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 of publication, subscription, books of review and other enquiries about advertisements, etc. should be addressed to the Dean, Faculty of Law, University of Delhi, Delhi-110 007, 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. 1 (1972) to Vol. XX (1998) are available @ Rs. 150 (Domestic) US $ 20 each (subject to availability)

Mode of Citation : XX DLR (1998)

EDITORIAL NOTE

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

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

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

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

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

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

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

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

*Dr. Dieter Conrad**

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

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

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

* Professor, South Asia Institute, University of Heidelberg, Germany.

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

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

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

1. B.B. Misra, The Judicial Administration of the East India Company in Bengal, 1765-1782. (Delhi, 1961), 18 149; H. Kulke and D. Rothermund, Geschichte Indiens (Stuttgart, 1982). 250 ff.
2. On the development of the British administrators' self-perception with respect to their role in India see generally E. Stokes, The English Utilitarians and India. (Oxford, 1959).

In the development of India's judicial system -which did indeed begin with the institutions created by the East India Company's administration of the province of Bengal after the Diwani grant — we can see the implications of this basic role tension unfolding in the administration of land system[3], i.e. systems of land laws centering on the collection of the traditional land revenue. Some important aspects this has taken are:

a. Professionalization of the judge as an issue. To us such professionalization is a matter of course and appears as an element of judicial independence, professional expertise and exclusive judicial career orientation operating as elements of distance from the conflicting interests to be adjudicated. But we ought to remember that the professional judge is a late product of differentiation, even in our culture. His role, i.e. the combination of professional expertise with political power to decide, has not developed in many traditional cultures where the judicial function is generally exercised as an incident of governance or administration, by the ruler himself or by his administrators. The process of role differentiation can be observed in the growth of the Indian judicial system. It was accompanied, however by a recurrent discussion on its relative merits *vis-a-vis* retention of judicial powers in the hands of the general administrator — legally speaking in lay hands. The argument invariably was that the professional judge is too remote from the actualities of society, too uninformed about real conditions, too unapproachable for or incomprehensible to the mass of the population.

b. Related to this is the opposition of two principles which Max Weber conceptualized as material vs. formal rationalization of law.[4] Material rationalization here means an evolution of the legal system whcih is oriented towards achieving substantive, ethical justice (as perceived by the law-enforcing agency). Obviously this is called for where stark social inequalities make reliance on a more formal, technicalized legal game unrealistic. It is equally obvious that it implies a more commanding position for the judge, freedom to dispense with formalities in the interest of an envisaged equitable solution, and thus a certain paternalistic tendency which may or may not operate in a disinterested manner.

c. In the presence of gross social inequality the perceived exigencies of substantive justice tend to foster inclinations to bifurcate the legal

3. The expression is taken from B.H. Baden-Powell's monumental work, The Land Systems of British India, 3 vols. (Oxford, 1892).
4. M. Weber, "Rechtssoziologie", in Wirtschaft und Gesellschaft, (Tubingen, 1925[3]), 468 ff.

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

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

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

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

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

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

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

(*a*) exclusion of the jurisdiction of the civil courts and substitution by a set of less confidence-inspiring tribunals under the control of the administration. In contrast to England, this exclusion in India was unmitigated by the supervisory jurisdiction of the High Court, since the power of the High Court to issue prerogative writs was confined to the Presidency Towns and could not even be used against revenue courts situated within a Presidency Town if the decision concerned lands upcountry in the province (mofussil).[8]

(*b*) privileged position of the administration in being able to decide its disputes with its subjects by its own tribunals;

(*c*) protection of civil servants even against tort claims for damages in cases of transgressions by statutes such as Bengal Government Indemnity Regulation II/1822 or sec. 10 Bombay Revenue Jurisdiction Act, 1876. Besides this, the civil courts - that is Englich judges had even managed to exclude the major part of the Company's (and Government's) vicarious liability for the torteous acts of its servants by construing a privilege for its "sovereign functions" in analogy to the British Crown privilege.[9]

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

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

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

not as such make it irrelevant in the consideration of English legal principles. Dicey did refer at some length, for instance, to the Legislative Council of British India[10] as an example of a non-sovereign law-making body, contrasting it to the sovereignty of the British Parliament. With respect to rule of law such direct comparisons might have been a little more embarrassing. While the gradation of political and legislative power was an obvious part of the colonial system, a general principle like rule of law was being used as a justification of British rule in India. In Dicey's time the ideology of the British empire in India was carried to the extreme of claiming a civilizing mission as its historical legitimation, a British duty to impart their law to the natives and to establish government by law in India.[11] At any rate the respective measures in India had not been taken, so to speak, without awareness of or lack of reflection on the theoretical implication. They had been accompanied by explicit discussions on first principles of jurisprudence and government, fully up-to-date with contemporaneous English discourse. It would seem that India, as in other respects, was used as a testing ground for unconventional theories of public administration, an ideal experimental arena for ambitious administrators freed from the constraints of the domestic scene.

10. As it then existed under the Indian Councils Act, 1861, (24 25 Vict., C. 67) modified by the Government of India Act, 1865, (28, 29 Vict., C.17).
11. See generally the discussion of the influential views of men like John Strachey and James Fitzjames Stephen in Stokes, Utilitarians, 287 ff. and consider quotations such as the following (*ibid.* 307, from Stephen's chapter "*Legislation under Lord Mayo*" in W.W. Hunter, LIFE OF THE EARLS OF MAYO, 2nd ed., London 1876, 158 ff.): "The utmost, I think, that European experience justifies us in asserting, is, that the maintenance of peace and order and the supremacy of regular law ... is an indispendsable condition of the only kind of benefits which it is in our power to confer upon India" and, "Our law is in fact the sum and substance of what we have to teach them. It is, so to speak, the gospel of the English." In a similar vein H. Cowell, History and Constitution of the Courts and Legislative Authorities in India, Tagore Law Lectures 1872, 6. ed. (Calcutta, 1936), 63. (speaking of the Regulating Act) ..."to teach both rulers and subjects in the East that respect for law which is the foundation of social order and the greatest gift which England has had in its power to bestow on India." Stephen's own perception of government by law, it should be admitted, did not include a separation of judicial from executive functions. In his Minute on the administration of justice in India he had strongly advocated the rentention of criminal jurisdiction by the district officers. He did recommend separation of the civil jurisdiction from the executive function, but took care to limit "judicial" functions to "the decision of civil and criminal cases properly so called" though he owned in passing that "much of the work connected with the collection of the revenue and the settlement department is substantially judicial" (ibid. p. 5) If, however, such a fusion of functions appeared perfectly compatible with rule of law to such a prominent administrator and legal writer, it is all the more astounding that the discrepancies were not taken note of when Dicey's opinions gained universal, almost canonical, recognition.
J.F. Stephen, Minute on the Administration of Justice in British India. Selections from the Records of the Government of India. Home Department. (Calcutta, 1872), 7, 33.1.

Even more remarkable is the phenomenon that Dicey's neglect of the existence of colonial administrative law has endured to this day in the former colony itself. While the introduction of the rule of law is being hailed as "the revolutionary achievement of the British Indian Administration",[12] the growth of administrative tribunals in India is regarded as a recent development and a by-product of the modern welfare state.[13] The traditional jurisdiction of the revenue administration in land disputes - still today, perhaps, an area of law affecting the majority of the Indian population - is hardly mentioned in general text books on Indian administrative law or Indian legal history. In its comprehensive Report on the Reform of Judicial Administration[14] the Law Commission of India has nothing to say about this kind of administrative justice, not even when discussing the comparative merits of French droit administratif. Meanwhile, as we shall see, administrative jurisdiction has even been considerably expanded in land reforms legislation enacted since Independence.

ORIGINS OF THE COURT SYSTEM AND CORNWALLIS' REFORMS

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

12. C. Sinha, "*Significance of Cornwallis's Judicial Reforms in Bengal Presidency*", in JOURNAL OF THE INDIAN LAW INSTITUTE, 11 (1969), 184 ff.
13. B.K. Gupta, "*Administrative Tribunals and Judicial Review: A Comment on Forty-Second Amendment*", in: R. Dhavan, and A. Jacob, (eds) INDIAN CONSTITUTION. TRENDS AND ISSUES, (Bombay, 1978), 401 ff.; S.N. Jain, ADMINISTRATIVE TRIBUNALS IN INDIA. EXISTING AND PROPOSED, (Bombay, 1977), 2.
14. Law Commission of India 1958, 14th Report (Reform of Judicial Administration), 2 vols. (New Delhi, 1958); see the discussion on "Administrative Bodies" in ch. 31.
15. G.W. Forrest, (ed.), SELECTIONS FROM THE STATE PAPERS OF THE GOVERNORS GENERAL OF INDIA, vol. II. Warren Hastings. Documents. (Oxford, 1910), 290; Misra, THE JUDICIAL ADMINISTRATION, 168. The system is known as adalat system (adalat: the term for a law court in Mogul administration) and applied only to the mofussil i.e. the provincial territory outside the Presidency town of Calcutta; this was the territory covered by the diwani grant.
16. 13 Geo III, C. 63.

from England to serve as judges of the Supreme Court introduced technical procedures of the common law, with disturbing and often oppressive effects. But they also used their jurisdiction over the Company's servants to assume control over the Company's adalats - which they understandably treated not as courts proper but as a kind of tribunal (Patna Case) - and also over zamindars as part of the revenue collecting machinery (Cossijurah Case). They intervened directly against irregularities in the revenue collection (Saroopchand Case).[17] All this could be viewed as a typical conflict between judical and executive power. It was, not surprisingly, irksome for the executive power, and it was resolved in favour of executive power against Dicey's "fundamental assumptions of the Common Law" by the Act of Settlement, 1781:[18] the Supreme Court lost its jurisdiction to interfere with revenue collection and also with the exercise of "judicial functions" by the Company's servants; Governor-General and Council in their public capacity were exempted from the Court's jurisdiction, and in their capacity as Sadar Diwani Adalat were recognized as a court of law.[19] In their role as a court they met - originally once in a week[20] - to decide appeals from Mofussil Diwani Adalats. On other days in the same composition but in a different role, sitting "on the executive side"; they decided on appeals in revenue matters.

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

On the local level the revenue function has been clearly separated from civil jurisdiction and had been entrusted to different agencies in 1781.[22] This was partially undone in 1787, when the two functions were again united in the person of the collector. He was, however, to keep them procedurally discrete. Thus, apart from his revenue collecting function he was to sit as civil judge in the Diwani Adalat, but in a different judicial

17. See generally the account given in M.P. Jain, Outlines of Indian Legal History, 3. ed., (Bombay, 1972), 90 ff.
18. 21 Geo III. C.70.
19. A.B. Keith, A Constitutional History of India 1600-1935, 2nd ed. (London, 1937), 88 ff.
20. Misra, The Judicial Administration, 275.
21. Significantly the restriction was re-introduced under Indira Gandhi's emergency regime by the Constitution (42nd Amendment) Act, 1976 sec. 37, but again removed by the Constitution (44th Amendment) Act, 1978.
22. For details see Misra, The Judicial Administration, 263 ff.

