along with its limitations and characteristics such as the traditional role of the Judge as a neutral umpire, the necessity of sanction from the Advocate-General to institute the suit and procedural handicaps inducing delay and formalism. Moreover, the scope of Sec. 91 is limited to public nuisance actions. Further, as the trial courts lack writ jurisdiction under the Constitution, they lack the necessary power to transcend the traditional judicial function of adjudication in order to provide remedies to social maladies.

110. J. Cassels, *supra* note 74 at 515.

would have, in any legal jurisprudence, amounted to abdication of its constitutional obligations.

Over the years, PIL has indeed enhanced the legitimacy of the Court as an institution. But then, is it only an institution - legitimatizing strategy with no instrumental effect in inducing social reform? Or does the converse proposition present a more accurate position; for, would not any strategy adopted by an institution which is effective in providing relief to the masses bound to enhance the legitimacy of that institution? Hence, if the Court is effective through PIL in using state law as an instrument of distributive justice, would it be fair to criticise the Court for having enhanced its credibility in the process?

The effectiveness of PIL in granting immediate relief to the aggrieved has not been questioned even by critics. If only the illustrations of PIL actions given so far is taken into account, the impact of the judicial decisions in human terms is astonishing; millions of people have benefited through court action; whether they be undertrials, bonded labourers, delinquent children, dowry victims or simply the general public suffering from environment pollution.

The Court has, however, made few mistakes as well in its attempt to provide remedial relief. A good example is *Rural Litigation and Entitlement Kendra v. State of Uttar Pradesh*[111] which pertained to the destruction of the vegetation cover of Mussoorie Hills, an exotic hill station, and the creation of drought-like conditions due to reckless limestone mining licensed by the State Government. The Court, in its endeavour to protect the fundamental right to clean environment as implicit in the right to life guaranteed by Art. 21, constituted and reviewed reports of several technical committees, including those of geological experts, and after considering, balancing and resolving competing policies and issues of resources including the need of environmental protection, developmental priorities, preserving jobs and protecting business investments, ordered all but one public and two private mines to close down. The three units were allowed to operate for a specified time under detailed conditions. The Court constituted a Monitoring Committee, at State expense, to ensure the compliance of its directions and to reforest the entire region; significantly, 25% of the gross profits of the three operating mines were to be paid to this Committee to facilitate the discharge of its functions. A Rehabilitation Committee was also set up to provide alternative mining sites for the displaced mine owners. However, the Court failed to take into account the interests of the labour. It is reported[112] that on closure of the mines, the mine

111. AIR 1985 SC 652; AIR 1985 SC 1259; AIR 1987 SC 359; AIR 1987 SC 2426; AIR 1988 SC 2187; AIR 1989 SC 594.

112. *Protecting Doon Valley's Eco System : Problems and Limitations*, ECONOMIC AND POLITICAL WEEKLY 1741 (10 October 1987).

owners literally chased out their workers without normal termination compensation amounting to one month's pay. Further, the mine owners used the environment campaign bogey to refuse regular employment pending closure. This allowed them to recruit workers on contract basis and thus escape the normal responsibility of providing provident fund contribution, medical relief and compensation in case of accidents which were frequent. It may however be clarified that the failure of Court to protect interests of the labour can be traced back to its observation[113]

> in regard to the mines closed for more than three years, we do not think the labour is sitting idle and the mine - owner is paying them. They must have got employed elsewhere or they have lost their service and have taken to alterative engagements.

Hence, the Court erred in this case because of its assumption that the mine-owners had discharged the labour in accordance with law rather than on account of any inherent inability to provide relief to the labour.

Critics do not dispute effective enforcement of the normally comprehensive court orders. Rather, they are concerned with what happens subsequently. The Court might release thousands of undertrials or bonded labourers, but who will rehabilitate them? For all that the Court may do, it cannot end bonded labour nor find homes for the pavement dwellers. In other words, they point out that the Court 'cannot be a substitute for executive efficiency' and that socio-economic change in a society 'organised around privilege, patronage and power, cannot be brought about just by a few PIL actions, howsoever well intentioned'.[114]

It is not entirely correct that the Court is helpless as regards the rehabilitation of the bewildered. For example, in *Ajaib Singh v. State of Punjab*[115] and *Sivaswamy v. State of Andhra Pradesh,*[116] thousands of released bonded labourers were rehabilitated. However, this criticism goes beyond the issue of rehabilitation and other remedial steps; what is being questioned is the ability of any litigative strategy to redistribute wealth or power on a massive scale within society.

This criticism seems to be correct to some extent. But then, the problem of the impoverished in India are too enormous and myriad to be solved even if major surgical operations were to performed by Parliament and executive working dutifully in cohesion with the judiciary. Nor does the Court profess to perform such a monumental task alone. Critics must remember that it is not a

113. A I R 1988 SC 2187 at 2209.
114. S.K.Aggarwal, *Public Interest Litigation : A Critique*, Indian Law Institute 45 (1985).
115. Writ Petition No. 2448-57 of 1983.Unreported.
116. Writ Petition No. 1187 of 1982.Unreported.

question of choosing between judicial efficacy and executive efficiency; while the Court may not be the best forum for socio- economic amelioration of the poor, it is their last resort precisely because of lack of executive efficiency.

Yet other commentators point to those PIL actions where the Court recognises the right of the aggrieved but fails to provide a remedy. An instructive example of such decisions, though fortunately rare, is *Olga Tellis's* case[117] filed on behalf of the Bombay pavement and slum dwellers who pleaded that eviction fron. pavements and slums would result in deprivation of their livelihood and consequently of life. In this case, the Court read a right to livelihood into the right to life under Art. 21 and recognised that the inability of such dwellers to obtain housing within a reasonable distance from their place of work violates such right to livelihood. Yet the only remedy it provided for the deprivation of this right was a prior warning to be given before eviction. It limited itself to giving unenforceable suggestions that the State should undertake a massive low-income housing programme in Bombay and that such programmes should 'be pursued earnestly' and 'implemented without delay'.

It is true that half an ounce of relief is more satisfying to a litigant than toothless rights. It would, however, be instructive to consider a similar case litigated around the same time as *Olga Tellis's* case, that is, of *Govind Ram (now Yashwant) v. Union of India.*[118] The action, which was filed on behalf of 7000 lepers in Delhi as being representative of 4 million lepers in the country, prayed for directions to the State to provide housing and medical aid to the lepers and to rehabilitate them. During the pendency of the petition, Delhi Development Authority (DDA) evicted lepers living in unauthorised hutments on the DDA land. The Court stayed further demolition and directed DDA to accommodate these lepers in alternative sites. It ordered DDA to construct hutments, with provision for medical treatment and vocational training, and hand over such hutments to the evicted lepers in lieu of their demolished hutments; an order complied with on 4 and 5 August 1986. The Court prohibited DDA from evicting the lepers, even if on unauthorised land, without providing alternative arrangement.

It would be incorrect to assume that the Court is composed of disembodied eminences who cannot seem to take a consistent stand. Critics overlook that the prescription that 'where there is a right there is a remedy and where there is no right, there is no remedy' stems from the traditional judicial role which limits the Court to resolving cases possessing the traditional lis. But if we step out of this traditional model, the function of the Court ceases to be adjudication; rather the Court may 'transcend traditional forms and inhibitions'[119] to assume

117. *Supra* note 55.
118. Writ Petition No. 10210 of 1985. Unreported.
119. *Supra* note 57.

several roles such as that of an ombudsman, an investigator, a mediator, a monitor, a social wrong publicist, a forum for a calm discussion of volatile public issues or even a deputy legislator. There may thus arise cases involving a right and no remedy (*Olga Tellis's* case) and those granting remedies without the determination of rights (*Govind Ram's* case). Such actions can be clubbed together as cases.[120]

> in which the court tells the government what in its opinion, the government ought to do. If the court feels that the social injustice presented by a particular case creates a powerful imperative for concrete action, and feels sufficiently confident that the executive will share that sense of imperative, then it will venture to issue specific remedial relief. If it does not feel that a case presents such an imperative, or doubts its ability to persuade the executive, it may limit itself to a declaration of rights bolstered by argument and rhetoric.

Hence, the allegation that PIL is ineffective in cases like *Olga Tellis's* case overlooks the secondary uses of PIL, such as a catalyst for legislative action or a deterrent for lawlessness or simply the highlighting of social wrongs.

Yet another criticism directed against PIL is that it is an episodic response to a particular outrage. Hence, it does 'not mobilise the victims nor help them to develop capabilities for sustained, effective use of law'.[121] The non-mobilising force of PIL awaits empirical proof. As regards its mobilising force, it will suffice to refer to *Randhir Singh v. Union of India*[122] where the Court expresses its 'pride and satisfaction' that the petitioner, who was a driver employed by Delhi Administration, had approached the Court pleading discrimination in pay. Observing that constitutional provisions had till then been invoked by the privileged classes for their protection and 'for a "fair and satisfactory" distribution of the buttered loaves amongst themselves', it rejoices that[123]

> thanks to the rising social and political consciousness and the expectations aroused as a consequence, and the forward looking posture of this Court, the underprivileged also are clamouring for their rights and are seeking the intervention of the Court.....

Another measure of effectiveness of PIL is the transformation in the attitude of the legal profession towards it. For the first couple of years, PIL had met with contempt, resistance and ridicule. In *Hussainara Khatoon's* case, the Court issued notice to the Supreme Court Bar Association to assist the Court,

120. C.D. Cunningham, *supra* note 60 at 521.
121. M.Galanter, LAW AND SOCIETY IN MODERN INDIA 291 (1989).
122. A I R 1982 SC 879.
123. *Id.* at 879.

yet the Bar did nothing and did that well.[124] The Bar was particularly piqued with the recognition of the right to speedy trial; for, with stricter standards for adjournment, the entire tribe of adjournment-lawyers could be driven to near extinction. Its reaction soon 'moved from indifference to indignation at what it regard(ed) as freak litigation'.[125] Senior lawyers were openly heard to say 'that if the Supreme Court thus wants to do social justice, it had better meet on the weekends'.[126] However, as human rights talk has gained legitimacy internationally, PIL has become 'fashionable'. One no longer hears the allegation that PIL is nothing less than a foreign conspiracy to topple the government through the C.I.A. Instead, the same lawyers now claim that they have always been associated with PIL.[127]

The attitude of the State, too, has become more receptive. The Court may characters PIL as a collaborative with all emphasis at its command; the behaviour of State Counsels in Court was still quite adversarial. After having been at its subversive best in cases[128] like *Anil Yadav's* case and *Rudul Sah's* case, the State is now more willing to co-operate with the Court and the petitioner. Judges of the High Courts are also becoming increasingly PIL-prone.[129]

B. Limitations Of Public Interest Litigation

The limitations on PIL as a strategy to provide remedies for social wrongs include the misuse of PIL by litigants filing actions for personal motives; institutional weaknesses of the Court to entertain PIL and political influence on judicial appointments.

(i) Abuse Of PIL

The very innovations that provide the impoverished access to Court also open the doors of the Court for unscrupulous litigants filing PIL actions for personal gain or motives. Given the epistolary jurisdiction of the Court and that

125. U.Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India,* in Baxi (ed.) LAW AND POVERTY : CRITICAL ESSAYS 387 (1988).
126. *Id.* at 409:
127. *Id.* at 410.
128. In Anil Yadav's case, the State Government initially prohibited its Inspector General of Prisons to appear before the Court and blocked investigations which were to be conducted by the Central Bureau of Investigation. It clamped down all data on the prisoners (*Bihar clampdown on data on convicts,* TIMES OF INDIA (3 December 1980)). Similarly, in Rudul Sah's case, it attempted to argue that Rudul Sah was not released as he had become insane. The Court promptly rejected the argument for lack of evidence and observed that even if Rudul Sah had become insane, such insanity must have been caused by his illegal detention for 29 years.
129. U.Baxi, *supra* note 125 at 413.

the Court shoulders the responsibility of investigating into the alleged facts, it is not surprising that attempt has been made to misuse PIL. To illustrate, in *Subhash Kumar v. State of Bihar*,[130] a letter, which alleged that a particular factory was polluting a river by discharging effluents, was discovered to have been sent merely to harass a rival industrialist. Similarly, in *C. P. W. Samiti v. State of Uttar Pradesh*,[131] the petition, which alleged air pollution, was found to have been filed out of enmity between parties. The Court dismissed these actions ruling that PIL cannot be invoked by a person to satisfy his personal grudge and enmity and that it was the duty of the Court to protect society from so-called protectors.