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

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

23. Sir John Shore 1785, cf. the account of the reform in Jain, Outlines, 161 f.; C. Sinha, The Indian Civil. Judiciary in Making, (New Delhi, 1971), 73. The argument is echoed by the instructions issued from the London Court of Directors stating the necessity of accormodating "their views and interests to the subsisting manners and usages of the people rather than by any abstract theories drawn from other countries"; F.K. Firminger, The Fifth Report from the Select Committee of the House of Commons on the Affairs of the East India Company. Dated 28th July, 1812. Edited with notes and introduction. Vol. I. (Calcutta, 1917), 53. More realistically Cowell, History and Constitution, 172; the object of the reform was "to accustom the natives to took to one master".
24. For a short description of this system as encountered, though in a degenerate state, by the British in Bengal, see Misra, The Judicial Administration, 52 ff. The "one officer theory" took its departure from the union of revenue collection and civil jurisdiction in the office of the diwan, but disregarded, quite apart from the more complex office structrue in the districts, the fundamental division between criminal and civil jurisdiction (nizam and diwan in the province, faujdar and amil in the district).
25. Firminger, The Fifth Report, 53.
26. See the view of the Board of Directors in n. 23 supra.

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

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

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

27. Firminger, The Fifth Report, 29.
28. See generally Sinha, "Significance of Cornwallis", 185 ff.; Jain, Outlines, 174 ff.
29. Bengal Regulation III/1793 Preamble. Cf. the explanation given for the abolition of mal adalats in the Preamble to Bengal Regulation II/1791: "The proprietors can never consider the privileges which have been conferred upon them as secure, whilst the revenue officers are vested with those judicial powers. Exclusive of the objections arising to those courts from their irregular, summary, and often ex parte proceedings, and from the collectors being obliged to suspend the exercise of their judicial functions, whenever they interfere with their financial duties, it is obvious, that if the Regulations for assessing and collecting the public revenue are infringed, the revenue officers themselves must be the aggressors, and that individuals who have been aggrieved by them, in one capacity, can never hope to obtain redress from them, in another."

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

30. Regulation VII/1793. This element in course of time developed its own dynamic in the direction of greater professionalization of the judges also: in particular, demands for better legal training of the British judges appointed directly to the posts of District Judges from the Company's covenanted service (cf. the following text and note) were supported by reference to the need to match the growing professional skills of the Indian advocates (Jain, Outlines, 320).
31. This was achieved by reserving the posts to the Company's covenanted servants recruited in England, sec. 57 Charter Act, 1793. At its face value the provision was racially neutral and was thus immune from guarantees of equal access to public office irrespective of race, place of birth etc., as contained in the Government of India Act, 1833, sec. 87 or Queen Victoria's Proclamation of 1858. The resulting exclusion was only gradually softened when Indians gained access to the Indian Civil Service by passing the examinations in London from 1862 onwards; cf. the table in B.B. Misra, The Bureaucracy in India. An Historical Analysis of Development up to 1947 (Delhi, 1977), 101. The special provisions for appointment of district judges still to be found in the Indian Constitution (art. 233, cf. sec. 254 Government of India Act., 1935) are referable to this racial origin.
32. Sinha, Civil Judiciary, 12. For the enlarged powers of distraining the tenants' personal property for arrears of rent, as introduced by the ill-famed Regulation VII/1799 (popularly known as qanun-haftam or haptam i.e. "seventh") cf. Baden-Powell, Land-Systems, vol. I, 633; A.C. Banerjee, The Agrarian System of Bengal, vol. 2, 1793-1955 (Calcutta, 1981) 20 ff.
33. Bengal, Regulation XL/1793; cf. Sinha, Civil Judiciary, 12; Jain, Outlines, 184 f.

The principle of separating judicial from executive posts was extended to the Sadar Diwani Adalat later, under Wellesley in 1801 and, again, Cornwallis in 1805.[34] But the logical conclusion, the establishment likewise of a separate judicial service staff, was only attempted under Minto from 1807 onwards, by separating a judicial from the revenue branch within the Company's service, and by requiring a definite choice of career from the servants. However, the rule was not strictly maintained and for a long time members of the same civil service cadre were eligible for both judicial and administrative appointments, sometimes in turns.[35] The distinction was further blurred, when judicial powers in revenue matters as well as criminal jurisdiction of magistrates were retransferred to the collectors. In non-regulated provinces, like Punjab or Central Provinces, for a long time the Deputy Commissioner still continued to officiate as District Judge.[36] Moreover, throughout the British period it remained axiomatic that the civil servant had to do executive - i.e. revenue and magisterial - work for serveral years before he could opt for a judicial career. This administrative experience, rather than a more thorough legal training, was considered indispensible for preparing him for his judicial task.[37] It was to acquaint him with local conditions, the country, its inhabitants and social relations, and it naturally tended to inculcate a Government perspective in him. The resulting character of the "civilian judge"[38] and the linkage between the two service careers is an important element to consider when we appreciate the relative merits of revenue vs. civil courts in adjudicating disputes of land law. It was only under the Indian Constitution of 1950 that truly separate judicial cadres were introduced, *i.e.* the principle of a professional life career for judges.

Evolution of the Dual System

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

34. Jain Outlines, 213.
35. Sinha, Civil Judiciary, 55 ff.; Jain, Outlines, 319 ff. Misra, The Bureaucracy, 191.
36. Cowell, History and Constitution, 245. ff.
37. Cf. in particular the discussion in J.F. Stephen, Minute, 28 ff.
38. For critical remarks, particularly from the viewpoint of the Indian public, see Jain, Outlines, 319 ff.

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

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

39. Jain, Outlines, 225.
40. Regulation VII/1799 sec. 15.
41. Bengal Rent Act (10/1859) otherwise known for introducing the protected position of occupancy raiyat.
42. Bengal Regulation VIII/1793, sec. 50. For the failure of the patta-requirement cf. Baden-Powell, Land-System, vol. 1, 632; Sinha, Civil Judiciary, 74 ff. L. Kabir, The Rights and Liabilities of the Raiyats under the Bengla Tenancy Act, 1885 and the State Acquisition and Tenancy Act, 1950, (Dacca, 1972), 10f.
43. Minute by the Marquess of Hastings, 2 October 1815 as rendered in Jain, Outlines, 231.

Government's revenue demand under penalty of immediate auction sale of his estate in the event of default, in the Government's as well as his own interest he had to be enabled to meet his obligations by prompt recovery of rent from his tenants.[44] On the other hand, it was expected that zamindar and raiyat would agree to "equitable" rents somewhat in conformity to rates of land revenue previously charged, since these rates bore some relationship to the value of the land; this again was a matter comparatively familiar to the collectors from their settlement operations with the landlords.[45] In this way issues of rent and tenant protection became associated with revenue jurisdiction. Generally the concepts of rent and revenue tended to shade into one another, and the fusion or confusion of ideas was complete when the economic doctrine of land rent was made the basis of land revenue assessment.[46] The interconnection between rent and revenue matters appears clearly in the explanation offered by Baden-Powell[47] for the transfer of jurisdiction in the Bengal Rent Act:

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

Compared to the District Judge, the Collector, or his subordinate revenue officer[48] was the "closer" judge, because unlike the former he regularly had to tour the district and to familiarize himself with local conditions. This was not limited to questions of revenue settlement and soil productivity, but included the variegated other functions of general administrator and, in particular, policing functions as a magistrate.[49] The

44. Regulation XVII/1793 granted powers of distraint to the zamindars on the same footing for "arrears of rent of revenue".
45. See the discussion in Baden-Powell, Land Systems, I, 612 ff.
46. On the role of Mathus' and Ricardo's doctrine of rent for Indian land tax policy cf. Stokes, Utilitarians, 81 ff. In 1972, L. Kabir is still discussing its applicability to the rents paid by tenants in Bengal (Rights and Liabilities, 183 ff.)
47. Baden-Powell, Land System I, (Oxford, 1892), 642.
48. Mainly the Subdivisional Officer (S.D.O.), empowered to try smaller revenue cases.
49. Since 1831 the functions of collector and district magistrate had been united, and this combination was to remain an essential feature of the colonial administration throughhout the British period. The measures coincided, hardly by accident, with the strengthening of the collector's revenue jurisdiction and was part of paternalist conceptions influential under Bentinck (C. Sinha, Civil Judiciary, 91 ff.).

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

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

50. The account of the Pabna district riots of 1873 in Kabir, Rights and Liabilities, 30. See also *The General Remarks* in E. Blunt, THE ICS. THE INDIAN CIVIL SERVICE, (London, 1937), 54 on the "disability" of Indian as contrasted to British officers, namely to "belong either to the Hindu or the Muhammadan community" and thus always to be liable to suspicions of communal partisanship.
51. See 104. ff, Bengal Tenancy Act; cf. D. Rothermund, GOVERNMENT, LANDLORD AND PEASANT IN INDIA. AGRARIAN RELATIONS UNDER BRITISH RULE 1865-1935, (Wiesbaden, 1978), 107.
52. U.P. Act XVII/1939 sec. 265.

Apart from the question of local expertise it has always been a standard argument in favour of administrative jurisdiction that its proceedings are more informal, less burdened with technicalities and thus - this is the real consideration - more open to equitable considerations in favour of the weaker party. Lord Hastings in his Minute of 1815[53] had already made the point that the decisions of the collectors were unembarrassed by the technical pleadings and delays of lawyers. The absence or the reduced influence of laywers in administrative proceedings remained a recurring theme in the official eulogies of informality. There may have been a certain class, even racial, bias in the administrators' attitude to the newly emerging class of Indian vakeels and pleaders, who were soon well versed in legal finesse, sometimes indeed better versed than their administrative counterparts officiating as Collectors or District Judges. But there was also a genuine apprehension that the interposition of lawyers might give an edge to the richer party who could afford the better advocate and with his help prolong the proceedings. The other major point in the argument for informality was the power of the revenue officers to make inquiries on their own initiative, or even cause such inquiries to be made by their subordinates, instead of being bound by the strict rules of the adversarial civil procedure.[54] This provides an interesting structrual parallel to the inquisitorial procedure (Offizial maxime) before administrative courts on the German or French pattern. The Collector's power to take evidence and collect information on his own is emphasized e.g. by the Bengal Rent Law Commission in the context of proceedings for enhancement of rent. Such powers of enquiry are expressly reserved side by side with dispute-deciding "judicial" powers in a modern statute like the Madhya Pradesh Land Revenue Code, 1959:

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

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

53. Cf. note 43 *supra*.
54. For instance sec. 73 Bengal Rent Act (X/1859) provides that the Collector may order a local inquiry by a subordinate officer or may himself make such local inquiry in person.
55. Legislative Council of India, Minutes 24.10.1879; Rothermund, Government, 64 f.

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

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

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

56. Minutes loc. cit., 298.
57. In the Dekkhan Agriculturists' Relief Act (XVII/1879) as finally passed, pleaders, vakils, advocates etc. are excluded from the proceedings before the Conciliator. In suits before the civil judge, when the party opposing an agriculturist hired an advocate, pleader etc., the judge could direct the Government pleader to appear on behalf of the agriculturist party (sec. 68. f).

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

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

General contours of the modern position: problems unsolved

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

58. See, e.g. sec. 77(1) Punjab Tenancy Act (XVI/1887): "When a Revenue officer is exercising jurisdiction ... he shall be called a Revenue Court". Similarly sec. 31 M.P. Land Revenue Code, 1959 quoted abvoe.
59. The Indian Evidence Act, 1872 (I/1872) according to its section 1 "applies to all judicial procedings in or before any Court"; sec. 3 gives the definition: "'Court' includes all Judges and Magistrates, and all persons, except arbitrators, legally authorized to take evidence".
60. Fitzjames Stephen, Minutes, 26.
61. Cf. e.g. sec. 43 M.P. Land Revenue Code, 1959 and sec. 5 Code of Civil Procedure, 1908. Subsection (2) ibid gives an interesting definition of "Revenue Court", meaning "a Court having jurisdiction under any local law to entertain suits or other proceedings relating to the rent, revenue or profits of land used for agricultural purposes...".
62. Blunt, The I.C.S., 106.

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

(*a*) the jurisdiction of the civil courts has been barred in matters of revenue assessment and collection - i.e. in matters of administrative law proper;[63]

(*b*) the true domain of civil courts has remained the determination of ownership, or proprietary right as it is sometimes more cautiously called, in title suits between two contenders. This is the class of people with whom originally the revenue settlement was made - the assignment of proprietary rights being but a consequence of the settlement. In this context the superior local knowledge of the Collector has never been an argument. The notion that "property" under a civilized government must be protected by the civil courts has remained unbroken - and there were no social considerations calling for a more "equitable" or summary adjudiction;

(*c*) it is the range of subordinate titles, particularly tenancy rights, which have increasingly become a matter of administrative concern, and where the competition between civil and revenue courts had led to a great variety of solutions. This third - residual - category likewise covers the field where aspects of social justice most likely come into play and - after the uprisings of 1857 - the administration's concern with rural unrest. Thus it is not surprising, at least in the British period, to find a tendency to retain and sometimes enlarge the sphere of administrative jurisdiction.

There have always been marked differences and a great variety of experiments and solutions of detail. The province where civil courts retained the largest share of their original jurisdiction is Bengal. The steps successively taken to transfer all tenant litigation to the revenue courts, culminating in the Bengal Rent Act, 1859, were soon partially retraced in 1869[64] and 1885.[65] The retransfer of rent cases to the civil courts, however, was not effected throughout the entire territory of the Presidency so as to still leave considerable scope for revenue jurisdiction under the Act of 1859 in certain areas, for instance in Orissa. But even under the Bengal Tenancy Act, 1885, the jurisdiction of the civil courts was drastically curbed in any local area where critical conditions had led to the preparation

63. Cf. for instance sec,. 158(2) ix, xiv, xv Punjab Land Revenue Act, 1887(XVII/1887).
64. Bengal Act VIII/1861.
65. Bengal Tenancy Act, 1885 (VIII/1885).

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

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

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

66. Rent assessments by the Collector in this case, except when made in connection with a revenue settlement (supra n. 51), could not be challenged in a civil court, sec. 109.
67. Rothermund, Government, 43.
68. Sec 136 Punjab Land Revenue Code (XVII/1887); sec. 33 C.P. Land Revenue Act (XVIII/1881) Sec. 158 (Exclusion of Jurisdiction of Civil Courts).
69. Punjab Tenancy Act, 1887 (XVI/1887) sec. 77 (tenancy cases); Punjab Land Revenue Act, 1887 (XVII/1887) sec. 158 (Exclusion of Jurisdiction of Civil Courts).
70. Ministry of Food and Agriculture, Government of India Agricultural Legislation in India. Vol. VI (Reform in Tenancy) New Delhi, 1955), XL.

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

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

(*a*) greater independence has been institutionally secured for the civil courts by establishment of separete judicial cadres placed under the superintendence of the High Courts (Art. 227 of the Constitution).

(*b*) on the other hand the factual independence of administrative officers has been reduced. The colonial officer, mostly British, though "close" to local conditions was nevertheless "distanced" from the Indian society and thus could assume the role of an impartial arbiter - at least in lis situations. The modern Indian officer is much closer to society and he is exposed to many political pressure by local members of the legislature, politicians of the local self-government councils and so forth. The problem of judicial independence of Revenue "Courts" - in fact administrative tribunals - has therefore become more acute than before.

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

as restored by the Constitution (44th Amendment) Act, 1978.[71] But this institutional progress of the Rule of Law is affected by the age-old disease of the judicial system: the unexpected, and thus somewhat unorganic superimposition of the superior court' control over the whole hierarchy of revenue courts causes excessive delays. In recent years several such cases were decided in the Supreme Court after anything between 20 and 40 years of litigation.[72] In other words, a satisfactory balance has still not been achieved, and where this article ends, further reflection should not.

71. See note 21 supra and accompanying text.
72. See the Reports by M.L. Upadhayaya, "*Law on Agrarian Reforms*" in: INDIAN LAW INSTITUTE, ANNUAL SURVEY OF INDIAN LAW, (New, Delhi 1985), 300 ff. mentioning a case where 15 years had been spent with an appeal to the Supreme court after 10 years' litigation in Revenue Courts and High Court; ibid, the case of State of Bihar v. B. Chand, AIR 1985 SC 285, decided on 8 January 1985 after the original suit had started in 1951. See further Annual Survey, 1986, 199; 1987, 56 f. with the exceptional case of Ram Adhar Singh decided by the Supreme Court after 118 years of litigation; 1988, 160 f.

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

*Parmanand Singh**

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

The OBCs[5], on the other hand, are no where defined in the Constitution and are left at the determination of the State governments. The constitution

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

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

I. The Emerging Public Debate

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

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

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

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

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

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

II. Sociology of Caste-conflicts and Politics of Backwardness

Let us begin simply by examining the structure of caste conflicts over the single issue of reservations for OBCs. Some sociological studies[7] have shown that the caste-conflicts on this issue are more acute in the Northern States than in the South. In South there has been a pre-independence history of communal quotas as a result of anti-Brahmin movement.[8] In North the OBC category has been used only in late seventies and an attempt to reserve seats and posts on caste-lines had led to intense social conflicts.[9] In Bihar and Uttar Pradesh, for example, the major beneficiaries

6. Marc Galanter, Competing Equalities : Law and the Backward Classes in India, xviii (1984).
7. M.N. Srinivas "Future of India Caste" XIV *E.P.W.* 237-41 (1979), E.M.S. Namboodripad "Caste Conflicts v. Growing Unity of Popular Forces" *Id.* at 335-37, Lelah Dushkin "Backward Class Benefits and Social Class in India - 1920-1970" *Id.* 661, Karuna Ahmed "Towards Equality : Consequences of Protective Discrimination" XIII *E.P.W.* 69 (1978), Parmanand Singh *"Some Reflections on the Indian Experience With the Policy of Reservations"* 25 *Journal of the Indian Law Institute* 56, 59 (1983).
8. See Parmanand Singh Equality, Reservation and Discrimination in India 80-84 (1982).
9. See, Pradhan H. Prasad "Caste and Class in Bihar" XIV *E.P.W.* 481 (1979), M.N. Srinivas *supra* n. 7, *Chote Lal* v. *State of U.P.* A.I.R. 1979, All 135.

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

10. See Parmanand Singh *supra* n. 8 at 80-84.
11. R.K. Hebsur 'Reservation for the Other Backward Classes : Comparative Study of Four States" in REPORT OF THE BACKWARD CLASSES COMMISSION (B.P. Mandal, chairman) Vol. 4, Part II, 131-164 (1981) (Hereafter as Mandal Report).
12. *Id.* at 144.
13. *Id.* at 141.
14. *Id.* at 153.
15. *Id.* at 147-50.
16. *Id.* at 145.

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

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

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

17. See Parmanand Singh and V.C. Mishra *Supra* n. 2.
18. See Meenakshi Jain "Rise of a Political Caste in Gujarat" *The Times of India* (Delhi) July 22, 1985; A.S. Abraham "Caste-War in Gujarat" *The Times of India* (Delhi) June 14, 1985.
19. Professor Baxi reports that in 1984 out of 675 seats in medical colleges, 7 per cent (47 seats), 14 percent (94 seats) and 10 per cent (67 seats) were reserved respectively for SCs, STs and OBCs but only 3.5 percent for OBCs was actually filled, the rest of the seats went to higher castes. See U. Baxi, 'Reflection on the Reservation Crisis in Gujarat' *Mainstream* (Annual) 8th, 15th and 22nd June, 1985, pp. 15-24.

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

III. Who are the OBCs?

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

20. Mar Galanter *supra* n. 6 at 186.
21. 7 *Constituent Assembly Debates* 701-2.
22. T. Chinnaiah *Id.* at 689-90.
23. Ismail Saheb *Id.* at 692.
24. *Id.* 696-97.
25. H.N. Kunzru *Id.* at 680; A.B. Gurung *Id.* at 685, R.M. Nalvada *Id.* at 686.
26. K.M. Munshi *Id.* 697.

would become a "paradise for lawyers",[27] while others feared that the system of reservation might put a premium on backwardness and impair the efficiency in administration.[28] Ambedkar clarified that Article 16(4) was designed to serve as a happy formula to reconcile the competing claims of equalities[29] and that a wholesale reservation in service would be incompatible with the principle of equality of opportunity.[30] He believed that the OBCs will be determined at State level[31], while some members[32] thought that it would be the President-appointed Backward Classes Commission, which would conclusively determine the criteria of backwardness. Later, while defending Article 15(4) in Parliament, Ambedkar reiterated : "What are called backward classes are ... nothing a but collection of certain castes."[33] K.T. Shah's[34] suggestion to add the word "economically" was rejected by Nehru on the ground that the words "socially and educationally backward classes" were bodily lifted from Article 340 and the word "economically" would cause a lot of confusion.[35] Nehru conceded that giving recognition to castes and communities went against formal equality yet an exception to this was necessary to ovecome historical injustice.[36]

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

Even the Kaka Kalelkar Commission[38] continued to defend the use of caste as the predominant factor in determining social and educational backwardness, as the Indian society was not based on economic structure but on the medieval concepts of *Varna* and social hierarchy.[39] The evils of

27. T.T. Krishnamachari *Id.* at 699.
28. L.N. Misra *Id.* 673. Damodar Swaroop *Id.* 679.
29. B.R. Ambedkar *Id.* at 701-702.
30. *Ibid.*
31. *Ibid.*
32. K.M. Munshi *Id.* at 697.
33. *Parliamentary Debates* Part II, Vol. XII Column 9006.
34. *Id.* Col. 9815.
35. *Id.* Col. 9830. Nehru clarified that the need of Article 15(4) arose because of the furore created in Madras and other parts of South India over the Supreme Court's invalidation of Madras reservation scheme in *State of Madras* v. *Champakam Dorairajan*, A.I.R. 1951 S.C. 226, *Id.* Col. 9615.
36. *Id.* Col. 9616.
37. For a detailed account of the history of OBCs see Marc Galanter *supra* n. 6 at 154-179, Parmanand Singh *supra* n. 8 at 80-107.
38. *Report of the Backward Classes Commission, Government of India* (Kaka Kalelkar, Chairman) 3 Vols. (1955).
39. *Id.* Vol 1, 41.