Again, in *Janta Dal v. H S Choudhary*,[132] the Court dismissed a PIL action for the quashing of the proceeding against the accused in the infamous Bofors corruption case. Holding that the petitioner had filed the PIL at the instance of the accused, the Court observed that a PIL action cannot be filed for personal gain or private profit or political motive or any oblique consideration. Similarly, the Court refused on 24 July 1995 to entertain a matter challenging the controversial Enron power project deal.[133]

Such cases use the already scarce human and financial resources available to the Court. At the National Conference on PIL organised by the International Institute of Public Interest Law [134] in Hyderabad on 24-25 September 1994, the then Chief Justice of India as well as the present Chief Justice of India cautioned that PIL will face structural and procedural problems unless it was administered in a disciplined manner and that the misuse of PIL will result in the loss of its credibility and will stem judicial activism.[135]

Few PIL analysts propose that the remedy is to impose heavy costs on the petitioner found to be misusing the judicial process through PIL. Others opine that laying down of clear guidelines specifying the matters that could be agitated in Courts as PIL would help in checking the abuse of PIL. Till then, there seems to be no solution other than requiring the Court to maintain a constant vigil.

130. A I R 1991 SC 420.
131. A I R 1990 SC 2060.
132. A I R 1993 SC 892.
133. *SC dismisses plea against Enron deal*, INDIAN EXPRESS (25 July 1995).
134. The International Institute of Public Interest Law was founded in response to a perceived need for formal institutionalisation of PIL. Justice M N. Venkatachaliah, Chief Justice of India and Chief Patron of the Institute inaugurated the Institute on 27.1.1994. Justice S.R. Pandian, former Judge, Supreme Court of India is its Patron while the Governing Council of the Institute comprises Kapila Hingorani (Advocate), Dipankar Gupta (Solicitor General of India), Suman Krishna Kant (of Mahila Dakshata Samiti), Vimla Farooqui (of National Federation of Indian Women), H . K. Dua (former Chief Editor of Indian Express), Father P. D. Mathew (of Indian Social Institute, New Delhi) and the present author.
135. *CJ For Proper Use of Public Interest Law*, INDIAN EXPRESS (25 September 1994); *Proper Handling of Public Interest Litigation Stressed*, NEWSTIME (25 September 1994).

(ii) Institutional Limitations

The Court is overworked, understaffed and underpaid. Despite its brave ruling in Bandhua Mukti Morcha's case that arrears of cases is no reason to deny justice to the poor, the Court simply does not have the facilities, resources nor the time to individually supervise each and every case. Though the mechanism of constituting commissions has reduced the burden of the Court, a formal and extensive infrastructure is nonetheless imperative for the Court to cope up with the PIL docket explosion.

The Court could do well with a major structural change in the operation of PIL cells. These cells are manned by the administrative staff rather than by socio-legal experts. Hence, several worthwhile PIL letters might be disregarded during the screening exercise itself. Similarly, the staff might not be able to correctly gauge the urgency nor the implications of certain letters. To illustrate, in *Nilima Priyadarshini v. State of Bihar*,[136] the Court expressed its shock that a letter written by the petitioner complaining of illegal detention was placed before it two and a half months after the PIL cell received it. Observing that such aberration make a 'mockery of the judicial process', the Bench referred the matter to the Chief Justice for taking 'suitable action against the responsible officials' and to 'devise machinery' to ensure that such incidents are not repeated.[137]

A similar set of guide-lines is required for the Court Registry. Several rules governing the filing of PIL actions are self-contradictory. A PIL action filed in the Registry is still to be accompanied by an affidavit, notwithstanding the evolution of epistolary jurisdiction and suo moto actions by the Court. It seems quite futile to require a lawyer or the petitioner-in-person to solemnly declare that the alleged facts are taken from a press report, especially when the press report is attached to the petition. Such bottle-necks in bringing actions before the Court is bound to discourage several prospective petitioners.

A far more serious institutional limitation is the fluctuating bench structure. It may be emphasised that though today PIL enjoys a collective endorsement from the Court, Judges vary in their degree of affection for PIL. The Indian Supreme Court too suffers from the universal problem of having some Judges activist, few conservative and others simply unpredictable. This problem gets further aggravated by the discretion of the Chief Justice to form Benches. Moreover, the Bench which admits a PIL action need nor necessarily be the one to hear it. These difficulties that arise due to the fluctuating bench structure get further compounded by the lack of cohesion and co - ordination even among the

136. A I R 1987 SC 2021.
137. *Id.* at 2022.

activist Judges.[138] This may be illustrated by considering *Nimeon Sangma v. Home Secy, Govt. of Meghalaya*[139] which was filed on behalf of the undertrials pursuant to *Hussainara Khatoon's* case. Two of the three Judges constituting the Nimeon Sangma Bench were common to the Hussainara Khatoon Bench Yet in Nimeon Sangma's case which was decided after three interim orders had already been passed in Hussainara Khatoon case, the court made no reference to *Hussainara Khatoon's* case nor read a right to speedy trial under Art. 21. The petitioner, common in both cases, was not asked to prepare charts categorising the undertrial prisoners. Instead the Court passed a blanket order releasing all prisoners, other than those charged with murder or dacoity, who had been in jail for more than six months without being charge-sheeted. As regards those charged with murder or dacoity, the Court directed that investigation must be completed within two months. This lack of cohesion among the Judges raises the spectre of litigants indulging in Judge-shopping[140] and of Judges in issue-shopping. Not only does it create legal loopholes that are bound to be gleefully exploited by the State, it results in unnecessary friction among the Judges which weakens the Court at an institutional level.

No matter how sound a jurisprudence may be in theory, attention still has to be paid to lowly details like remunerating the petitioner. It does seem a topsy-turvy situation that the petitioner who is vindicating public causes incurs personal expenses[141] while the State Counsel opposing PIL action or defending

138. U.Baxi, *The Supreme Court Under Trial : Undertrials and the Supreme Court*, 1 S.C.C. 35, 47 (1980).

139. A I R 1979 SC 1518. Similarly, inconsistency has crept in while interpreting Art. 21 to include a right to clean environment. The Court in Rural Litigation and Entitlement Kendra's case simply did not mention the Art. under which it read this right as a fundamental right. Several High Court read it into Art. 21. For example, the Andhra Pradesh High Court in Damodar Rao v. The Special Officer Municipal Corp. of Hyderabad, A I R 1987 AP 171 argued that there was no reason why only violent extinguishment of life must be considered as deprivation of life and not slow poisoning by environment degradation. Hence it was the ambit of the term 'deprived' in Art. 21 which was perceived to have been extended by the Supreme Court. In later cases (such as Subhash Kumar's case - *supra* note 130), the Supreme Court expressly read a right to pollution free air and water and to clean environment into right to life itself, thereby widening the ambit of 'life' in Art. 21. The significance of this distinction is that in the latter case, it is presumed by the Court that pollution per se violates Art. 21. The petitioner need not make out a prima facie case that the complained pollution is of such a degree that it will result in deprivation of life; a major advantage in cases where the impact of pollution is not as drastic or apparent as it was in Rural Litigation and Entitlement Kendra's case.

140. In early eighties, an unhealthy practice of writing letters to certain Judges had resulted in friction among few Judges of the Court (see Tulzapurkar *supra* note 86 at 14). In Sheela Barse's case (*supra* note 57), the Court ruled that such a practice is undesirable particularly as other Judges on the Bench are often not even aware of the contents of such letters. Further, even the authencity and delivery of letters might be disputed. As Judges should keep out of such controversies, the Court opined that all letters must be addressed to the Registry which will forward them to the Court.

141. The Supreme Court has in few cases directed the State to pay costs to the petitioner. For example in P. N. Thampy v. Union of India, A I R 1984 SC 74, costs of Rs 5000 were awarded. In D. C. Wadhwa's case (*supra* note 88), where a Professor of Political Science brought an action successfully challenging the practice of repromulgation of Ordinances by the Governor of Bihar from time to time without getting them replaced by Acts as unconstitutional, the Court awarded Rs 10,000 as costs. However, such awards are made on an ad-hoc basis and depend on Judge to Judge.

governmental lawlessness gets paid by the hearing from the public exchequer. Remuneration to a successful petitioner by the State would go a long way in endearing PIL to the lawyers and the public, and, in the process, check governmental excesses. Given the time, money and energy needed to bring and pursue a PIL action, lack of remuneration would, on the same footing, slacken the current momentum of bringing voluntary actions.

However, these limitations of lack of infrastructure and guide-lines or that of the fluctuating bench structure or of remuneration are not insurmountable difficulties. The Court has all the powers it needs to set its house in order; it may lack the same perceptions.

(iii) Political Influence On Judicial Appointments

PIL draws its strength from the insulation of the judiciary from the executive and legislature. However, political influence, particularly in the High Court - the recruiting ground for Supreme Court Judges - is on the increase today. The main reason for this is the method of appointment of Judges.

Art. 124 of the Constitution empowers the President of India to appoint the Supreme Court Judges after consultation with the Chief Justice of India and such other Judges who he deems fit. The President appoints the High Court Judges in consultation with the Chief Justice of India, the Chief Justice of the State and Governor of the State (Art. 217). Prior to 1981, the advice of the Chief Justice of India was considered binding. However, the Supreme Court, in *S P Gupta's* case, inflicted a wound on itself by ruling that no primacy is to be given to the advice of the Chief Justice of India over that of the other functionaries. This decision encouraged the executive to use its conventional weapon system of appointing co-operative Judges.[142] Further, it construed its constitutional right to initiate appointments to mean that the State Governments could propose the names of Judges directly to the Central Government by - passing the Chief Justice of the High Court.

In *Subhash Sharma v. Union of India*,[143] the three Judge Bench of the Supreme Court ruled that the right to initiate appointments is limited to suggesting appropriate names to the Chief Justice of the State or to the Chief Justice of India and that the practice of State Governments to send proposals directly to the Central Government is impermissible under the Constitution. Further, the Court held that the advice of the Chief Justice of India should play a decisive role; if the executive has primacy in the selection process, it may

142. U.Baxi, *supra* note 80.

143. A I R 1991 SC 631.

involve arbitrariness. Ruling that the seven Judge decision in *S P Gupta's* case needs reconsideration, it referred it to a larger Bench of nine Judges for review. In *Supreme Court Advocates-On-Record Association v. Union of India*,[144] the nine Judge Bench overruled *S P Gupta's* case to hold that the opinion of the Chief Justice of India has primacy in the appointment of Supreme Court and High Court Judges. It remains to be seen whether the 1994 decision will reduce the vulnerability of Judges to political influence.

C. Pre-Requisites For Public Interest Litigation

The norms of PIL, like any other legal rules, become invisible as rules of action precisely when they are effective. They don't appear as rules at all but simply as an apt response 'to an immediate reality, as part of 'the way things are' [145]. As a result, several conditions necessary for the very existence of PIL are relegated to the background. Let us start the task of appropriating these pre-requisites for PIL from the realm of the natural by referring to the view held by several commentators [146] that PIL is Judge-induced and Judge-led. While the accuracy of the latter part of the proposition varies from Judge to Judge and petitioner to petitioner, the former part is certainly not true. PIL is not Judge induced; rather, it was induced by ripe political, social and economic conditions co-inciding in time, facilitated by constitutional provisions and sustained by a free Press and vibrant democracy.

(i) Ripe Political, Social And Economic Conditions

There must exist a vacuum for justified political authority before the Court can assume an active political role without losing its credibility. In other words, loss of legitimacy of the legislature and the executive (and the Court) during the 1975 Emergency and the criminalisation of politics was crucial for PIL to exist today. Further, before the Court can justify its affirmative role to mitigate the sufferings of the poor, there must be acute poverty along with its dehumanising economic and social implications. Unfortunately, there had to be cases like the *Hussainara Khatoon's* case, *Anil Yadav's* case and *Rudul Sah's* case to conscientise the nation and the Court; though even these ghastly cases do not appear to have stirred the vestigial conscience of the State. To put the point

144. A I R 1994 SC 268.
145. L. L. Fuller, *Collective Bargaining and the Arbitrator*, Wisconsin Law Review 3 (1991).
146. U. Baxi, *supra* note 125 at 90; P. N. Bhagwati, *Judicial Activism and Public Interest Litigation*, 23 Columbia Journal of Transnational Law 561 (1985); J. Cassels, *supra* note 74 at 497; A. Rosencranz, S. Divan & M. Noble, Environmental Law & Policy in India 119 (1991).

differently, for the Court to justify its departure from the traditional judicial role, ripe socio-economic conditions must coincide in time with political vacuum.

(ii) Enabling Constitutional Provisions

The politically active judicial role must fall within the constitutional framework. The insulation of the judiciary from the executive and legislature[147] is necessary for very conceptualisation of PIL. Further, even an insulated Court could not have justified its departure from Anglo-Saxon jurisprudence but for the language of Art. 32 and 226 not prohibiting the Court from exercising its judicial power in cases lacking the traditional lis. Art. 142, perhaps the only provision of its kind in the world, supplements the wide powers of the Court to mould the relief in light of the circumstances of the case.

Few High Courts have also used the Fundamental Duties Chapter (Part IVA of the Constitution) to secure public accountability by reading the prescribed Duties as rights. In *Koolwal v. State of Rajasthan*,[148] where the complaint pertained to pollution, the Rajasthan High Court held that Part IVA 'is the right of citizens to..move the Court to see that the State performs its duties faithfully '.[149] Given that every citizen owes a constitutional duty to protect the environment, he must also be entitled to enlist the Court's aid in enforcing it against recalcitrant state agencies.

It has been suggested that the notion of imposing Fundamental Duties on citizens as well as the ease with which the Court read enforceable rights from unenforceable obligations might stem from the concept of *Dharma*.[150] By

147. Several constitutional provisions seek to insulate the judiciary from the executive and the legislature. For example, the salaries of the Judges are fixed by the Constitution and cannot be varied by the legislature except under proclaimed financial emergency (Art. 125, 221 and 360). The privileges or allowances of a Judge of the Supreme Court or of a High Court, or his rights in respect of leave of absence or pension cannot be varied to his disadvantage after his appointment (Art. 125, 221). The administrative expenses, including salaries, allowances and pensions payable to or in respect of the officers and servants of the Supreme Court is charged on the Consolidated Fund of India and that of the High Court, on the Consolidated Fund of the State (Art. 146, 229). Further, the Supreme Court and the High Court can recruit their own staff and frame rules regarding their conditions of service (Art. 146, 229). No discussion is permitted in the legislature with respect to the conduct of a Judge of the Supreme Court or the High Court in discharge of his duties (Art. 121, 211). Moreover, a Supreme Court Judge is debarred from practicing in any Court or before any authority after retirement (Art. 124) while a retired High Court Judge may practice only in the Supreme Court or in a High Court in which he has not been a Judge (Art. 220).
148. A I R 1988 Raj. 2.
149. *Id.* at 4.
150. The Anglo-Saxon division of the normative world into separate domains - legal, moral and religious - was alien to ancient India. Rather Dharma, enunciated in Sanskrit texts called Dharmasastras written between 600 BC and 500 AD could connote law, religion, duty, morality or simply rightful action. It applied to all aspects of life and had a binding force similar to what Santos terms as 'interlegality' - see *supra* note 4.

prescribing obligations to regulate the conduct of individuals in ancient Indian society, *Dharma* precluded the abstraction of natural law type and hindered the development of any sort of human rights. Rather a person could move the royal court or panchayat for the failure of another person to fulfil a prescribed obligation. Hence, the principle adopted to protect human interests was that of 'obligations' and not of 'rights'. The notion that something was due to an individual flowed from the non-observance of an obligation owed to him rather than from the concept of inalienable natural rights with their individualising effect. It is interesting to observe that the Court adopts the same strategy[151] to protect human interests by relying on the positive obligations contained in Part IV of the Constitution to read new rights into Part III.

Again, if the Constitution had professed liberal capitalist ideology, any departure from Anglo-Saxon jurisprudence could have confidently been ruled out.

(iii) Democracy, Free Press And Strong Bar

Not only must the Court draw its sanction from the Constitution, it must enjoy the support of the people. Without popular mandate, the Court would have been chastened by the executive and legislature long ago. In India, there exists a grassroot democracy, perhaps, as a result of the involvement of men, women and children from all sections of society in the Independence Movement against the British colonial rule. Moreover, the legal profession has historically played an important role in the freedom struggle and is therefore inextricably linked to politics. The Press, being extremely independent and pro-people, has played a major role in the evolution of PIL. It has ceaselessly worked to expose state corruption, lawlessness and callousness. The Court, the Press and the people seem to be sharing a symbiotic relationship which has at times kept an important check on the Judges from committing irregularities. This somewhat unique check and balance system is illustrated in the corruption scandal involving the then Supreme Court Judge, Justice V. Ramaswami.

In April - May 1990, press reports highlighted the huge expenses incurred by Justice Ramaswami for his official residence during his tenure as Chief

151. Another similarity between the ancient legal system and the present judicial role is the flexibility in resolving disputes. The pandits who interpreted and applied Dharmasastras, also sought to incorporate and accommodate the practice and customs of parties. The panchayats or the royal courts did not strive for uniformity nor binding precedents; the system cohered by 'example, instruction and slow absorption rather than by imperative imposition' (M. Galanter, *supra* note 4 at 31). The panchayat tradition offered a model where adjudication was blurred with mediation. The membership of the traditional panchayat was flexible so that the conflicting parties might often be included to decide their own conflict : as the panchayats operated on the rule of unanimity, the process resulted in a communal consensus on the solution, somewhat akin to the way 'a close-knit family might resolve a problem between two cousins' (C. D. Cunningham, *supra* note 6 at 797).

Justice of Punjab and Haryana High Court. These reports agitated lawyers who voiced their concern to the Chief Justice of India. On 3 July 1990, the Chief Justice announced in open Court that he had advised Justice Ramaswami to desist from discharging judicial functions so long as the investigations continued.[152] Justice Ramaswami went on leave for 5 months and resumed work only in December 1990 when the new Chief Justice ended his leave. Soon thereafter, press reports appeared again detailing the various acts of outright misappropriation of goods by Justice Ramaswami. This prompted the Supreme Court Bar Association to pass an unprecedented resolution on 1 February 1991 which asked Justice Ramaswami to resign and called upon the Chief Justice not to assign him judicial work, failing which it would be constrained to boycott Justice Ramaswami's Court. Soon thereafter, the Speaker of Parliament admitted an motion for the impeachment of Justice Ramaswami and constituted an Inquiry Committee just before the dissolution of Parliament on collapse of the government. The new Congress-I government refused to proceed with the matter contending that the motion lapsed on dissolution of Parliament. This provoked a body of lawyers to constitute a Committee on Judicial Accountability and file a PIL action[153] impleading the Union of India, the Chief Justice of India and Justice Ramaswami as respondents. It prayed for a ruling that the motion had not lapsed and also for a direction to the Chief Justice prohibiting him from assigning judicial work to Justice Ramaswami. While the Court held that the motion had not lapsed, it observed that the Chief Justice did not have the power to direct a brother Judge to desist from discharging judicial function. However, it held that 'the question of propriety (was) different than that of legality' and it 'should be expected that the Judge would be guided by the advice of the Chief Justice of India as a matter of convention'.[154] Justice Ramaswami still did not resign.

In December 1992, the report of the Inquiry Committee was tabled in the Parliament, but only after the Court has disposed off two petitions: one[155] filed by a proxy of Justice Ramaswami and the second[156] filed by Justice Ramaswami's wife held by the Court to be on behalf of Justice Ramaswami. The report found Justice Ramaswami guilty on several charges. The Constitution requires that a motion to remove a Judge be carried by a special majority of not less than 2/3 of the members voting and an absolute majority of the total membership of the House (Art. 124(4)). When the motion to impeach Justice Ramaswami was

152. P. Bhushan, *A historic non-impeachment*, FRONTLINE 17 (4 June 1993).
153. Sub-Committee on Judicial Accountability v. Union of India, A I R 1992 SC 320
154. *Id.* at 357.
155. Krishnaswami v. Union of India, Writ Petition No. 149 of 1992. Unreported.
156. Ramaswami v. Union of India, A I R 1993 SC 2219.

put to vote on 11 May 1993, the Opposition voted for it but the ruling Congress-I party abstained from voting; for, Justice Ramaswami was a staunch Congress supporter. Hence, with 196 votes for, no votes against and 205 abstentions in a House with 401 members present and an effective strength of more than 500, the motion failed - Justice Ramaswami, despite of being proven to be corrupt, could not be impeached.

The 'reaction amongst the people, reflected in the press, was of shock and revulsion'.[157] There was unanimous and severe condemnation of Congress-I. The intensity of public outcry shook the government. The Opposition promised that the non- impeachment of Justice Ramaswami would be the major issue in the forthcoming election. Under mounting public pressure and press editorials and articles condemning it, the government withdrew its support for Justice Ramaswami; the Judge announced his resignation on 14 May 1993.

Conclusion

It would be appropriate to conclude by quoting Cunningham[158],

> All throughout the world, those who share in the ancient British legal tradition, should observe with rapt attention as that tradition is immersed in the fiery crucible of modern Indian society. For as the heat of the crucible burns away the dross and impurities to leave only pure metal, so too the jurisprudence which emerges from India's refining process may well prove a model of the best and most universal concepts of the common law. Indeed the metaphor of the crucible is inadequate because often the strongest and most durable metal is alloy, a fusing of different elements into a new form. Thus a comparative study should not merely examine how in India outmoded legal traditions have been stripped away, but also how qualities which are India's own may have merged with elements of the common law system to form a more just and enduring jurisprudence...Yet perhaps neither the metaphor of refined metal nor the alloy is appropriate. Indian PIL might rather be a phoenix : a whole new creature arising out of the ashes of the old order.

PIL represents the first attempt by a developing common law country to break away from legal imperialism perpetuated for centuries. It contests the assumption that the more western the law is, the better it must work for economic and social development; the only development such law produced in

156. Ramaswami v. Union of India, A I R 1993 SC 2219.
157. P. Bhushan, *supra* note 152 at 21.
158. C. D. Cunningham, *supra* note 60 at 496.

developing states, including India, was the 'development of underdevelopment'.

Before the emphasis shifted from legal centralism to legal pluralism, the strategy used by most states to deliver justice to the victims of underdevelopment had been to provide legal aid services; the purpose of these services being to enable the impoverished to participate in the traditional legal system on an equal economic footing. But then, just as access to hospitals need not necessarily secure good health, access to Courts need not necessarily secure justice. What happens within the Court is equally, if not more, important - the formalism, the 'neutrality' of law, the procedural technicalities and delay render justice as a commodity tragically beyond the grasp of the bewildered.