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

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

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

40. *Id.* at 39.
41. *Id.* at XIV.
42. *Memorandum on the Report of the Backward Classes Commission, Ministry of Home Affairs, Government of India*, 1-5 (1956).
43. The Centre repeatedly objected to the use of caste test as perpetuative of commual divisiveness. By 1965 it was almost clear that any all India list of OBCs was not mandated by the Constitution and hence Centre abandoned the idea of drawing such list. *Lok Sabha Debates* Series 3, Vol. 48, Column 3973-76 (Nov. 25, 1965).
44. A.I.R. 1963 S.C. 649.
45. *Hari Haran Pillai* v. *State of Kerala*, A.I.R. 1968 Ker. 42, *Triloki Nath Tikku* v. *State of Jammu and Kashmir*, A.I.R. 1967 S.C. 1283, *P. Sagar* v. *State of A.P.*, A.I.R. 1968 A.P. 165.
46. A.I.R. 1964 S.C. 1823.

completely eschewing caste and communal considerations. Soon many people of Karnataka, began to realize that the new practice served yet another tool at the hands of the dominant Lingayats and the Vokkaligas to advance themselves at the expense of less articulate backward castes.[47] The Government under the chief ministership of Devraj Urs, capitalized the resentment of the backward castes over the major gains of reservations going only to the two dominant communities under the *Chitralekha* arrangement. A commission[48] under the chairman of L.G. Havanur was appointed in 1972 which reported in 1975 that the *Balaji-Chitralekha* view that "castes" could not be equated with "classes" was repugnant to idea underlying compensatory discrimination.[49] The commission propounded the doctrine of equality of castes.[50] Several examples were given to prove that the word "classes" in the Indian context has historically been linked with "castes"[51] The result of the massive survey conducted by the Havanur Commission was to designate 15 communities, 128 castes and 62 tribes as beneficiaries under Article 15(4) and 9 communities, 115 castes and 61 strikes as beneficiaries under article 16(4). The Brahmins, Bunts, Lingayat, Kshatriyas and Jains were excluded from the list. The commission recommended only 32 per cent reservation for OBCs (in addition to 18 per cent SC/ST quota). The government orders that followed during 1977 and 1979 added several groups to the list and as against 32 percent as suggested by the commission, reservations were raised to 50 per cent sending the total reservation to 68 per cent,[52] apparently in utter disregard of the settled legal limit of below 50 per cent. The Lingayats, discomfitted by the new policy saw in the report and the orders a sinister move of the government to isolate their community and reduce their power and influence but no violent protests took place. The resentment manifested in a series of writ petitions culminating in *Vasanth*.[53] The Venkataswamy Commission appointed by Hegde government conducted surveys to

47. *Nagan Gowda Committee* (1961) had excluded the Lingayats from the OBC list but under caste pressures the government had to include them. This list was invalidated in *Balaji*. *Supra* n. 44.
48. *Karnataka Backward Classes Commission* (L.G. Havanur, Chairman) vol. I, Part I (Main report) at ii, Chairman's covering letter.
49. *Id.* at v.
50. *Id.* at 60.
51. The definition by Lahore High Court in A.I.R. 1967 Lahore 340 is cited *id.* at 60-61 "The term class carries with it the idea of a readily ascertainable group having some element of permanence, stability and sufficiently numerous and widespread to be designated as a class. It is in this sense that the expression was commonly understood in this country ..."
52. *Id.* Vol. I, 359-72.
53. *K.C. Vasanth Kumar* v. *State of Karnataka* A.I.R. 1985, S.C. 1495.

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

In Tamil Nadu, a commission[55] reported in 1970 that only 9 out of 105 castes listed as backward managed to create a virtual monopoly for themselves in government services and suggested their elimination from the list. Instead of their elimination, more castes were added in the list.[56] In 1979 in income ceiling[57] was fixed for enjoying the benefits but soon the government yielded to the vigorous protests by caste leaders and in February, 1980 the income ceiling was withdrawn. Reservations were also enhanced from 31 to 50 percent in addition to 18 per cent SC/ST quota raising the aggregate reservation to 68 percent. In Tamil Nadu there is "an under current of some disappointment on the part of the part of the weaker castes, against (*a*) the dominance of the Modaliars and Naidus, (*b*) the nine top backward castes and (*c*) inclusion of otherwise powerful castes in the OBC list.[58] The Ambasanker Commission's report submitted in February 1985,[59] became a source of intense debate in Tamil Nadu.

In Kerala, the proposals of a backward classes commission[60] applying economic test of backwardness was accepted by one government but rejected by another presumably under the pressure of some caste allies who were discomfitted by income tests and income cut-offs[61]. In Kerala, the benefits of educational reservations were given to listed castes and communities (recommended by Pillai Commission[62]) and an income

54. See REPORT OF THE KARNATAKA THIRD BACKWARD CLASSES COMMISSION, GOVERNMENT OF KARNATAKA Vols. I and II (1990).
55. REPORT OF THE BACKWARD CLASSES COMMISSION, GOVERNMENT OF TAMIL NADU (A.N. Sattanathan, Chairman) 3 Vols. (1971). The nine elite castes are Vadugas, Veerakodi - Vellalas, Gavaras, Sourashtrians, Thuluva-Vellalas Devangas, Sozhia - Vallalas, Agha mudiyans, Sadhu Chettis. V.G. Prasad Rao "Caste Factor in Tamil Nadu" *The Time of India* (Delhi) March 9 and 10 1981.
56. R.K. Hebsur *Supra* n. 11 at 149.
57. The income ceilling was fixed by Ramchandran ministry in 1979 *Id.* 144.
58. R.K. Hebsur *Supra* n. 11 at 149.
59. A.S. Abraham "Turmoil over Reservations : Backward Classes in Full Cry" *The Time of India* (Delhi) April 12, 1985.
60. *Report of Backward Classes (Reservation) Commission; Government of Kerala* (P.D. Nettur, Chairman) 2 Vols. (1970).
61. The report was accepted by Achuta Menon ministry but rejected by Vasudevan Nair ministry.
62. REPORT OF THE COMMISSION FOR RESERVATION OF SEATS IN EDUCATIONAL INSTITUTIONS, GOVERNMENT OF KERALA (G. Kumar Pillai, chairman) (1966). 91 Communities are eligible beneficiaries. An income ceiling of Rs. 10,000 per annum had been fixed and 25 percent seats were reserved. See *K.S. Jayasree* v. *State of Kerala*, A.I.R. 1976 S.C. 2381.

ceiling was imposed for enjoying the benefits. But for reservation in services there was no such ceiling and a separate list was used[63]. Caste-class hierarchy was an inherent feature in socio-economic relations in Kerala.[64] The Andhra list[65] had fell from 146 communities to 92 communities and 25 percent seats were reserved for them. Bihar,[66] Uttar Pradesh,[67] Gujarat[68] Punjab[69], also maintained a list of castes and communities and Jammu and Kashmir maintained the list of caste, occupational and territorial groups.[70] In Kerala, a law has been passed to overcome *Mandal's* insistence on the elimination of creamy layers and benefits of reservation is given without any income out off. The Kerala's Scheme is apparently unconstitutional but it has remained unchallenged so far.

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

63. Rule 14, *Kerala State and Subordinate Services Rule 1958* specified 9 communities and reserved 40 per cent posts for them.
64. P. Sivanandan "Caste and Class and Economic Opportunity in Kerala" XIV *E.P.W.* 475 (1979).
65. *P. Sagar* v. *State of A.P., supra* n. 45, struck down an Andhra list containing 112 communities. As a result *Manohar Prasad Backward classes Commission (1970) specified 92 communities which was upheld in State of A.P.* v. *U.S.V. Balaram*, A.I.R. 1972 S.C. 1374.
66. The Bihar list comprised 128 castes and communities out of which 92 were designated as Most Backward, 26 percent seats and posts were reserved for them.
67. *Chote Lal* v. *State of U.P.*, A.I.R. 1979 All. 135 struck down the U.P. list containing 59 communities as being based on a pre-independence list. The court ordered the setting up a commission to investigate into the social conditions of the state.
68. *Bakshi Commission* (1972) reported in 1976 that there were 82 caste and comunities as OBCs and 10 percent reservation was recommended for them. In 1978 the Government implemented the report. *Rane Commission* (1981) reported in 1983 that instead of caste test, income and occuption test should be applied and applying economic tests 63 occupational groups were designated as OBCs. An increase of 18 percent reservation was also recommended. Only those whose annual income was less than Rs. 10,000 were eligible to apply for reserved posts. The announcement of 18 percent like in the quota in January 1985 led to widespread and prolonged agitation in Gujarat leading to the removal of the Chief Minister, Solanki, in July 1985.
69. The Punjab list contained 14 castes and communities, constituting 2 percent of the State's population as OBCs. See *Mandal Report* Part I. Vol. I, p. 10.
70. In Jammu and Kashmir, the Kashmiri Pandits who constituted only 2 percent of the State's population had the preponderance in services. This led to a widespread agitation by other communities to have their proportional representation in services. In 1956 , the Government introduced a pattern of communal allotments but the Supreme Court intervened and declared communal quotas as opposed to the Constitution. *Triloki Nath Tikku* v. *State of J and K*, A.I.R. 1967 S.C. 1283, *Triloki Nath* v. *State of J and K*, A.I.R. 1969 S.C. 1.

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

The controversial Mandal Commission had also strong preference for the historic view on the meaning of OBCs. It has specified 3,743 caste and communal groups[71] as "classes" comprising about 52 percent of the population of India. It wanted to recommend reservations for them in proportion to their ratio in the population[72], but in deference to the legal limitation only 27 percent reservations had been recommended by it.[73] The central theme of the report was to highlight the evils of *Varna* social structure and the exploitations growing out of it since ages. The Commission believed that the caste standing of a person summed up his social and economic position. It said that in the traditional social structure the social backwardness was a direct consequence of caste status of a person[74] and although some features of the caste system have weakened in ritual front, "it has more than gained in the political front".[75] After extensive citations from the decisional law, the Commission favoured the *Rajendran*[76] view that castes and classes were synonymous and severely criticised the *Balaji* and *Chitralekha*[77] view that castes could not be equated with classes. The Commission stated that there was a "close linkage between caste ranking of a person and his social and educational status[78] and thus "the lower ritual caste status of a person has a direct bearing on his social backwardness.[79] It, however, made no attempt to eliminate the well-off from the listed groups. On the contrary it justified the "elite benefits" as providing a psychological spin off" among the members of the groups in the achievements of its better off members and as providing a symbolic sense of group participation at the higher echelons of public life[80]. *Balaji's* insistence on the comparability of the OBCs with the SCs and STs was also refuted by the Commission which thought that *Balaji* represented the "most conservative view on the relevance of caste for determining social backwardness and on synonimity between "classes" and "castes."[81]

71. MANDAL REPORT Part II, Vol. VI, 173-274.
72. MANDAL REPORT Part I, Vol. I. 57.
73. *Id.* 58.
74. *Id.* 17.
75. *Id.* 20.
76. *P. Rajendran* v. *State of Madras*, A.I.R. 1968 S.C. 1012.
77. *Chitralekha* v. *State of Mysore*, A.I.R. 1964 S.C. 1823.
78. MANDAL REPORT Part I, Vol. 1, 62.
79. *Ibid.*
80. *Id.* 57.
81. *Id.* 26. 167.

IV. JUDICIAL RESPONSES

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

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

82. *Balaji* v. *State of Mysore supra* n.44.
83. *Supra* n. 44, 662-63.
84. *Id.* at 660.
85. *Id.* at 658.
86. *Id.* at 659.
87. *Ibid.*
88. *Ibid.*
89. *Id.* at 658.
90. *Ibid.*

expanding into a regime of caste and communal allotments.

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

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

While developing the tests of educational backwardness the Court observed"[92]

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

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

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

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

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

91. *Id.* at 664.
92. *Id.* at 660.
93. *Supra* n. 46.
94. *Id.* at 1833 (emphasis added)

communal groups.

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

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

95. *Supra* n. 76.
96. *Id.* at 1014-15.
97. *Periakaruppan* v. *State of Tamil Nadu,* A.I.R. 1971 S.C. 2303.
98. *Supra* n. 65.
99. *Supra* n. 46 at 1834.
100. *Supra* n. 65 at 1395-96.
101. *Id.* at 1397.
102. *Id.* at 1395-96.
103. *Janki Prasad* v. *State of J and K* A.I.R. 1973 S.C. 930.
104. *Id.* at 938-39.
105. *Id.* at 937.

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

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

106. *Ibid.*
107. *State of U.P.* v. *Pradip Tandon,* A.I.R. 1975 S.C. 563.
108. *Id.* at 568.
109. *Id.* at 566-67.
110. *Supra* n. 62.
111. *Id.* at 2386.
112. *Ibid.*
113. *Supra* n. 53.
114. *Id.* at 1498, 99.
115. *Id.* at 1500, 1505.