The shift from legal centralism to legal pluralism was prompted by the disillusionment with the formal legal system. In India, however, instead of seeking to evolve justice-dispensing mechanisms outside the formal legal system, the endeavour has been to deliver justice by changing the formal legal system itself through PIL. The changes, as we have seen, are both substantive and structural. The remedial nature of state law, the relaxation of the strict rule of locus standi and the evolution of the epistolary jurisdiction together offer a new paradigm of law which has taken on its identity as a response to the misery of the impoverished. It has radically altered the traditional judicial role so as to enable the Court to bring justice within reach of the common man. Such a paradigm of law has profound implications for the theoretical premise of current literature on legal pluralism, namely, that of locating informal justice outside and in contradiction to formal state law. It renders irrelevant the question on the challenge of informal justice to the state monopoly of production and distribution of law and justice, on the 'trivialisation' or 'relativization' of 'official' formal law by informal justice or on informal justice functioning as an agent or alternative to state law.

Given that developing states are desperately in need of a remedial jurisprudence, PIL has attracted emulation in few countries like Malaysia and Philippines;[159] its success will invariably depend on the context in which it fuses with the pre- existing legal system. However, more than providing a model for emulation, it sends an important message to those developing states, who look towards the developed States for inspiration, to glance inwards at their own history and modes of social regulation in order to forge new tools and remedies to secure justice. But then, how many developing states, reeling under legal, cultural and intellectual imperialism, even remember their own history; and among those who do, how many value it ?

159. J. Cottrell, *supra* note 73.

BOOK REVIEWS

LAW OF ARBITRATION. By Avtar Singh . Lucknow : Eastern Book Company 3rd ed., 1994. Pp.xxviii + 164, Rs.75/-.

The book under review is the third enlarged edition of a commentary on the Arbitration Act, 1940, written by a well known author in the field of commercial law. His books on company law, contract, and negotiable instruments are note-worthy. This book is a welcome addition as there is no other reliable book of the class comparable with the present work of the author on this subject.

The mode of settling disputes by arbitration is very popular, both with business as well as government, on account of its being speedier, more informal and cheaper than the conventional judicial procedures. Further, it has the advantage of providing a forum which is more convenient to the parties, who are at liberty to choose the time and place of the tribunal's sitting. In addition to this, the parties are free to select an arbitrator who possesses special qualification required to arbitrate an intricate, technical, scientific or any other problem, requiring specialized training or knowledge of the matter in dispute. As the author himself has pointed out in the preface that the subject has acquired complexity in recent years due to the growing use of technology. Writing for students in his characteristic style, the author has made such an important and technical subject easy to understand.

Instead of writing a stereotype section-by-section commentary on the Arbitration Act, the author has intelligently reorganized the provisions of the statute in a logical manner, thereby making the book much more useful as a teaching tool. There is an in-depth discussion on all the key topics and all important cases have been discussed. The table of cases running into sixteen pages inserted in the beginning of the book is indicative of the amount of case law discussed. The rules on the complex but currently developing topic relating to the respective spheres of power of the court and the arbitrator to award interest, have been explained satisfactorily. Discussion in chapter-6 on appeals needs to be made more elaborate.

The paper, the printing and the get-up are all excellent but some more care could have been taken in proof-reading. On the first page itself while giving the language of section 2 in bold type sub-section 2(b) which reads 'award means an arbitration award' is repeated glaringly, but to be fair, it may be mentioned that such mistakes are rare in this book.

Inspite of the escalating technology and labour costs, the printed price of

Rs.75/- could be reduced. For a small book of 147 main pages, duplicating a subject index of 10 pages when already two Tables of Contents of 8 pages are given in the beginning and again repeating 6 pages of Local Amendments of U.P. and Orissa in the end, while the same are sufficiently taken care of in the body of the text seems to be a luxury which could easily be dispensed with. After effecting this economy the publishers could substitute in its place a bibliography of books and articles on the subject which could suggest useful further reading to students. This would have made the book more useful and brought it within easy reach of students.

The Book is recommended as an accompanying text necessary to supplement the case-material for the case-method system of teaching followed at the Faculty of Law of the University of Delhi .

P.P.Singh Alakh*

DUTT ON CONTRACT (INDIAN CONTRACT ACT). By Salil K.Roy Chowdhary. Eastern Law House. 8th ed., 1994. Pp 951+12, ISBN 81-7177-040-1.

Perhaps no other subject in the standard canon of legal education can claim such an august tradition, such rigour of analysis, and such sublime irrelevance, as the law of contract.[1]

Every society creates an order of wealth and power. It establishes rules and institutions which direct the means for the creation and distribution of wealth and allocate power to certain individuals to control others. In modern societies, where market transactions serve as the principal mechanisms for the production and distribution of wealth, this part of the law assumes paramount importance. Most economic arrangements are supported, shaped, and regulated by these legal rules. The law of contract normally supports these transactions by making them legally enforceable, but at the same time it places restraints on conduct, controls the terms on which transactions may be agreed, and limits the extent to which the parties may enforce the agreement by means of self-help or coercion from legal institutions. Consequently, the law of contract, which regulates market transactions, plays a leading role in determining the order of wealth and power.

The law of contract was devised during the nineteenth century by lawyers in Europe and North America for interpreting and regulating economic practices of social life. Obligations based upon statutes, trust, and economic

---

* Reader, Faculty of Law, University of Delhi, Delhi.

1. Hugh Collins, THE LAW OF CONTRACT (2nd ed 1993), Butterworth in preface p.xi.

dependence were reintroduced as contractual agreements to be governed by the contract law. The potential scope of this classification started from marriage to business companies and employment, and from sale of private property to the provision of public services by governments. The empire of the law of contract expanded in tandem with what Marx described as the commodification of social life.[2]

The Law Of Contract and Market Economy

This category of law provided an essential tool for lawyers to understand the social and economic relations which were formed in the course of the explosion of a market economy, as markets became the dominant instrument for the production and allocation of wealth. During this century, the State intervened to devise new principles to govern the operations and outcomes of the market. Instead of permitting the distribution of wealth to be determined by voluntary choices to enter market transactions, the social security system and all the other instruments of the welfare state, funded largely through progressive taxation, clearly affect the eventual outcomes of the distribution of wealth. At the same time similar ideals of social justice have justified the channelling and regulation of market transactions. Here, the modern law of contract, comprises those rules, standards, and doctrines which serve to channel, control, and regulate the social practices which can be loosely described as market transactions. Thus the law of contract facilitates the creation of legal obligation on any terms which individuals freely choose; but it also sets limits to the exercise of voluntary choice.[3]

The market, not only provides a principal mechanism for the distribution of wealth, it also establishes some of the significant relations of power in modern society.[4] Contracts provide the basis for the construction of many institutional arrangements which operate in the market. These institutions, be they firms, trade unions, or trade associations, can exert power over members of the organization, according to the license of the contractual constitution. The firm, which normally takes the legal form of a company, acquires capital through a mixture of contracts with shareholders and loans from banks. The firm acting through its directors, who are its contractual agents, employs managers to organize production. Employees of the firm accept the managers' contractual right to direct and control their efforts during working

2. K.Marx, Capital I (1867), Chap.I.
3. P.Atiyah, The Rise and Fall of Freedom of Contract (1979).
4. I.Macneil, The New Social Contract. 32-5 (1980).

hours in return for the payment of wages. The firm enters into numerous agreements with suppliers and customers for the purchase of raw material and the sale of finished products. Suppliers often undertake a requirements contract, which obliges them to satisfy the needs of the firm for a raw material at a fixed price. Similarly, through franchise agreements with retailers and distributors, the firm secures reliable outlets for its products and the right to control price and exclude competition. Within this matrix of production relations established by variety of contracted relations, each party becomes heavily dependent upon the others for the proper performance of contracts.

In these commercial transactions, the parties usually wish to avoid the expenses and uncertainties of litigation in the courts, so they have strong incentives to 'agree remedies' for breach of contract. But if no explicit arrangements have been agreed, then the courts impose their own remedies for breach of contract. Thus, the parties have agreed their 'primary obligations' under the contract, but when they are broken, then the courts will impose 'secondary obligations' which can be enforced by the injured party.[5] The principal judicial remedies available are either compulsory performance of the primary obligation (by specific performance or injunctions) or compensation (damages). A breach of contract may also provoke insolvency proceedings against a defendant company, resulting in the courts' appointment of an administrator or receiver. Failure to comply with judicial orders for remedies for breach of contract results in the application of further coercive measures. If an award of damages is not paid by the defendant, then the plaintiff may invoke a court procedure for the seizure and sale of defendants' goods to the value of the outstanding sum owed. If the defendant defies an order for compulsory performance, then the plaintiff may invoke the sanction for civil contempt of court. If the court determines that the defendant has committed contempt by failing to comply with its order, then it may impose the sanctions of fines or imprisonment in order to coerce performance from the recalcitrant defendant.

Thus, in the 19th century, the common law defined its conception of a just market order in a rigorous set of legal doctrines. The law was reduced to a set of rules, comprising of categories. This concept of law of contract lives on in the text books and they have altered little in their organization of the rules, and their conceptions of the scope of the subject. This formalism also suited the courts because they could quickly dispose of a case by reference to a narrow technical rule, without venturing into the field of basic principle or considering

5. The terminology derives from Lord Diplok in Photo Productive Ltd v. Securicor Transport Ltd 1980 All ER 556(HL).

openly the consequences of the decisions. However, here we should remember that the ideals of the Rule of law and the separation of powers circumscribe the political authority of the judges when creating the law. Their job is, in principle, to enforce the law, not to create it.

Thus, like other textbooks, this book typically repeats an interpretation of the subject which has remained unaltered for a century or more in its categorization and organization of the legal material. The aims of this book remain as they were in previous editions. They are to state the general principles of the subject in such a way as to make it useful to judges, lawyers, students and others concerned in the field.

Four years is a long time in the law of contract, so that the text has again been extensively revised. The new edition takes full account of the many important developments in both case and statute law that have occurred since publication of the latest edition in 1990. The most important changes are as follows :

In introduction, the discussion of 'General Rules of Interpretation' has been recast in the light of various recent Supreme Court decisions. Important decisions focusing on the basic principles of the law of contract have been carefully been noted.

In chapter I, the discussion of offer and acceptance has been recast in the light of recent cases.

In chapter II important changes in the law of undue influence are noted. Further, new development in the law relating to restraint of trade and illegality generally are considered. The new text takes account of the provisions of the Indian Contract (Amendment)Bill,1992, relating to agreements in restraint of legal proceedings. In this chapter, account is taken of many recent decisions on the effect of exemption clauses, both between the contracting parties and with regard to third parties.

Chapter IV,V,VI have been extensively revised to take account of important new decisions in the area of performance, breach, frustration and remedies.

Credit card transactions and Government contracts now receive fuller discussion.

In chapter XI the Building contracts and Tender contracts have been extensively revised covering latest case law.

All the issues of importance like Government contracts, agreements between employees and trade unions, lock-out agreements, contract of employment, contract of credit cards, foreign elements in contract and so on have been comprehensively discussed. Many less extensive changes have been made in almost every chapter of the book, the result of which is that about half of the text is new. The book also makes a comparative study of the law of contract as authors have introduced frequent comparisons with jurisdictions from the

common law world. One more asset is that most of the English case references of unavailable English Reports have been replaced by reference to All England Reports;thus book makes a comparative study of the law of contract between England and India.

Suman Gupta *

CONTRACT OF EMPLOYMENT AND MANAGEMENT PREROGATIVES. By Harish Chander. Noida : Vijaya publications. Pp.xxix + 322, Rs.250/-.

An important starting point in any labour law discourse, is the contract of employment. Otto Kahn-Freund, who has made monumental contribution to 'labour law and society' scholarship, has described it as the 'cornerstone in the edifice' and the 'principal actor in the drama'.[1] While this contract continues to remain symptomatic of the subordination of the employee to the dictates of the employer, historically, this relationship has undergone modification all over the globe through a series of legislative, judicial and social actions. These actions have in various ways regulated both individual and collective employment relations. And these norms and actions are 'expressed in processes and institutions such as employment protection legislation, collective agreements, conciliation and arbitration, industrial conflict, industrial tribunals, and work-place organisation.'[2] These developments have not, however, put any substantially fundamental attack on the supremacy of the individual employment relationship even as the contract of employment is deemed to incorporate the collectively agreed conditions that reflect changed stipulations in the original contract of employment.

Be that as it may, the tendencies of 'status' attempting to corrode the employment contract are discernible from the post-Second World War developments in minimum standards of employment. Employment contract was also diluted by the flourishing of the *collective laissez faire* in the U.K. and of development of somewhat regulated collective bargaining in other Western systems. However, lately contract is showing tendency of revival virtually all over. It is especially so since the emergence of the supply side economics being followed through Thatcherism and Reagonomics in the West and through

---

* Lecturer, Faculty of Law , University of Delhi , Delhi.

1. Quoted in Jon Clark and Lord Wedderburn, *Modern Labour Law: Problems, Functions, and Policies*, in Lord Wedderburn et al. (eds.), LABOUR LAW AND INDUSTRIAL RELATIONS: BUILDING ON KAHN-FREUND 146 (1983).

2. Jon Clark, *Towards a Sociology of Labour Law*, in Lord Wedderburn et al. (eds.), LABOUR LAW AND INDUSTRIAL RELATIONS: BUILDING ON KAHN-FREUND 100 (1983).

Manmohanomics in India since July 1991. In furtherance of these policies, throughout the 1980s in the U.K. 'legislation aimed at restricting trade union power at different points in the decade,'[3] in pursuance of governments' policies of deregulation of fair wage standards and free labour market. Since 1979, British industrial relations, which have been known to be the model of industrial democracy, have been witnessing a weakening of the welfare state, social security and trade unionism. Indian labour laws, too, have on their reform agenda an attack on basic protection of fair standards to cope with the exigencies of the new economic thinking. One can foresee a large-scale retrieval of management prerogatives with renewed emphasis on efficiency, productivity and market-friendliness.

Chander's book, *Contract of Employment and Management Prerogatives*, does promise to the reader, as a central theme, to deal with contract-status configurations in employment relations. Surprisingly though, global developments of the past, more than a decade or so, in this regard do not find place or even a reference in this book published in 1993. In view of these developments the book appears to be containing old knowledge in this regard. The reader gets struck with this feeling while reading the author's observation that 'these days the contract of employment between the employer and employee is increasingly approaching nearer to "status", rather than remaining purely, a "contract" between them' (p.vii). The book contains no reference to the reversal of society, as also of the employment contract and management prerogatives, from status back to contract. But this preliminary general observation should not undermine some of the otherwise excellent features of this book.

The book is a revised version of the author's doctoral thesis in law submitted to the University of Delhi. In fact, it is fascinating to come across this otherwise interesting book on labour law, given the extremely scant research coming from law scholars in India in this field. The book primarily seeks to trace the developments in master and servant relationship with special reference to the management prerogatives from common law to contemporary times. In this regard the author mainly assesses the developments in the Indian law relating to employment contract. The book is divided into ten chapters including the introduction and the conclusion. The introductory chapter elaborates the conceptual framework and the relevance and the scope of this work. Chapters 2 and 3 discuss the nature of contract of employment, and sources of terms of employment respectively. In chapter 4 are discussed management prerogatives where he notices 'clear trend of changes in law indicating restrictions on these management prerogatives which were not present at common law...' (p.69).

3. Paul Davis and Mark Freedland, LABOUR LEGISLATION AND PUBLIC POLICY 526 (1993).

Modes of termination of contract find place in chapter 5. Here the author examines how the employer's prerogative to terminate the employee's service are restricted, and what is the judicial attitude to issues like reinstatement. He laments that judicial attitude in this regard has exacerbated industrial indiscipline.

Chapter 6 is somewhat unrelated to the author's central theme and deals with the concept of industrial discipline at the aggregate level, and also primary causes of industrial indiscipline in India. The next chapter examines the management's prerogative of discipline. Here, with the help of case law he discusses the legal basis of various prerogatives and thus examines contribution of the judiciary in this regard. This chapter also analyses various types of disciplinary action. Chander here concludes that 'the management's prerogative to take disciplinary action is substantially curtailed being subject to the strict scrutiny of courts which has affected the morale of the management to a great extent ....' (p.204).

It is now too well known that the common law dicta have failed to provide a procedural fairness in disciplinary actions as they are based on the presumption of formal equality of contracting parties. The concept of domestic enquiry has been evolved to curb arbitrariness in this regard. Chapter 8 discusses this issue and outlines various stages of such enquiry. The chapter is titled 'constraints of procedure and judicial review'.

In chapter 9, Chander surveys the position of government servants to substantiate his point of 'status' becoming stronger than 'contract' in their case. He discusses various constitutional provisions and important cases; *Tulsi Ram Patel*[4] and *Central Inland Water Transport*,[5] among others. In the concluding chapter the author brings out his concluding observations of earlier chapters to substantiate his central theme (which, of course, is no new revelation) that contract of employment now, unlike what it was in common law, has reached its 'status' character.

The fact that I read Chander's book from cover to cover demonstrates that I found it interesting. One of the remarkable features of the book is coherence in the presentation and its lucid language. But at the same time the book also suffers from some serious limitations which at times seem to be obfuscating its merits. Chander's presentation of the position of employment contract in common law is articulate and interesting. Undoubtedly, he has worked hard to complete this work. His discussion on *Tulsi Ram Patel's* case contains rigorous analysis, so is the discussion on forms of punishment for committing acts of indiscipline. His exhortations on disciplinary questions, though may appear

4. Union of India v. Tulsi Ram Patel and Others, (1985) 3 SCC 398.
5. Central Inland Water Transport Corporation v. Brojo Nath Ganguly, AIR 1986 SC 1571.

platitudinous to the social scientist and specialists in labour studies, do raise some of the intriguing issues in industrial indispline. In this regard his observations of near obliteration of management prerogatives relating to disciplinary questions cannot be treated as simplistic or perfunctory even by those whom Professor Upendra Baxi in his forward to this book refers to as 'diehard advocates of working class sovereignty' . In fact, in the emerging economic scenario of globalization and industrial restructuring, Chander's analysis and observations are likely to attract greater attention of the judiciary. This is what appears from the recent reversal of the judicial attitude to Indian working class struggle as discernible from cases such as *Kelawala,*[6] and *Dena Nath.*[7] In *Kelawala*, the Supreme Court has endorsed the principle of 'no work, no pay' in strike situations whether the strike is legal and justified or not. This will have a debilitating impact on development of equitable collective bargaining. But, as a programme of action, liberalisation would necessitate reduced legal and bureaucratic interference in managerial prerogatives, at least in the short run.[8] And Chander's analysis would merit serious consideration in view of these hard realities.

It has to be admitted that this book will be of considerable interest to master's degree students in labour law and also to researchers in the area. The author has painted a wide canvas, though he has committed some serious mistakes in the course of doing so. But surely, these mistakes can be corrected by a subsequent revised edition, which I am convinced this book deserves.

My first problem with Chander's work was with his claim about the book reflecting an 'inter-disciplinary' (p.vii) approach. A serious reading of the book shows that hardly any inter-disciplinary is manifested by this work. He perhaps thinks that his presentation of some labour statistics in chapter 6 makes it so. Firstly, I think that the whole of this chapter does not fit in the scheme of this book, and should better be taken out. In fact, the value of Chander's work will not diminish if he doesn't make the claim of inter-disciplinarity. And, certainly, it is not possible to study a problem as vast as the present one doctrinally as well as with a social science perspective at the same time. It is not that one cannot study contract of employment with a social science approach; in fact, it would be a wonderful attempt if a labour law scholar makes a sociologist analysis of employment contracts in an empirical situation. That would help us to gauge 'processes and empirical conditions through which legal propositions [including employment contracts in our case] are allowed to grow

6. Bank of India v. T.S.Kelawala and Others with S.U.Motors Pvt.Ltd. v. Their Workmen, 1990 II LLJ 39 (SC).

7. Dena Nath & Others v. National Fertilizers Ltd. & Others, 1992 I LLJ 289 (SC).

8. D S. Saini, Review of book LAW, LABOUR, AND SOCIETY IN JAPAN by Anthony Woodiwiss' in 4(2), SOCIAL AND LEGAL STUDIES (1994).

or remain in oblivion.'[9] But then he would not be expected to demonstrate doctrinal rigour in that work.

In his foreword to the book, Professor Upendra Baxi has hinted at the important question of 'power' in labour-management relations. Chander's analysis and his lamentation of dilution of management prerogatives do not appear to be sufficiently rigorous from that point of view, given the inherent disequilibrium in labour-capital power distribution. In fact, advocates of labour sovereignty, or even those who may rest content with a more equitable sharing of the gains of industry, would question if a more manifest industrial peace, industrial discipline and low incidence of work stoppages would necessarily mean realisation of the goal of industrial equity and justice. Rather, some may look at this as reflecting a quasi-repressive order at the workplace. Labour scholars have noted employment contract as an epitome of the inherent disequilibrium in labour relations; and issues in industrial indiscipline cannot be dealt with by looking at them merely as legal questions. We rather need to understand them from variegated angularities so as to reach more objective conclusions. From this point of view, Chander's conclusions at times appear less convincing. Discipline questions have also to be examined in the context of the 'paradigm of politics of production' and deployment by employer 'of force and fraud at every conceivable level in dealing with the slightest form of assertion of collective rights.'

Another problem with the book relates to the missing links or the non-updation of the information of the author. For example, he gives an impression to the reader that the 'period for the operation of settlement [signed under the Industrial Disputes Act, 1947 (IDA)] has been provided for a period (sic) of six months unless any party gives a notice of two months to terminate the settlement' (p.35). This sentence is misleading, even apart from the syntax problem. In fact, he does not state here that parties are free to specify the longevity of a settlement, which actually they do in most cases. The above referred statement applies only if parties fail to do so, which is rarely the case. Similar ambiguity about settlements can be noted on p.59. Then, referring to the existing Indian law regulating employment of children, he refers (p.25) to the Employment of Children Act, 1938, which has been repealed seven years ago and has been replaced by the Child Labour (Prohibition and Regulation) Act, 1986. Also, he argues (p.59): 'the employer and employee also sometimes enter into private collective agreement. Such private agreements, though not legally binding, have a normative effect to play (sic) in day to day industrial relations in India.' He couldn't distinguish how his 'private agreement' differs

9. U. Baxi, UNORGANIZED LABOUR? UNORGANIZED LAW ? in D. S. Saini, LABOUR LAW, WORK AND DEVELOPMENT —ESSAYS IN HONOR OF P.G.KRISHNAN 7.

from a 'voluntary settlement' under Section 18(1) of the IDA. This is likely to confuse the reader.

Another illustration of unclear expression relates to the explanation of a change brought about by Section 11-A of the IDA. On page 231, he gives a wrong impression to the reader that labour tribunal can change punishment awarded by the management, under this section in all situations. He fails to mention that Section 11-A applies only in case of punishments related to dismissal and discharge and not others. Further, since Chander's major thrust in the book is on discipline, he has not analyzed, or even cited, some of the fundamental cases related to Section 11-A, like *Ved Prakash Gupta,*[10] *M.Kuppuswamy,*[11] *Jaswant singh*[12] and others.