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

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

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

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

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

116. *Id.* at 1507.
117. *Id.* at 1530.
118. *Ibid.*
119. *Ibid.*
120. *Id.* at 1531.
121. *Id.* at 1512.
122. *Ibid.*
123. *Id.* at 1546.
124. *Ibid.*
125. *Ibid.*

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

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

V. The Mandal Judgement : A Critique

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

(a) Backward classes can comprise castes and communities

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

126. *Id.* at 1545.
127. *Id.* at 1548.
128. *Supra* n. 1.

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

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

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

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

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

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

(d) Creamy layers must be eliminated

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

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

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

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

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

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

(g) Reservations are impermissible in promotions

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

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

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

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

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

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

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

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

(i) Reservations cannot exceed 50 percent

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

VI Concluding Remarks

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

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

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

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

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

131. See. Marc Galanter *Supre* n. 6 at 392.

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

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

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

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

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

Justice (Mrs) Sujata V. Manohar noted that the observations of Justice B.P. Jeevan Reddy in the *Mandal* case against reservations in certain higher echelon posts and services were made in relation to job reservations under Article 16(4) read with Article 335. As is well known Article 335 requires that the claims of the SCs and STs in public services will be considered by the state consistent with maintenance of efficiency in administration. No considerations of efficiency in professions is mandated under Article 15(4). Her lordship however, ruled that admission to super specialities courses in medicine amounted to recruitment to posts and services in the hospitals and therefore the principles embodied in Article 335[134] equally applied to Article 15(4) reservations.

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

132. A.I.R. 1999 SC 2894 (Dr. A.S. Anand C.J. and Sujata V. Manohar K. Venkataswami, V.N. Khare and S.B. Majumdar JJ).
133. *Id.* of 2920.
134. *Id.* at 2921. On this point Justice S.B. Majumdar dissented holding that the principle of Article 335 cannot be applied to Article 15(4) and is relevant for Article 16(4) only. *Id.* at 2939.
135. *Ibid.*.

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

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

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

Most importantly the Supreme Court in *Preeti* overrules its two earlier judgments[137] which held that prescribing no minimum qualifying marks for the reserved category candidates would have no impact on standards of education and a reserved category candidate getting even zero mark could be admitted. The Court also rejected the argument that if minimum qualifying marks for the reserved category candidates was insisted many reserved seats may remain unfilled. The purpose of higher medical education according to the court was not to fill the reserved seats by lowering the standards, but to "ensure that the reserved category candidates having the requisite training and calibre to benefit from post graduate medical education rise to the standards which are expected of persons possessing post graduate medical qualifications, are not denied this opportunity by competing with general category candidates."[138]

136. *Id.* 2906.
137. *State of M.P.* v. *Kumari Nivedeta Jain* (1981) 4 SCC 296, and *Ajai Kumar Singh* v. *State of Bihar* (1994) 4 SCC 401.
138. *Id.* at 2918.

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

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

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

139. (1999) 7 SCC 209.
140. (1996) 2 SCC 715.
140. (1995) 6 SCC 684.
141. (1997) 6 SCC 538.
142. A.I.R. 1968 SC 507.
143. The present author has also maintained that Articles 15(4) and 16(4) donot confer any fundamental right to reservation. See P. Singh Fundamental ight to Reservation, A Rejoinder *Supra* n. 5. But for a contrary view see M.P. Singh, "Are Article 16(4) or 15(4) Fundamental Rights?" (1994) 3 SCC (Jour) 31-41.
144. *Supra* n. 139 at 227.

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

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

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

145. *Supra* n. 130.

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

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

*Dr. B. Errabbi**

I. INTRODUCTION

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

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

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

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

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

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

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

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

II. The Right to Health Care: International Incorporation and Enforcement

The right to health care, as an international human right, is founded on the edifice of the prescriptions of the United Nations Charter, the International Bill of Rights, the Convention on Elimination of All Forms of Discrimination Against Women, 1979, the U.N. Convention on the Rights of the Child, 1989, etc. Therefore the members of the international community are expected to build their health care strategies on this edifice,

2. *Ibid.*

(A) The Scheme of the United Nations Charter

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

3. United Nations Charter, Article 1(3).
4. *Id.* Article 55.
5. *Id.* Article 56.
6. *Id.* Article 13 (b).
7. Thomas Buergenthal, "*International Human Rights Law and Institutions*" in Herman L.Fwen Zalida Puelma and Susan Schoellconner (eds). Right to Health in the Americas-A comparative Constitutional Study.

B. The Scheme of International Bill of Rights

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

(i) The Universal Declaration of Human Rights

The adoption of the Universal Declaration by the U.N. General Assembly brought human rights revolution in the world, thereby marking the ushering in of a new era in the mankind's struggle for freedom and human dignity. The Declaration Proclaims that all human beings are born free and equal in dignity and rights[8] and that they are entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised.[9] A significant feature of the Universal Declaration of Human Rights is that it proclaims and recognises the importance of not only civil and political rights but also economic, social and cultural rights. Of these, individual rights to social security, to work, to protection against unemployment, to rest and leisure and to protection against torture and cruel and inhuman treatment are some of the important rights the enjoyment of which depends on the efficacy of the right to health and health care. Coming to the crucial provision of the Declaration which expressly recognises the right to health, Article 25 reads:

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

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

8. The Universal Declaration of Human Rights, 1948, Article1.
9. *Id.* Article 28.

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

(ii) The Scheme of International Covenants on Human Rights

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

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

10. *Id.* Article 29 (2).
11. See supra note 7 at p. 6.
12. *Id.* at p. 7.

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

(a) Nature of Obligations created by the Covenants

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

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

(c) Other Important Human Right Instruments

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

13. See Articles 10 (3) and 11, International Coventat on Economic, Social and Cultural Rights, 1966.
14. *Id.* Article 2 (1).

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

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

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

III. The Right to Health care : Other International Efforts for its Realisation

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

15. See *supra* note 7 at p. 10.
16. See , *Apparel Export Promotion Council* v. *A.K. Chopra*, A.I.R. 1999 S.C. 625; *Vishaka* v. *State of Rajasthan* A.I.R. 1997 S.C. 3011; *People's Union for Civil Liberties* v. *Union of India*, A.I.R. 1997 S.C. 1203; *D.K. Basu* v. *State of West Bangal*, A.I.R. 1997 S.C. 610; *Sheela Barse* v. *Secretary, Children Aid Society*, A.I.R. 1987 S.C. 656 and *Prem Shanker* v. *Delhi Administration*, A.I.R. 1980 S.C. 1535.
In *Apparel Export Promotion Council* v. *A.K. Chopra*, A.I.R. 1999 S.C. 625. the Indian Supreme Court, while dealing with the issue of sexual harrasment of women at work places in the light of International Instruments seeking to protect the dignity of women, observed: (at. 634).
"These International Instruments cast an obligation on the Indian State to gender sensitise its laws and the Courts are under an obligation to see the message of the International Instruments is not allowed to be drowned. .... The Courts are under an obligation to give due regrad to International Covenants and norms for construing domestic laws more so when there is not inconsistency between them and there is a void in domestic law".

International Health Conference, orgainsed jointly by World Health Organisation [WHO] and UNICEF at Alma Ata [the then USSR], added a new vigor to the idea of primary health care which would have far reaching implications for the developing cuntries.[17] The Alma Ata Conference adopted "Primary Health Care" (PHC) as a key approach for the attainment of the goal of health for all by the year 2000.[18] The importance of the Alma Ata Health Conference lies not so much in inventing the idea of primary health care but in forcefully advancing and promoting the concept that health development can take place only as an integral part of each country's individual socio-economic development process.

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

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

17. Evaluation of the Strategy for Health for all by the year 2000- Seventh Report on the World Health Situation Vol. 1 (WHO-1987).
18. *Ibid.*
19. V.T. Heart Gunaratne, YOYAGE TOWARDS HEALTH (1980).

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

(A) Constitutional Scheme of Fundamental Rights and Directive Principles

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

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

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

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

20. Jurisprudentially speaking, these rights are considered to be in the nature of "privileges" or "liberties" which the individuals can enjoy with no aims imposed on the state. (See Dias, Jurisprudence, pp. 23 to 25 and 28).
21. Article 37 declares:
"The provisions contained in this Part shall not be enforceable by any Court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws".
22. A.I.R. 1976 S.C. 490.
23. *Id.* at 516.

realisation and enjoyment of the various fundamental rights guaranteed in the Constitution. Even judicial intervention will be of no avail. This has been made clear by the Indian Supreme Court in the context of its discussion of the nature of the right to life as guaranteed in Article 21 of the Constitution. Thus, in *Bandhua Mukti Morcha* v. *Union of India*[24] Justice Bhagwati observed[25]:

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

To the same effect are the observations of Chief Justice Chandrachud in *Olga Tellis* v. *Bombay Muncipal Corporation*.[26]

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

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

24. A.I.R. 1984 S.C. 802.
25. *Id.* at 811-812.
26. A.I.R. 1986 S.C. 180 at. 194.
27. In *A.B.S.K. Sangh (Rly)* v. *Union of India*, A.I.R. 1979 S.C. 298, Justice Chinnappa Reddy Observed : (at 335) " It follows that it becomes the duty of the Court to apply the Directive Principles in interpreting the Constitution and the laws. The Directive Principles should serve the courts as code of interpretation. Fundamental rights should thus be interpreted in the light of Directive Principles and the latter should whenever and wherever possible be read into the former"
Inspired by the spirit of this theme the Indian Apex Court in *State of H.P.* v. *Umed Ram*. A.I. R. 1986 S.C. 847, called upon the state to provide road facilities to the residents of hilly areas, for in its view "access to the road is access to life". In this context the Court observed: (at 856)
"Affirmative action in the form of some remedial measures, in public interest, in the background of the constitutional aspirations as enshrined in Art.- 38 read with Arts 19 and 21 of the Constitution by means of judicial directions in cases of excessive inaction or slow action is permissible within limits".

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

(B) The Right to Health : Constitutional Position

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

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

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

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

In *Unni Krishnan* v. *State of A.P*, A.I.R. 1993 S.C. 2178, the Indian Supreme Court, for the first time, held that Article 21 of the Indian Constitution which guarantees the right to life and personal liberty has positive or affirmative dimension also. In that case the main question was whether the right to education as a positive right requiring the State to provide the requisite educational facilities could be read into Article 21 of the Indian Constitution. Answering the question in the affirmative Justice Jeevan Reddy held that every child of this country had a right to free education until he completes the age of fourteen years. In this context he also held that the passage of 44 years since the commencement of the Constitution had transformed the unenforceable positive obligation envisaged in Article 45 relating to primary education into an enforceable positive individual fundamental right under Article 21 of the Indian Constitution (at p. 2197).
28. *Minerava Mills* v. *Union of India*, A.I.R. 1980 S.C. 1789, at. 1807.
29. *Ibid.*
30. *Francis Coralie Mullin* v. *The Administration, Union Territory of Delhi*, A.I.R. 1981 S.C. 746, at 752-53; *Gian Kaur* v. *State of Punjab*, A.I.R. 1996 S.C. 946 at 952; *Stae of Punjab* v. *Mohinder Singh Chawla*, (1997) 2 SCC. 83; *Mr. 'X'* v. *Hospital 'z'* A.I.R. 1999 S.C. 495; *Chemeli Singh* v. *State of U.P.*, A.I.R. 1996 S.C. 1051; and *C.E.S.C. Limited* v. *Subhash Chandra Bose*, A.I.R. 1992 S.C. 573 at 585.
31. See, *supra* n. 30.

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

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

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

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

32. *Id.* at 85.
33. See. *supra* n. 30.
34. *Id.* at 503.
35. See *supra* n. 30.
36. *Id.* at. 1053. See also *Vincent* v. *Union of India*, A.I.R. 1987 S.C. 990; *State of Punjab* v. *Ram Labhaya Bagga*, (1998) 4 SCC 117; *Kriloskar Bros Ltd.* v. *ESI Corpn*, (1996) 2 SCC 682 and *Paschim Bangakhet Mazdoor Samity* v. *State of W.B.*, (1996) 4 SCC 37.
37. See *Supra* n. 27.
38. See Constitution (Eighty Third Amendment) Bill, 1997.

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

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

A close examination of the scheme of Part IV of the Constitution indicates that it is this Part that is crucial to the goal of socio-economic development of the country. It is by this part of the Constitutions that the state is obligated to transform all the international human rights, including the right to health, which the Indian constitution embodies and guarantees as constitutional rights, into legally enforceable basic needs[39]. The State's obligation under this Part is however, unenforceable in the sense that any failure on the part of the state to translate the rights into basic needs by necessary supporting legislation would not entitle any judicial action. The extent of the state's obligation is made dependent upon the extent of the economic development of the country. This means that the individual's right to the enjoyment of all the basic needs, including the human need of health care which is the most basic need, would depend upon the effectiveness of the state's socio-economic development strategies. This would lead to the premise that the state cannot be constitutionally compelled to translate the constitutional rights to work, to eduction, to public assistance,[40] to just and human conditions of work and maternity relief[41] and to living wage for workers[42] into legally enforceable basic needs of the people. Similarly, the state cannot be compelled to transform its constitutional duties to raise the level of nutrition and the standard of

39. See *supra* n. 21.
40. Article 41 states:
"The State shall, with in the limits of its economic capacity and development , make effective provision for securing the night to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in cases of underserved want".
41. Article 42 of the Constitution declares:
"The State shall make provision for securing just and humane conditions of work and for maternity relief".
42. Article 43 provides:
"The State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and in particular , the state shall endeavour to promote cottage industries on an individual or cooperative basis in rural areas".

living and to improve public health[43] into legally enforceable basic needs of the people in the country.

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

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

Therefore, it is imperative that the Indian parliament should enact a comprehensive health care law dealing with preventive, protective and curative aspects of health care. In this respect India should be guided by the experiences of Canada,[44] the Switzweland[45] and Israel which have appropriate health laws in operation. The enactment of such a law is absolutely necessary to combat the formidable problem of health development in all its aspects in the country.

V. Conclusion

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

43. Article 47 of the Constitution reads:
"The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties, and in particular, the State shall endeavour to bring about the prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health."
44. See Central Health Act, 1955.
45. Switzerland enacted its health law in 1961
46. Israel's health law is called The Patients' Rights Act, 1996.

HISTORICAL FOUNDATIONS OF DISABILITY DISCRIMINATION IN CLASSICAL HINDU LAW

*Vinod Dixit**

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

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

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

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

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

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

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

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

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

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

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

(1) Insane at the time succession opened.[2]

(2) Born blind.[3]

(3) Lame from birth.[4]

(4) Deaf and dumb from birth.[5]

(5) Infected with a virulent or ulcerous form of leprosy.[6]

(6) Sexually impotent.[7]

(7) In Mitakshara law, widows, if unchaste at the time of widowhood unless the husband had condoned the unchastity.[8]

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

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

Hindu law discriminated against the disabled on two grounds (a) According to Baudhayana because they are incapable of transacting legal business[10] (b) Mayne believes that there was discrimination against the disabled because they were unable to perform religious ceremonies[11] inspite of a contrary opinion expressed, in *Surraya* v. *Subamma*[12] by Sadasiva Aiyer J., depending on Dr. Julius Jolly,[13] that discrimation was not on religious grounds as shudras who were not required to perform vedic rites were also excluded from inheritence on grounds on disability.

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

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

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

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

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

In pre-capitalist societies market forces were insufficiently developed. In these societies, surplus was extracted, not through market forces, but through extra-economic coercion. Therefore in these societies dominant culture was martial culture and its corrollary, i.e; the culture of violence.

At the time of establishment of paramountcy of the East India company in India, Rahasthan was also a pre-capitalist society with a dominant martial culture.[14] This society was also a male dominated, patriarcical society. At least among the ruling elite i.e. among the twice-born castes, chastity of the women was an obsession. A known unchaste women did not have any place in this society. We seek to find reasons for disability discrimination in the supremacy of martial culture and exclusion of unchaste women from inheritance in patriarchy including insistence on chastity. We also propose to show that there was some connection between supremacy of martial culture and insistence on women's chastity.

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

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

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

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

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

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

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

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

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

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

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

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

*Dr. Ved Kumari****

I. Legal Education in India

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

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

---

* Revised version of the paper written for International Conference of Clinical Teachers held in Miami, Florida, USA in May 1996.

** Reader, Faculty of Law, University of Delhi, Delhi-110007.

1. Kagzi, M.C.J., "Certain Issues of Legal Education and National Development - Objectives, Medium and Methods," 2 *Delhi Law Review*, 179 at 183 (1973). While pointing the land marks in this debate the *Report of the Curriculum Development Centre in Law*, University Grants Commission, (1990) at page 2 pointed out, "the 1964 Kasauli seminar on legal education (convened by Prof. G.S. Sharma), the 1972 Pune international seminar on Indian legal education (convened by Prof. S.K. Agarwala), the Dharwad workshop on teaching of jurisprudence (convened by Professors G.V. Ajjappa and Upendra Baxi) were major efforts at rearticulation of legal learning and research in India. To these must be added: the 1975-76 UGC convened workshops on socially relevant legal education (leading to a report by Professor Upendra Baxi published in 1979) and the UGC 1981 Report on the Status of Teaching and Research in the Discipline of Law (prepared by Professors S.K. Agarwala and Mohammed Ghouse)."
2. Bakshi, Veena, "Legal Education in India", Vol. No. 1, *Delhi Law Review*, 49 at 64 (1972).

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

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

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

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

3. Students and teachers participate in these activities on a voluntary basis. The clinic depends for its activities on the labour of love of teachers, willing to do extra work. The Faculty has yet not framed any rules for adjustment of teaching load of teachers involving themselves with legal aid clinic and its activities. Legal aid activities not being part of curricula, majority of the law students do not join the activities of the Legal Aid Clinic and pass out without any practical experience or exposure about how to handle a real case or what all happens before a case is decided or about the differential applicability of law to powerless. I have always felt concerned at the lack of any substantive practical training to students and the lackadaisical functioning of the legal aid activities but have felt constrained because of the large number of students and my own inexperience at the bar.
4. Hereafter called CDC.
5. Report of the CDC, n. 1.
6. *Id.* Vol 1, p. 27.

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

(*i*) a regulated volume of actual client representation by the student taking into account the needs of the student for exposure and the needs of the client for adequate legal service;

(*ii*) an individualized teaching relationship between the teacher and the student aimed at identifying the personal needs of students for professional purposes and designing the programme to fulfil those needs;

(*iii*) a training in technical law skills and ethics of professional responsibility;

(*iv*) a programme aimed at integrating and synthesizing the different components of legal education;

(*v*) training in strategy formulation in pursuance of social and individual client objectives.[8]

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

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

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

7. *Id.* Vol. II, pp. 363 *ff.*
8. *Id.* Vol. I, pp. iv to vi.
9. *Ibid.*

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

Pursuant to these recommendations, the Bar Council of India reintroduced apprenticeship for a year under a senior lawyer as a precondition for enrolment as a lawyer from 2nd April, 1996.[11] The scheme has now been struck down by the Supreme Court as ultra vires the rule making power of the Bar Council of India under the Advocates Act.[12]

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

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

10. *V. Sudeer* v. *Bar Council of India and another*, JT 1999 (2) SC 141 at 171.
11. The rules provided that an advocate with 15 years of continuous active practice or an advocate designated as the senior advocate by the Supreme Court only could be a guide. Name of the guide of every trainee was to be approved by the Bar Council. The guide's consent was also required. The student was to maintain two diaries for keeping records of chamber and court activities. These diaries were to be periodically checked and signed by the guide and countersigned by the Enrollment Committee of the State Bar Council.
12. *V. Sudeer*, n. 10.

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

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

II. Definitions

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

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

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

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

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

III. About the Law Faculty in Delhi and its students

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

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

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

IV. Initiating the experiment

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

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

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

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

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

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

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

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

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

V. The Course and the Classes

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

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

14. AIR 1965 SC 722.

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

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

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

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

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

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

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

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

15. AIR 1978 SC 1025.

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

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

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

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

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

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

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

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

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

VI. Feedback

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

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

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

Response of students to questions 4 to 17 of the questionnaire

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

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

Sr. No.	Statement in brief	No. of students choosing the prescribed scale					
		5	4	3	2	1	No answer
4	Clinical Method - more interesting	10	23	4	1	-	-
5	More self learning	11	18	7	1	-	1
6	More learning	13	17	5	2	1	-
7	Immediate application of learning	6	25	3	4	-	-
8	More students participate	9	15	8	5	1	-
9	Require more class-time	13	21	4	-	-	-
10	Requires more home preparation	5	12	5	5	-	1
11	Not as useful as the time spent	1	6	10	15	6	-
12	Unreasonably more workload	4	14	5	12	3	-
13	Mock trial ought to be conducted	13	15	5	5	-	-
14	Less confident compared to last semester	7	5	10	9	7	-
15	Adequate course coverage	5	13	11	7	1	1
16	More focus on examination needs	9	13	1	10	5	-

Part C :

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

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

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

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

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

Conclusion

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

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

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

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

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

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

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

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

ANNEXURE

QUESTIONNAIRE FOR THE FEEDBACK FROM STUDENTS

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

ON THE INNOVATIVE TEACHING METHOD IN CRIMINAL LAW II

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

Part A

Please tick the answer which is correct in your case

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

2. How many classes have you attended in Criminal Law?
   - (*a*) 100%
   - (*b*) 50% - 70%
   - (*c*) Less than 50%

3. Were you in Section A in the 1st Term also?
   - (*a*) Yes
   - (*b*) No

Part B

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

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

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

Part C

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

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

18. Any suggestions for improvement in the -

(*a*) Teaching method

(*b*) Coverage of course contents

(*c*) Any other aspect related to the

(*i*) class

(*ii*) course

CONTROL OF WATER POLLUTION IN INDIA : JUDICIAL ENFORCEMENT

*Mrs B. Aruna Venkat**

I. Introduction

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

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

* M.A; LL.M; Lecturer, Amity Law School, Saket, N.Delhi.

with only one-spoonful of sweet water for every five liters of total water".[1]

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

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

The position of water resource in India is really alarming. Investigations by Central and State Boards for prevention and control of water pollution show that the major sources of pollution of our natural water courses including coastal waters are the discharge of community waste from human settlements. Most of the community and industrial waste water goes straight into water courses rendering them unfit for most uses. This is evident from the Statement of Objects and Reasons of the Water (Prevention and Control of Pollution) Bill, 1974, which reads:[3]

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

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

II. Prevention and Control of Water Pollution : Legislative Measures

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

In order to achieve the above objects, the Water Act, 1974 was enacted. The Water Act, 1974 has been passed to combat the most rampant water pollution in the country. It represented India's first attempt to deal comprehensively with an environmental issue. Parliament adopted minor amendments to the Act in 1978 and revised it in 1988 to more closely conform it to the provisions of the Environment Act, 1986. Since 'Water' is a subject in the State List[5] under the Indian Constitution, the Centre had to enact the Water Act under Article 252 (1)[6] of the Constitution. It is comprehensive in its coverage, applying to streams, inland waters, subterranean (ground) waters and sea or tidal waters. The main objects of the Act are:

(*i*) To provide for the prevention and control of water pollution and maintaining of wholesomeness of water (in streams or wells or sewer or on land);

(*ii*) To establish Central and State Boards with a view to carrying out the above purposes; and

(*iii*) For conferring on, and assigning to such boards, powers and functions relating there to and for matters connected therewith.