Another serious limitation of the book pertains to syntax. Innumerable sentences are also incomplete. Some examples may be given to illustrate lackadaisicalness in this regard. For example, among others, this is so in sentences beginning with: 'In corporate organizations' (p.102, first line from above), 'However, in Hamdard' (p.190, first line in second para), 'Similarly in India' (p.191, first line in second para), 'In National Engineering' (p.196, tenth line from below), 'For instance' (p.199, fifteenth line from below), 'For instance' (p.202, first line from above), and 'If the management makes' (p.215, seventeenth line from below).

Further, printing errors have not been managed too professionally, which the reader finds somewhat irritating. The author has not been consistent in citations and often lack of uniformity is visible. At most places printed books and names of journals have not been italicized. On page 196 he states, 'it has been provided that maximum of 2 per cent can be imposed as a fine'; 2 per cent of what? Also, the index of this book is extremely brief. I wanted to see explanations given and positions taken by the author on many concepts, but they could not be located in the index, even though the concepts have been nicely handled by the author in the book.

A balancing of the merits and limitations of this book still convinces me that Chander has done a remarkable job in bringing out this book. Indeed, he has worked very hard; however, he should have been more careful in handling positions stated above. Overall, despite the limitations discussed above, labour law scholars will find this book interesting. It has an excellent get up and is reasonably priced too. It should be welcomed as a fine addition to the scant literature on the development of labour law in India.

Debi S. Saini*

10. Ved Prakash Gupta v. Delton Cables India (P) Ltd., 1984 Lab. I.C. 658 (SC).
11. M.Kuppuswamy v. The presiding officer, Labour Court, 1984 Lab.I.C.78 (Mad.).
12. Jaswant Singh v. Pepsu Roadways Transport Corporation, 1984 Lab. I.C. 7 (SC).

* Former Professor of Labour Law, Gandhi Labour Institute, Ahemdabad.

CONSTITUTIONAL LAW OF INDIA. By V.D.Mahajan. Lucknow : Eastern Book Company. 7th ed., 1991. Pp. 788, Rs. 125/-.

The Book[1] under review is an exhaustive commentary on the constitution of India. It has gone through seven editions. The first edition was published in 1963 with a Foreword by Hon'ble Mr. Justice M.Hidayatullah. The author has arranged the book following the scheme of the Constitution. His method is to give on each topic the text or the substance of the relevant articles at the outset and then to explain the implications by an analysis of the terms with reference to the case law. In respect of its scheme, the book appears to have followed some other authors especially V.N.Shukla's, *The Constitution of India* .

The book is divided into forty one chapters. Chapter I deals with the introduction. It contains the views of various jurists about what is meant by constitution and constitutional law. The author has highlighted the development of legal history from the pre-independence era.

Chapter II deals with the nature and salient features of the Indian Constitution. After discussing different views of the scholars on the concept of Federation, the author has discussed distinctive features of the Indian Federal systems. Relevant case law on the point has also been cited.

In Chapter III, while discussing the Preamble of the Constitution, the author, has rightly, discussed the conflicting views of the Supreme Court over the question of amendability of the Preamble.[2]

In Chapters IV and V, the author has discussed at length about the Union and its territory and citizenship, including the Indian Citizenship Act, 1955.[3]

Chapters VI-XIX of the book deals with Fundamental Rights in general and in particular. In this part of the book under review, the author has not referred to latest cases at the appropriate places. For instance, in Chapter VII,[4] the author has not referred the case[5] wherein the Special Courts Act, 1979 was upheld. In Chapter VIII,[6] the author has not given due importance to the Balaji case.[7] This case deserves discussion at length. Similarly while discussing Article 16(1) of the Constitution the author should have referred[8] the theory of 'State Frontiers' or cult of the 'Sons of the Soil' as propounded by the Supreme

1. V.D. Mahajan, CONSTITUTIONAL LAW OF INDIA (7th ed. 1991).
2. *Id*, at 47-48.
3. *Id.* at 63.
4. *Id.* at 118.
5. State (Delhi Administration) v. V.C. Shukla, AIR 1980 SC 1882. The case has been referred at p.110 of the book.
6. *Supra* note 1 at 134.
7. M.R. Balaji v. State of Mysore, AIR 1963 SC 649.
8. *Supra* note at 139.

Court.[9]

Similarly, the author has discussed Article 16 (2) of the Constitution in a half-hearted way.[10] He should have referred other relevant cases on the point.[11]

Similarly, while discussing the scope of right to life under Article 21 of the constitution, the author has not referred [12] to the latest case decided by Andhra Pradesh High Court[13] wherein it was observed that the immunity of sovereign function under Article 300 of the constitution was not an exception to Article 21 of the Constitution.

In Chapter XX[14] while discussing the relationship between the Directive Principles and Fundamental Rights, it would have been more appropriate to refer the view taken in *Sanjeev Coke*[15] case wherein the Supreme Court expressed doubts on the validity of the decision in *Minerva Mills* case.[16]

Chapter XXI of the book deals with Fundamental Duties. The author has discussed at length the various provisions of Article 51 A of the Constitution. He has also referred to, although, in brief the Fundamental Duties as laid down in other countries.

The author has given only a cursory treatment to the remaining chapters of the Book. The various provisions of the Constitution have been discussed therein in a half-hearted way. Excepting Chapters XXXIII, XXXIX and XL, all other chapters have received a raw deal at the hands of the author.

For instance, while discussing the principle of harmonious construction,[17] the author has omitted to mention some relevant cases.[18] Similarly, while discussing the doctrine of ancillary legislation,[19] some of the well established cases[20] are not cited although the view taken in those cases are mentioned by the author. Similarly, the doctrine of repugnancy[21] is also given the raw treatment.

9. Charles K. Skaria v. C. Mathew AIR 1980 SC 1230.
10. *Supra* note 1 at 144.
11. C. B. Muthamma v. Union of India, AIR 1979 SC 1868; W.A. Baid v. Union of India, AIR 1976 Del. 302.
12. *Supra* note 1 at 231.
13. C. Ramkonda Reddy v. State of Andhra Pradesh, AIR 1989 AP 235.
14. *Supra* note 1 at 377.
15. Sanjeev Coke Manufacturing Co. v. Bharat Coking Coal Ltd., AIR 1983 SC 239. Although the author has discussed the case in ch. XVIII, 345-347 of the Book under review.
16. Minerva Mills Ltd. v. Union of India, AIR 1963 SC 1789.
17. *Supra* note 1 at 569.
18. Gujarat University v. Sri Krishna, AIR 1963 SC 703; D.A.V. College, Bhatinda v. State of Punjab, AIR 1979 SC 1731; O.N. Mahindroo v. Bar Council, AIR 1969 SC 858.
19. *Supra* note 1 at 573-74.
20. United Provinces v. Atiqa Begum, AIR 1941 FC 16; C.P. Appanna v. State of Coorg, AIR 1958 Mys. 102.
21. *Supra* note 1 at 576.

The notable feature of the book is Chapter XVIII which deals with limitations on Fundamental Rights. Similarly, the inclusion of Chapter XLI containing all the amendments of the constitution so far, will be very useful to the students.

There are, however, few printing errors in the book, for instance see the citation of the *Minerva Mills* case.[22]

The publishers claim that the Book is of 1991 Edition, yet it does not include an important case[23] decided in 1990. The book is undoubtedly useful in addition to the existing literature on the subject. Its style is lucid which makes it readable. The book is in its 7th edition and this is testimony to its popularity among the students of law.

Surendra Prasad *

NAMBYAR LECTURES —FIRST SERIES—RESTITUTION IN PUBLIC AND PRIVATE LAW. By Gareth Jones.London : Sweet and Maxwell Ltd., Bombay: N.M. Tripathi (P) Ltd. 1991. PP. XI + 172, Rs. 60/-.

The book under review consists of four lectures delivered by Prof. Gareth Jones, Vice-Master, Trinity College, University of Cambridge published under the auspices of National Law School of India University, Bangalore as the M.K. Nambyar Memorial Lectures, First series in March, 1991.

The first lecture is on Restitutionary claims against Public Authorities : A comparative study.This lecture has analysed the question whether a taxpayer can recover a payment which a public authority has no right to demand. This lecture consists of four sections. In section I, payments made under mistake and under Duress (i.e.coercion) are discussed. In section II, the basis of these claims viz. doctrine of unjust enrichment and various defences to such claims are analyzed. In Section III, some conclusions are arrived at; whereas in section IV, the lecturer has added An Indian Postscript, in which he examines the Indian case law. The lecture is illustrated with Indian and foreign case law.

The second lecture discusses claims against wrong doers in two parts. In Part I, personal claims such as fiduciaries, criminal, infringers of intellectual property rights (e.g. Patents, Trade Marks and Copyrights), tortfeasors and the contract breaker are discussed in detail. In Part II, proprietary claims i.e. the

22. *Supra* note 1 at 29 and at 376.
23. M/s Video Electronics Pvt. Ltd. v. State of Punjab AIR 1990 SC 820.
* Professor, Faculty of Law, University of Delhi, Delhi.

equitable remedy of rescission is discussed. The lecture elucidates the success of the claim against a wrong doer who makes profit from above situations which in the past, was neglected by the practitioners.

In the third lecture, Restitution of Benefits Conferred under an Ineffective contract are discussed. Money claims and claims for services which arose in *Rover International Ltd. v. Canon Film Sales Ltd.* (1989) W.L.R. 912 (CA) are discussed and compared. The relevance of the terms of the ineffective contract in valuing the benefit conferred are examined, followed by a summary.

In the fourth lecture restitutionary claims arising from Necessitous Intervention such as compulsion and intervention in an emergency are discussed. The latter restitutionary claims, based upon intervention in an emergency, in fact forms the substance of the lecture. The lectures are very useful for students of comparative law. The book has an Index but no table of cases and table of statutes. The table of contents should have details of various topics under each lecture.

The author of the book is a well-known co-writer of *The Law of Restitution*. The lucid and simple understandable language and the manner of presentation will make this book very popular not only for students of comparative law but also render good help to the Bar and the Bench since the author has discussed the case law exhaustively.

N.K.Rohatgi *

HINDU LAW AND THE CONSTITUTION. By A.M.Bhattacharjee. Calcutta, New Delhi : Eastern Law House. 1994. Pp. 19 + 188, Rs. 150/-.

Law is not static. Law exists to subserve the social needs and therefore, it is always desirable that the law should conform to the changing needs of the society and life. Just as society progresses and undergoes changes so must the law. In this, Hindu Law, which has the oldest pedigree of any system of jurisprudence, has shown remarkable adaptability. Though extraordinarily accomplished from points of legal finesse, the system of Hindu Law, with its unconcealed bias for Brahminical supremacy, rigid adherence to caste system, glaring inequalities among the sexes and the like, demonstrates many disciminatory features.

The Book under review written by Justice A.M.Bhattacharjee and mainly

*Reader, Faculty of Law, University of Delhi, Delhi.

based on the M.N.Bose Memorial Lectures delivered by him at the Calcutta University in 1981, aims to analyze the impact of Indian constitution with its equality clauses and avowed egalitarian philosophy on this oldest law of ours.[1]

The book has been divided into five chapters. Chapter I has been incorporated by the author only in the second edition. The author seems to be very optimistic when he visualizes Hindu law as an object of love and respect in order to evolve a truly Indian jurisprudence in consonance with Dharmasastric temper and culture.

In chapter II, the author tries to point out that the view consistently maintained by all the leading authorities on Hindu law e.g. Mulla, Mayne, Raghavacharian, Derrett etc. to the effect that Srutis and Smritis are two of the primary and paramount sources of Hindu law is probably incorrect. According to him, the Srutis neither are nor ever were the source of Hindu law and the Smritis also neither are nor were the sources of Hindu law but were only the sources of knowledge of that law, the sources being the common customs of the land which were complied by the Smritikars. This revolutionary view put forward by the author is quite thought provoking and calls for a serious consideration. The distinction made by the leading authorities between the 'primary source' and the 'secondary source' is vital. The author seems to have confined himself to the narrow question as to whether Srutis and Smritis can ever be considered to be the 'legal' source of Hindu law. He quotes from Sarkar-Sastri *Treatise on Hindu Law* and Sarvadhikari *Tagore Law Lectures* to show that Srutis and Smritis do not contain 'positive law' or 'forensic law'. The author makes reference of the Salmond's concept of 'legal source' to mean something which makes, creates, orginates or generates the law and thus concludes that Srutis and Smritis are not the sources of law but only were the evidence and record thereof and as such constitute source of our knowledge of law.

In Chapter III, the author points out that the personal laws of Hindus were obviously 'law in force' within the meaning of that expression in Article 372(1) and Article 13(1) of the constitution and tries to show that the court decisions in *Krishna Singh v. Mathura Ahir*[2] and *State of Bombay v. Narasu Appa Mali*[3] may not be good laws.

In Chapter IV, the author tries to point out that if the personal laws of Hindus were 'law in force' within the meaning of Article 372 (1) and Article 13(1) of the Constitution, then immediately with the commencement of the

1. HINDU LAW AND THE CONSTITUTION (1994).
2. AIR 1980 SC 707.
3. AIR 1952 Bom. 84.

Hindu Laws Acts of 1955-56,[4] which were discriminatory on grounds of religion, sex etc. became void *e.g.* Hindu law providing polygamy only for the males; life-estates for the females; exclusion of the daughters by the sons from inheritance; females being denied the right to adopt etc.

In Chapter V, the author with his analytical dexterity and transparent clarity points out that inspite of our constitutional pledge to constitute India into a secular state,[5] we have in the past constitution Hindu Law Acts of 1955-56 which unjustifiably dominating and effective role to 'religion'. The provisions of these Acts concerning dissolution of marriage ;[6] deprivation of guardian ship ;[7] capacity to give the child in adoption ;[8] and maintenance[9] solely on the ground of change of religion of one of spouses or parents etc. may be violative of the provisions of Article 14, 15 and 21 of the constitution.

The author also refers to other provisions of these enactments which are, in his view, violative of and inconsistent with the provisions of Part III of the constitution *e.g.* Sec. 13(2) (ii), 13(2) (iv) of Hindu Marriage Act,1955 and Sec. 23, 24 and 26 of Hindu Succession Act, 1956. The author while hitting hard at the lackadaisical attitude of ours to frame a uniform civil code has thus pointed out a number of glaring improprieties from which the present codified Hindu Law Acts of 1955-56 suffer and has asked for a careful and anxious legislative advertence and interference. The book represents the outcome of very careful study in the area for which it had received scant attention earlier. Its chief merit is comprehension, analysis and discussion on various aspects of Hindu Law and the constitution. The book is moderately priced and should be of great use to lawyers and scholars not only in the field of Hindu personal law but also in the field of constitution and jurisprudence.

To sum up, Justice Bhattacharjee has proposed an agenda for a seminar for the scholars to discuss some of the revolutionary remarks contained in the book and to contribute towards making Hindu law an admirable system of jurisprudence.

Sunil Gupta *

4. Hindu Marriage Act, 1955; Hindu Adoption and Maintenance Act. 1956; Hindu Succession Act 1956 and Hindu Minority and Guardianship Act 1956.
5. It has been expressly declared in the Preamble to our Constitution (Forty Second Amendment Act, 1976).
6. Sec. 13(1) (ii) of Hindu Marriage Act, 1955.
7. Sec. 6, Hindu Minority and Guardianship Act, 1956.
8. Sec. 9, Hindu Adoption and Maintenance Act. 1956.
9. Sec.18 (2) (f), *Ibid.*

*Lecturer, Faculty of Law, University of Delhi, Delhi.

History of India Part — I. By H.V. Sreenivasa Murthy. Lucknow : Eastern Book Company. Pp. xi + 288, Rs. 65/-.

Legal and constitutional history is a compulsory course for LL.B. in all the universities throughout the country. Normally this course comprises legal and constitutional developments since the arrival of the East India Company. Hardly any attention is paid to the legal and constitutional developments before that. For that reason most of the books and other reading materials that have been prepared for the students also deal with what is normally called British or colonial era. There is some good justification for this kind of restricted teaching and materials in the fact that much of our existing legal system has been shaped on the laws, legal instituions and legal techniques given to us by the British rule. So one can reasonably say that the beginning of the British era was a watershed in the growth of legal and constitutional institutions in this country. At the same time, however, it cannot be denied that before and at the time of arrival of Britishers we had well-established laws and legal institutions having their roots either in the most ancient past of the human civilisation on this part of the globe or as given by the Islamic rulers since almost the beginning of this millennium. These laws and legal institutions were not immediately or completely replaced by the British rulers. On the contrary they specifically preserved them in certain matters. Moreover, the arrival of Britishers and establishment of their institutions was not an overnight revolution; it was a long-drawn slow process which could not fully cover every nook and corner of the Indian society and its legal institutions even until the day of their departure. Therefore, the role of the pre-British laws and legal institutions in the shaping of our present legal system cannot be completely denied or ignored. For that reason it is imperative that the lawmen must have at least the basic information and understanding of the broad features of the pre-British law and legal institutions. In persuance of that goal some literature form time to time has been prepared on the position of law and legal institutions in the pre-British period.[1] No concerted effort has, however, been made to make and teach the pre-British laws and legal institutions as part of curriculum in law schools. Even if it was ever made, it has been abandoned.[2]

The National Law School of India University, Banglore, however, seems to have made a serious and sustainable beginning in that direction by introduc-

1. P. V. Kane, History of Dharmashastra (1930 - 1962) in eight volumes is the most monumental work in that regard. However, it does not deal with Islamic or British institutions. M. Rama Jois, Legal and Constitutional History of India (1984) gives complete picture from the ancient to the present time. On the same lines also see M.P. Singh, Outlines of Indian Legal History (Ancient and Medieval Periods) (1968) and Outlines of Indian Legal and Constitutional History (1969).
2. In 1968 Meerut University, Meerut had introduced such a course. But it abandoned it after few years.

ing a two semester course on History of India in its integrated five year law course. This history could be a general history which the non-law students also study in schools and universities. But that would have not met the special and specific needs of law students. Therefore, it has got prepared the book under review.

The book as the author states in its preface 'is primarily designed to meet the demands of the students of law and to provide them with an appropriate historical background — political, socio-economic, law and legal institutions, judicial organistaion — for the study of Hindu and Muslim law in a better or truer perspective'(p.iii). The reviewer would like to emphasise that such background is necesary not only for the study of Hindu and Muslim laws but for the proper and better understanding of the whole of the Indian legal system as such. That is what Professor N.R. Madhava Menon, Director, National law School of India states in his introduction to the book. He says that 'it was felt necessary to carefully develop a syllabus keeping the interests of the law student in focus and to assemble materials relevant to modern legal inquiry'(p.iv).

The book is Part I of the two parts course on history. In the parenthesis of its title it is clearly mentioned that this part comprises history of India 'from the earliest times to the death of Aurangzeb'. It is divided into eleven chapters entitled respectively, History and its Territory, Polity in Ancient India, State and Government in Ancient India — A Survey, Social Organistaion in Ancient India, Status and Position of Women in Ancient India, , Economic structure in Ancient India, Legal System in Ancient India, Administration of Justice in Ancient India, Medieval India, Medieval Indian Society, and Law and Legal Institutions and Judicial Organisations. As is apparent from the titles of the chapters the book has been imaginatively designed and written to meet the needs of the law students so that they may have some understanding of the origin and growth of law and legal institutions in this country and may appreciate the interaction and correlation between the law and the society. This kind of understanding is indispensable for the understanding of the nature and functions of law and for making it an effective instrument of social order.

Not only the subject matter of the book is imaginatively and well -designed, it is also very lucidly written. From the begnning to the end it establishes author's total command on the subject matter and the medium of expression. It blends the events and ideas perfectly and provides a very smooth reading to a beginner and useful information even to an accomplished scholar. Of course, as Professor Menon expects, the book may be further improved in the course of its use in the classroom so that a new edition truly fulfilling the needs of law students may be brought out in the course of the next few years (p.v), it is an excellent work even in its first and present appearance. Undoubtedly fresh

research and thinking must continue to enrich the contents of the book, it is rich enough even now and fully serves its purpose. The book also contains a chapterwise comprehensive bibliography and a subject index. It has been nicely printed, beautifully brought out and very reasonably priced, by the 'Eastern Book Company'. The author, the National Law School and the publishers deserve full praise and congratulations for this achievement.

M. P. Singh*

LABOUR LAW; WORK AND DEVELOPMENT (ESSAYS IN THE HONOUR OF P.G. KRISHNAN). By Debi S. Saini (ed). New Delhi : Westville Publishing House. Pp. xv + 221, Rs. 295/-.

The book under review is a collection of essays in the honour of Late Professor P.G. Krishnan. The editor Dr. Debi S. Saini as well as the reviewer have been the students of Professor Krishnan. The editor very much longed and extended every possible incentive and concession to the reviewer to join the celebrated authors of the essays. But unfortunately, despite his keen desire and sincere effort, the reviewer failed to do so. The reviewer is glad that due to special interest taken by the editor, he has got the opportunity of associating himself with the book through this review.

Yet another prominent student of Professor Krishnan, Professor Tahir Mahmood, the then Dean, Faculty of Law, University of Delhi, and, a wellknown legal luminary, has written the foreword for the book. Professor Tahir Mahmood fondly and vividly recalls his first contact with Professor Krishanan at the initiation of his legal studies and his subsequent association with him until the unfortunate and untimely end came.

In his preface Dr. Saini gives a brief biographic sketch of Professor Krishnan and highlights his achievements as teacher and researcher, his mastery and expertise in labour laws, his sociological exploration of legal issues, his simplicity, sincerity and dedication, and his socialistic leanings and futuristic and progressive approach.

Introducing the book Dr. Saini refers to Art. 23 of the Universal Declaration of Human Rights to highlight the importance of the right to work and its associated rights which he finds fully reflected in the Directive Principles of State Policy and to some extent also in the Fundamental Rights in our Constitution and which, according to him, form the basis of the protective

* Professor, Dean and Head, Faculty of Law, University of Delhi, Delhi.

labour laws in our country. Dr. Saini laments that 'hardly any empirical account of labour law in action is available' (p. xix) in India and emphasises that 'the focus in the ten essays presented in this volume, is on how Indian labour laws work and with what manifestation'(p.xx). Giving a brief summary of the essays, he asks with skepticism whether one can rely on the state for labour welfare and fair working conditions. Perhaps the constitutional goal and vision of development, he suggests, could be realised if greater reliance could be placed on voluntary non-government organisations and if the development process could be turned from top down to bottom up.

The ten essays in the book are divided into four well-charted parts- I. Labour Law and Labour Power; II. Constitutional Developmental Vision and Working of Labour Laws for Rural Labour ; III. Globalisation, Industrial Restructuring and Industrial Relations Law; and IV. Towards Alternatives in Labour Justice Dispensation.

In the first essay: '*Unorganised' Labour? 'Unorganised' Law?* Professor Baxi draws attention towards the limited application of labour law to the so called organised labour sector and its non-application to the vast field of unorganised sector. He attributes this difference to the politics of law. Our laws, in his view, are based on capitalistic mode of production and ignore the model laid down in our Constitution particularly in the Directive Principles of State Policy such as Arts. 39, 39A, 42, 43, 43A. He wants a conscious pro-active model of law based on constitutional scheme which demands codification of law in the unorganised sector also in order to change the present situation. The state as employer should follow the Directive Principles model and should not exploit unorganised labour. Emphasising the need of translating the constitutional model into law and practice, not only through state but also citizen's action, he concludes : 'To make the life and future of "unorganized labour" into *our common future* is the unique endeavour of the imagination of the Constitution, which conceives of *scholarship itself as a form of struggle*'(p.16).