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

4. Heraafter called the Water Act, 1974.
5. Entry 17 of the State List, 7th Schedule of the Indian Constitution.
6. Under this provision, if two or more States are desirous that with respect to any particular matter in the State List there should be a single Act which would apply in those states, they can invoke the aid of Parliament to make such an Act for them.
7. The Water Act, 1974, section 24.
8. *Id.* sections 25 and 26.
9. *Id.* section 17 (g).

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

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

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

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

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

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

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

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

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

(B) Some problems of enforcement

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

16. *Id.* Section 23.

Section 33A orders since the State Boards have no direct power to exact extracts, order imprisonment or otherwise complete compliance with their directions other than penalty actions filed with the Courts under the Act.

2. Under Section 33A, the directions of the State Boards are subject to any directions issued by the Central Government. The question is which authority is better situated to evaluate local water pollution problems - the Central Government or State Boards? Which authority is better insulated from pressure by industry, or local Governments?

3. The addition of a citizens suit provision to the Water Act may result in a more diligent enforcement of the Act.

The citizens suit provision requires that Courts take cognizance of an alleged violation of the Water Act upon the complaint of any person who has given 60 days notice to the appropriate State Board or official.[17] But under Sections 20 and 21, only officials of the Boards are empowered to obtain information and take samples from polluting enterprise. The citizens suit provision requires the Boards to realise relevant information but does not require them to undertake investigation of alleged water pollution.

Section 21 of the Act provides detailed procedures for sampling effluents. The analysis of a sample is not admissible in evidence in any legal proceeding under the Act unless the sample is taken in accordance with that section. For example, in the case of *Delhi Bottling Company Pvt. Ltd.* v. *Central Board for the Prevention and Control of Pollution*,[18] the Central Board took a sample of trade effluent from a bottling company's discharge stream, analysed the sample and determined that the trade effluent did not conform to the requirements of the consent order granted to the company. The Board sued under section 33 and the Magistrate's Court issued an injunction requiring the company to establish a treatment plant. The company challenged the injunction claiming that a representative of the company, present at the sampling had requested that a sample be analysed by the Delhi Administration Laboratory as provided under Section 21(e) of the Act. This analysis was not carried out. The Court ruled in favour of the Company, holding that samples not taken in strict compliance with Section 21 are inadmissible, as evidence and therefore, the Board had not proved that the Company was violating its consent orders.

17. *Id.* Section 49.
18. A.I.R. 1986 Del.152.

The Water Act regulates water pollution through a system of "Command and Control". Effluent discharge standards are established and persons whose discharge exceeds the standards are subject to fines and imprisonment. Other means of regulation are possible, for example, the government could establish an upper limit of allowable pollutant release based on public health standards and charge fees on the amount of the pollutant released within those limits. Under this system, polluters would have an economic incentive to reduce pollution if the fees are higher than the costs of reducing pollution.

Before concluding the discussion of the Water Act, it may not be out of place to mention that the Water (Prevention and Control of Pollution) Rules, 1975 have been framed by the Central Government in exercise of its powers conferred by section 63 of the Water Act.[19] These rules were framed in consultation with the Central Board for the Prevention and Control of Water Pollution.

(C) The Water (Prevention and Control of Pollution) Cess Act, 1977

As the preamble to the Act states,[20] the Act is enacted to provide for the levy and collection of a cess on water consumed by persons carrying on certain industries and by local authorities, with a view to augment the resources of the Central Board and the State Boards for the Prevention and Control of Water Pollution constituted under the Water Act, 1974. This is supplementary to the Water Act, 1974.

The Act says that there shall be levied and collected cess for the purpose of the Water Act, 1974 and utilisation thereunder.[21] Such a cess shall be payable by (*a*) every person carrying on any specified industry; (*b*) every local authority which shall be calculated on the basis of water consumed by such person or local authority, as the case may be, for any of the purposes specified in column (I) of Schedule II,[22] at such rate, not exceeding the rate specified in the corresponding entry in column (2) thereof, as the Central Government may by notification in the Official Gazette, from time to time specify.[23] 'Specified Industry' means any industry specified in Scheduled I.[24] The Act provides not only for the payment of interest for the delayed payment of the levied cess[25] but also

19. Published in the Gazette of India, extra-ordinary Part II, Section 3 (i), dated 27-2-1975.
20. See, Preamble, The Water (Prevention and Control of Pollution) Cess Act, 1974.
21. *Id.* Section 3 (1).
22. *Id.* Sxhedule II.
23. *Id.* Section 3 (2).
24. *Id.* Schedule I.
25. *Id.* Section 10.

for the imposition of penalty for non-payment of cess within the specified time.[26] The Act also provides for the recovery of all amounts under the act including the interest and penalty payable by the Central Government in the same manner as arrears of land revenue.[27]

Under the Act, whoever, being under an obligation to furnish a return, furnishes a false return, or wilfully or intentionally evades or attempts to evade the payment of cess is liable to imprisonment which may extend to six months or with fine which may extend to one thousand rupees or with both.[28]

The Central Government, in exercise of its powers conferred by section 17 of the Act framed and issued the Water (Prevention and Control of Pollution) Cess Rules, 1978.[29]

Similar is the mechanism provided in the Environment Act, 1986. The Act invests the Central Government with similar powers under Section 5[30] with an authority under section 23[31] to delegate the same to the State Governments.

III. Prevention and Control of Water Pollution : Judicial Enforcement

(A) The River "Ganga" Pollution Cases

In quite a few cases the State Pollution Control Boards or the State Governments have issued directions for the closure of the concerned industries for noncompliance of the conditions in the consent orders with regard to the establishment of effluent treatment plants. The affected persons have questioned the closure orders in courts. Before we discuss these cases, it may not be inappropriate to discuss first the Ganga River Pollution cases. It is a matter of common knowledge that River Ganga, the mightiest of all rivers in India is the most polluted river in the country. To redeem the river from the appalling pollution, the Government of India, to

26. *Id.* Section 11.
27. *Id.* Section 12..
28. *Id.* Section 14 (1) (2).
29. Published in the Gezette of India, Extraordinary, Part II, Section 3 (1) dated 24-7-1978.
30. Section 5 of Environment (Protection) Act 1986 reads:
"Not withstanding anything contained in any other law but subject to the provisions of this Act, the Central Government may, in the exercise of its powers and performance of its functions under this Act, issue directions in writing to any person, officer or authority and such person, officer or authority shall be bound to comply with such directions.
Explanation- For the avoidance of doubts it is hereby declared that the power to issue directions under this section includes the power to direct-(a) closure, prohibition or regulation of any industry operation or process: or"
31. See. Section 23 of the Environment (Protection) Act. 1986.

clean the river, launched an ambitious plan known as "Ganga Action Plan" in 1985. Under this plan, Ganga Authority has been established consisting of the Union Planning and Environmental Ministers and the Chief Ministers of States through which the river Ganga passes, with the Prime Minister as its Chairman. It appears Ganga Action Plan has not been successful, as it has not been effectively implemented.

Two of the landmark decisions in the area of control of water pollution are those filed by the environmental activist Mr M.C. Mehta.[32] In 1985, he filed a writ petition under Article 32 of the Indian Constitution before the Supreme Court against the tanneries near Kanpur and the Kanpur Municipality to stop pollution of "Ganga" by the discharge of sewage and trade effluents into the river. The Supreme Court discussed these two issues separately and delivered two judgements. Thus, in *M.C. Mehta* v. *Union of India*[33] a writ of mandamus was sought against the tanneries near Kanpur to restrain them from discharging industrial effluents into the river Ganga until such time as they set up necessary treatment plants for treating trade effluents in order to control and stop the pollution of water in the said river. This case which was a Public Interest Litigation (PIL) petition was treated as a representative action and notices were issued through newspapers calling upon all the industrialists and municipal corporations and the town municipal councils having jurisdiction over the area through which the river Ganga flows to appear before the court. They were asked to show cause as to why directions should not be issued to them as prayed by the petitioner. Pursuant to this said notice, a large number of industrialists and local bodies have entered appearance before the court. Some of them have filed counter-affidavits explaining the steps taken by them for treating the trade effluents before discharging them into the river.

The Supreme Court was of the view that, having regard to the adverse effect that the effluents would have on the river water, the concerned tanneries should set up at least primary treatment plants and that was the minimum which the tanneries should do in the circumstances of the case.[34] The court after express reference to the Water Act, 1974, the Environment Act, 1986 and to the 1972 Stockkholm Conference, directed for the stoppage of work in the tanneries which were discharging effluents in Ganga and which did not set up primary treatment plants for the proper treatment of the waste water.[35] The Court held that the financial incapacity

32. *M.C. Mehta* v. *Union of India*, AIR 1988 SC 1037: and *M.C. Mehta* v. *Union of India* AIR 1988 SC 1115.
33. A.I.R. 1988 S.C. 1037.
34. *Id.* at 1045.
35. *Ibid.*.

of the tanneries to set up primary treatment plants was wholly irrelevant and that such tanneries had no right to exist just as those industries which had no financial viability to pay minimum wages to their workers had no right to exist. The court observed that leather industries consumed large quantities of water for processing of hides and skins into leather and the resultant waste water contained toxic inorganic materials which caused serious damage to aquatic life and polluted ground water resources.[36]

Therefore, the Court issued the necessary directions for the closure of these tanneries, which have failed to comply with its orders. In this context, the Court observed that closure of tanneries may bring about unemployment, loss of revenue, but life, health and ecology have greater importance to the people.[37]

In the same case, while passing further orders, the Supreme Court observed that municipal authorities had the statutory duty to prevent public nuisance caused by the pollution of the river Ganga. The court observed that although Parliament and the state legislature have enacted laws imposing duties on the Central[38] and State[39] Pollution Control Boards constituted under the Water Act, 1974 and the municipalities under the UP Nagar Mahapalika Adhiniyam for prevention and control of pollution of water, many of those provisions have just remained on paper without any adequate action being taken pursuant thereto. The court further observed that on account of the failure to obey the statutory duties for several years the water in the river Ganga at Kanpur has become so much polluted that it can no longer be used by the people either for drinking or for bathing. The Nagar Mahapalika of Kanpur has to bear the major responsibility for the pollution of the river near Kanpur city.

Accordingly, the Court issued certain directions to the Kanpur Nagar Mahapalika and other authorities for compliance, which are:[40]

(*a*) The Kanpur Municipal Corporation should submit its proposals for effective prevention and control of water pollution within six months to the Pollution Control Board constituted under the Water Act, 1974;

(*b*) The Kanpur Nagar Mahapalika should get the dairies shifted to a place outside the city or arrange for removal of waters accumulated at the dairies;

36. Justice K.W. Singh (as he then was) in his concurring opinion highlighted the importance of river Ganga in the Indian civilisation, culture and life apart from its religious impact on a very large sectionof the Indian population.
37. *M.C. Mehta* v. *Union of India.* (1988). ISCC 471; A.I.R. 1988 S.C. 1115.
38. See. Section 17 of the Environment (Protection) Act. 1996.
39. See. Sections 16,17.20.21.23.24 and 33 of the Water Act. 1974.
40. See. *supra* n. 37 at pp 489-91.