Dr. Saini's essay: *Compulsory Adjudication Syndrome in India: Some Implications for Workplace Relations* is based on a study which he describes as 'the first comprehensive attempt to understand the working of various facets of the Indian collective labour law, the hallmark of which is the compulsory adjudication system, in an empirical situation, which we have been working since 1942, and its impact on the workplace relations'(pp.21-22). The study was conducted at the Faridabad Industrial Complex. Thirty three labour disputes in the private sector of that complex, were scientifically taken up for observation and examination by the author. An important issue in the research was : 'what does the compulsory adjudication system do, and to what effect'(p.31). The author found that 'the system has projected itself as a source of "power" '(p.31). After a detailed analysis of various aspects of his study

and its findings, the author comes to the conclusion that the 'Workplace relations in India remain based in a war-time industrial relations model which envisages compulsory arbitration of industrial disputes'(p.51). In this model 'law is used by capital as a resource to legitimate the repressive workplace order'(p.51). The settlements reached under the compulsory adjudication are 'nothing but the manifestations of the defeat of labour'(p.52). The author's conclusions are not in any way implausible or isolated. They are well supported by various other studies conducted elsewhere and used by the author as background and supportive materials.

The third essay: *Rural Migrant Labour and Labour Laws* by Arjun Patel and Kiran Desai is based on the authors' study on 'Migrant labour in rural Gujarat' conducted in 1990 as part of an All India Study on Migrant Labour commissioned by the National Commission on Rural Labour. The detailed study, based on the secondary materials and on field visits and survey work shows that though Gujarat has made elaborate rules under the Inter-state Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979 and has made them applicable to all migrant workers including those working in Sugarcane fields, brick kilns, Narmada Dam project and fish-processing units, in general these rules and laws are not observed or enforced. 'The study shows that the dominance of vested interests over the executive is so strong that the laws become toothless. Hence the condition of rural labourers — both native and migrant — remains wretched. They not only do not get minimum wages for survival but their overall living condition is also pathetic'(p.79). The authors question whether laws are made merely to legitimise the government or do they suffer from the failure of their structural framework? and express a hope that the draftsman will reexamine the 'existing legal framework for the protection of migrant labour'(p.79).

In his essay: *Bonded Labour: Social Context and the Law* Vidyut Joshi traces the different forms of bonded labour, particularly in agricultural sector in Gujarat. He defines bonded labourer as one who remains 'stuck to his master, and can seek employment elsewhere only subject to master's willingness'(p.86). According to him such labourers in the agricultural sector in Gujarat fall in three categories (a) bonded labourer (b) beck-and-call reationship and (c) unpaid forced labour. The bonded labour is popularly known as *Hali Pratha* in Gujarat. Under this system the lender advances loan to the labourer and puts him in bondage till the loan is returned (pp.90-91). This system 'grew in the raiyatwari system whereby the land owners had the money power, which they used by advancing loans to the agricultural labourers and consequently put them under bondage'(p. 91). Discussing the legal framework of bonded labour with reference to Arts. 21 and 23, the Bonded Labour System (Abolition)Act, 1976 and various Supreme Court decisions, the author finds that the 'rehabil-

itation of bonded labour was very difficult despite the Supreme court's clear orders in this regard'(p.94). Examining the social context of bonded labour, the author states that (i) the bonded labour system 'exists in a closed, feudal, agrarian milieu where free labour supply is not easily available and the labour mobility is discouraged,' and therefore it will vanish in the capitalist farming; (ii) the bondage is normally life long ; (iii) it has social sanction as regards debtor creditor relationship; and (iv) the terms and conditions of bondage are arbitrarily determined by the master. On analysing various studies on bonded labour in Gujarat the author concludes that 'a majority of studies analysing bondage in its social context conclude that, with the shift in the mode of production in agriculture, there is a shift in agrarian nations from bondage to contract (p.101). Finally, coming to his own conclusions the author laments that all efforts to abolish bonded labour under the 1976 Act and through court litigation have concentrated on the release of the labourer but not on his rehabilitation. According to him a strategy is needed which does not end at the release of the bonded labourer but also ensures his rehabilitation as, for example, recognition of tenancy rights in the land he has been tilling for his master.

Suresh Srivastava in his essay: *Social Security for Agricultural Workers in India* regrets that the agricultural labour in general remains ouside the protection of social security laws. Examining the provisions and application to the agricultural labour of the Workmen's Compensation Act, 1923; the Employees' Provident Funds and Miscellaneous Provisions Act, 1952; the Maternity Benefit Act, 1961; the Kerela Agricultural Workers Act, 1974 and some pension and unemployment insurance schemes introduced or suggested by the states and the Centre, the author finds that very little of those laws is applicable to the agricultural labour and still less of it is in fact implemented or enforced. Therefore, he suggests that the application of these legislations must be extended and expanded to agricultural labourers and the people in villages where agricultural labour exists must be involved in the initiation and implementation of these measures.

In his essay: *Social and Labour Issues in Privatisation : An Overview*, Venkat Ratnam explains 'the concept of privatization and examines the social and labour issues involved in this process, such as employment and job security effect on trade unions and collective bargaining, employee ownership, industrial relations and tripartite consultation'(p.123). He defines privatisation as 'a process through which the direct involvement of the state or the public sectors is reduced through transferring the ownership, control or managaerial responsibility for government enterprises, functions and activities fully or partially, to the private sector corporations, individuals or group of individuals such as employees, customers and citizens, domestic or foreign' (p. 124). Analysing this definition the author closely examines the reasons, methods and subjects of privatisation and the other issues mentioned above. On such examination he comes to the conclusion that privatisation involves major structural adjustments and complex social and labour issues. But it does not necessarily result in job loss. Nor does it adversely affect the rights of trade unions. It increases decentralisation and bargaining with local unions and reduces influence of national federations of unions and of government. Individualised contracts rather than collective bargaining and tripartite consultations acquire greater attention and focus. The author bases his conclusions on deep thinking and backs them up with solid research and makes a very convincing and impressive presentation.

Kuriakose Mamkoottam in his essay: *Industrial Restructruing, Technological change and Industrial Relations Law* discusses 'the relationship between technology, work organisations and industrial relations ; analyses the industrial restructuring taking place in India ; and examines the efficacy of Indian industrial relations laws to meet the needs of the emerging techno-economic realities'. In respect of the first, the author states that so far technology has not been part of industrial relations. But in the changed scenario it must become because of close linkage between technology, work organisation and industrial relations. Therefore, he suggests that the trade unions must 'develop an integral strategy of their own by extending their concerns beyond the traditional limits of industrial relations' (p.148). In respect of the second, the author recognises that 'employment generation and economic development have become matters of great concern of Indian economy and policy' (p.148). Until now that was being sought through greater state control and participation in economy. But since 1991 it is being reversed. In this reversed situation he discusses the problem of sick units with reference to exit policy and the laws made in this regard. In the same context he also discusses the workers' social security with reference to National Renewal Fund which will absorb the burden of technological change without adversely affecting the worker. Dealing with the third aspect the author finds the labour and employment laws in India 'extremely rigid' insofar as labour deployment is concerned. For example, he says, employer needs state permission to retrench a worker. He advocates flexibility with regard to products, production process and the labour market (p.154). Discussing various laws and their application by the courts and otherwise, illustrating rigidity and emphasising the need for flexibility, the author, however, concludes that 'the existence of a larger size of the population well below the level at which they are able to compete in a free market situation on their own, will require the state to continue to intervene and provide the minimum social protection'(p162). In the end, he again emphasises that 'any

meanigful restructuring will demand greater labour flexibility'(p.162).

In his essay: *Judicial Approach to Industrial Discipline: Annihilation of Work Ethics*, Manik Kher starts with the social malady of lack of work ethics which has become deep rooted in Indian society. Examining the provisions of such laws as the Industrial Employment (Standing Orders) Act, 1946 and the Industrial Disputes Act, 1947, the Constitution and some of the leading decisions of the Supreme Court regarding the work ethics the author concludes that the 'courts have been overprotective towards all those who are covered in the bargainable category of employees *i.e.* under the definition of a "workman" in the Industrial Disputes Act, 1947'(p.170). This category of employees sometimes includes very highly paid employees also. The author notices slight change in the Court's approach since the beginning of liberalization in 1980 as, for example, in *Bank of India* v. *T.S. Kelawala*[1] where the Court laid down the 'No Work No Pay' rule. But he also cites several other cases where the Court has protected the erring employees. The author emphasises that the values enshrined in the Constitution, particularly in the Directive Princinples of State Policy cannot be realised without changing our work ethics. Now that the economic liberalization has come to be accepted in the Indian political enonomy, the author recommends 'commensurate changes in our labour laws and the required approach of judiciary to sustain that philosophy'(p.173).

In his thought -provoking essay: *Towards a Third Alternative and Labour Participation in Management* T.U. Mehta stresses on the labour's participation in management mandated by Art. 43A of the Constitution. But such participation cannot be ensured and be sufficient unless it is spontaneous and generated from below. It should not be just some compulsion for the management to show its benevolence to the labour. The labour, however, must be given proper training in participation. Dealing with the present dilemma of our economic policy in which we have liberalised yet not given up fully the Nehruvian model and are afraid of invasion by the western economy, the author suggests an alternative model of economy based on cooperation which he considers will generate more wealth and ensure social justice. To legitimise and to make effective this alternative model the author suggests amendment in the Constitution making cooperation a central theme and also a central legislative subject. Drawing support from the Gandhian ideology, the author also recommends profit sharing. He finds some social and legal base for the idea and considers it as part of labour participation in the management.

In the concluding essay: *The Constitutional Vision of Development, Unorganized Labour and Accessibility to Justice System* Rani Advani and Debi S. Saini assert that the 'creation of a welfare state is the most glaring

1. 1990 LLJ 39.

manifestation of the development vision of the Indian Constitution which is imbibed in it'(p.189). Supporting the assertion from the constitutional provisions and other views on the interpretation and application of the Constitution, the authors examine the accessbility of the justice system to the unorganised labour for enforcing the minimum standards of employment. Recognising the need for greater accessibility they point out the inadequacies of the present system. They highlight the role of legal aid committees in this regard with reference to Chikodara case in which the legal aid committee at the Gujarat High Court got relief for 70 women of Chikodara village , dismissed by their employer. The authors also point out that in view of inadequate accessibility to the judicial system the applicable laws to the unorganised labour are observed more in their breach. This happens, among others, for lack of political will and collusion with the powerful. In conclusion, they suggest that accessibility could be increased by providing moblile courts, imposition of manadatory sentence instead of fine for the violation of labour laws, establishement of a registering authority for the identification of the workers and their employees, holding of Lok Adalats in the mofussil area and creation of special mechnaism to recognise and deal with the employement related issues of the unorganised sector.

Going through these essays is an enjoyable experience . They are full of information, ideas and learning. They are all very readable. Their authors deserve unqualified appreciation for their learning, labour and interest in the subject. Each one of them has something new to say and to add to the existing knowledge or thinking. They cover different, though sometimes overlapping , territories and issues. Every issue is highly important and of great contemporary interest and value. The editor has classified and arranged them very imaginatively. He deserves unqualified praise and congratulations and even thanks for every step from the conception the idea of the book, to the selection of authors, to its final publication. The book has been brought out beautifully. The reviewer could notice no shortcoming in it. Hopefully anyone who reads it will come to the same conclusion. In view of the variety of subjects and their great contemporary relavance, the book must attract a wide readership from common man to specialists in different disciplines who will all find it equally enjoyable and beneficial. It stands out as the most appropriate memorial to Late Professor P.G. Krishanan by one of his most promising students.

M. P. Singh*

* Professor, Dean and Head, Faculty of Law, University of Delhi, Delhi.