(*c*) The Mahapalika should lay sewerage lines where the same were not constructed as also to increase the size of the existing sewers in labour colonies;

(*d*) The Mahapalika should construct public latrines and urinals for use of poor people free of charge;

(*e*) The Kanpur Municipal Corporation should ensure with the help of police that dead bodies or half burnt bodies were not thrown into the river; and

(*f*) The Kanpur Municipal Corporation should not issue licences to new industries unless adequate provision has been made for the treatment of trade effluents flowing out of the factories.

The Supreme Court also emphasised on the need to make the people in general, aware of the importance of cleanliness and hazards of pollution in this context. Justice Venkataramaiah, who spoke for the court, observed:[41]

> "Having regard to the grave consequences of the Pollution of water and air and the need for protecting and improving the natural environment which is considered to be one of the fundamental duties under the Constitution [Vide clause (g) of Article 51-A of the Constitution] we are of the view that it is the duty of the Central Government to direct all the educational institutions throughout India to teach at least for one hour in a week, lessons relating to the protection and the improvement of the natural environment including forests, lakes, rivers and wildlife in the first ten classes. The Central Government shall get textbooks written for the said purpose and distribute them to the educational institutions free of cost. Children should be taught about the need for maintaining cleanliness commencing with the cleanliness of the house both inside and outside and of the streets in which they live. This should be done through out India."

The Court, further, was of the opinion that it was desirable to organise 'Keep the city clean' week, 'Keep the town clean' week and 'Keep the village clean' week in every city, town and village throughout India at least once a year, as the court felt that these programmes were necessary to rouse among the people the consciousness of cleanliness of environment.[42]

41. *Id.* at 491.
42. *Ibid.* The learned judge also gave detailed instructions as how to organize these awareness programmes.

(B) Bokaro River Pollution Case

In another PIL petition under Article 32 of the Indian Constitution, the petitioner in *Subhash Kumar* v. *State of Bihar*[43] sought the issuance of a writ or direction, directing the Director of Collieries, West Bokaro Collieries at Ghatoland, District Hazaribagh in the State of Bihar and the Tata Iron & Steel Co. Ltd to stop forthwith the discharge of slurry/sludge from its washeries of Ghatoland in the District of Hazaribagh into Bokaro river.

The petitioner, *inter-alia,* alleged that the surplus waste in the form of sludge/slurry[44] was discharged as an effluent from the washeries into the Bokaro river which got deposited in its bed. The petitioners further alleged that the effluent in the shape of slurry is flown into the Bokaro river which was carried out by the river water to distant places polluting the river water. As a result of this, the river water had become unfit for drinking and irrigation purposes. The petitioner asserted that inspite of several representations, the State of Bihar and State Pollution Control Board had failed to take any action against the company, but instead they, had permitted the pollution of the river water.

Therefore, the petitioner sought the issuance of direction directing the respondents which included the state of Bihar, the Bihar Pollution Control Board, the Union of India and Tata Iron and Steel Co. to take immediate steps prohibiting the Pollution of the Bokaro river water from the discharge of slurry into the Bokaro river and to take further action under the relevant provisions of the water Act against the Tata Iron & Steel Co.

The court, after hearing the rival contentions and perusing the specific averments contained in the counter-affidavits filed on behalf of the State Pollution Control Board, came to the conclusion that the petitioner's allegation was without substance. Dismissing the petition, the Court was of the view that the petitioner filed the petition not in any public interest but for his own personal interest which he had in the collection and transportation of the sludge/slurry flowing out of the washeries of the respondents. Dealing with the scope of PIL, the Court observed:[45]

> "Public interest litigation cannot be invoked by a person or body of persons to satisfy his or its personal grudge and enmity. If such petitions under Article 32 are entertained it would amount to abuse of process of the court, preventing speedy remedy to other genuine petitioners from this court. Personal interest cannot be enforced through the process of this court under Article 32 of the Constitution in the garb of a public interest litigation. Public interest litigation contemplates legal proceedings for indication or enforcement of fundamental rights of a group of persons or community which are not able to enforce their fundamental rights on account of their incapacity, poverty or ignorance of law."

43. A.I.R. 1991 S.C. 420.
44. The word slurry or sludge refers to coal particles which are ash free and which are the by-product of a chemical process involving the washing of coal extracted from the mines which is mixed with certain oils and chemicals before it is washed with large quantity of water.
45. See, *supra* n. 43 at 424.

Explaining the scope of the constitutional position of the right to clean environment, the court declared:[46]

> "The right to live is a fundamental right under Article 21 of the Constitution and it includes the right of enjoyment of pollution free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, a citizen has a right to have recourse to Article 32 of the Constitution for removing the pollution of water or air which may be detrimental to the quality of life".

In *Chhetriya Pardushan Mukti Sangharsh Samiti* v. *State of U.P.*[47], the petitioner in a PIL petition prayed for necessary direction to check pollution alleging that the Jhunjhunwala Oil Mills and refinery plant located in the green belt area surrounding Sarnath temple were causing pollution in the thickly populated area. It was alleged that the smoke and dust emitted from the chimneys of the Mills and the effluents discharged from these plants were causing environmental pollution and that they were proving health hazard.

The Court, after examining the facts, circumstances, and nature of the allegations and the history of enmity and animosity between the parties, held that since the respondents compiled with the provisions of the Air Act, 1974 and the Water Act, 1974, the petition was liable to be dismissed. The court also held that the petition was devoid of any merit or principles of public interest and public protection.

(C) Palar River Pollution Case

In *Vellore Citizens Welfare Forum* v. *Union of India*[48] a petition was filed by the Vellore Citizens Welfare Forum seeking a direction to the

46. *Ibid.*
47. A.I.R. 1990 S.C. 2060.
48. A.I.R. 1996 S.C. 2715.

tanneries[49] and other industries which caused pollution by enormous discharge of untreated effluent in the state of Tamil Nadu. It was alleged that the tanneries were discharging untreated effluents into agricultural fields, road sides, water ways and other fields. The Palar river into which the untreated effluent was discharged was highly polluted making its water highly unpotable. The petitioner stated that an independent survey conducted by *"Peree Members"*, a non-governmental organisation, covering 13 villages of Dindigal and Peddlar Chatram Anchayat Unions, revealed that 350 wells out of total of 4678 used for drinking and irrigation purposes had been polluted and that women and children had to walk miles to get drinking water. Justice Kuldip Singh, after examining various reports, affidavits of the parties and the relevant provisions of the Water Act and Environmental Protection Act, 1986,[50] expressed his disappointment with Central Government's performance as regards the discharge of its statutory duties. His lordship observed:[51]

> "It is thus obvious that the Environment Act contains useful provisions for controlling pollution. The main purpose of the Act is to create an authority or authorities under S.3(3) of the Act with adequate powers to control pollution and protect environment. It is a pity that till date no authority has been constituted by the Central Government. The work which is required to be done by an authority in terms of S.3(3) read with the other provisions of the Act is being done by this court and other courts in the country. It is high time that the Central Government realises its responsibility and statutory duty to protect the degrading environment in the country. If the conditions in the five districts of Tamil Nadu, where tanneries are operating, are permitted to continue then in the near future all rivers/canals will be polluted, underground waters contaminated, agricultural lands turned barren and the residents of the area exposed to serious diseases. It is, therefore, necessary for this Court to direct the Central Government to take immediate action under the provisions of the Environment Act".

His Lordship recognised the vital importance of leather industry to the country's development. He stated that the only answer to the conflict between environment and development was the adoption of concept of

49. According to the affidavit filed by Member Secretary, Tamil Nadu Pollution Control Board, there are 584 tanneries in North Arcot District. There are 900 of them in five districts of Tamil Nadu.
50. See, *supra* n. 48 at 2724.
51. *Ibid.*

"Sustainable Development[52] which was accepted and adopted as a viable concept in the Stockholm Declaration of 1972. Emphasising its importance in the context of global environmental protection efforts, he expressed the view that "Precautionary Principle" and "The Polluter Pays" principle were its essential features. As regards the meaning of "Precautionary Principle" the learned judge expressed the view that in the context of municipal law this principle meant that : (*i*) environmental measures - by the State Government and the statutory authorities - must anticipate, prevent and attack the causes of environmental pollution; (*ii*) where there are threats of serious and irreversible damage lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation and (*iii*) the onus of proof is on the actor or the developer/industrialist to show that his action is environmentally benign."[53]

As regards the meaning of "The Polluter Pays" principle, referring, with approval, to the view taken in *Indian Council of Enviro-Legal Action* v. *Union of India*,[54] His Lordship stated that the principle meant that "absolute liability for harm to the environment extends not only to compensate the victims of pollution but also to the cost of removing the environmental degradation. Remediation of the damaged environment is part of the process of "Sustainable Development" and as such the polluter is liable to pay the cost of the individual sufferers as well as the cost of reversing the damaged ecology".[55]

According to Justice Kuldip Singh, these two principles had became part of Indian municipal law by virtue of their being part of the customary international law.[56] After examining the scope of Articles 21,[57]

52. The World Commission on Environment and Development in its Report called "Our Common Future" (Report is known as "Brundtland Report") defines "Sustainable Development" as "Development that meets the needs of the present without compromising the ability of the future generations to meet their own needs".
53. See, *supra* n. 48 at 2721. See also *A.P.P.C.B*, v. *M.V. Nayudu*, 1999 (1) SCALE. 40.
54. A.I.R. 1996. S.C. 1069.
55. See, *supra* n. 48.
56. In India it is an accepted proposition of law that the rules of customary international law which are not contrary to the municipal law shall be deemed to have been incorporated in the domestic law and shall be followed by the courts of law See, *Jolly George Varghese* v. *Bank of Cochin*, A.I.R 1980 S.C. 470 *In Apparel Export Promotion council* v. *A.K. Chopra* , A.I.R 1999, S.C. 625 Dr. Anand, C.J.I. speaking for the Supreme Court observed : (at 634) " The Courts are under an obligation to give due regard to international Conventions and norms for construing domestic laws, more so when there is no inconsistency between them and there is a void in domestic laws.
57. Article 21 States: "No person shall be deprived of his life or personal liberty except according to procedure established by law."

47[58], 48A[59] and 51A[60] (g) of the Constitution and the Water and Air Acts, he expressed the view that "[i]n view of the above constitutional and statutory provisions we have no hesitation in holding that the "precautionary principle" and "polluter pays" principle are part of the environmental law of the country.[61]

His Lordship, taking into consideration all the aspects of environmental law, issued comprehensive directions. His Lordship directed the Central Government to constitute an authority under Section 3 (3)[62] of the Environment (Protection) Act, 1986 with necessary powers to deal with the situation created by the tanneries and other polluting industires in the State of Tamil Nadu. The Central Government was required to confer on the said authority the powers to issue directions under Section 5[63] of the Environment Act and to take measures with respect to the matters referred to in clauses (v), (vi), (vii), (viii), (ix), (x) and (xii) of sub section (2) of Section 3[64]. The Central Government was obliged to constitute the

58. Article 47 declares:
"The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.

59. Article 48 A says:
"The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country."

60. Article 51 A (g) declares:
"The State shall endeavour to - ... protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures."

61. See, *supra* n. 48 at 2721-22.

62. Section 3 (3) of the Environment (Protection) Act, 1986 declares: "The Central Government may, if it considers it necessary or expedient so to do for the purpose of this Act, by order,... constitute an authority or authorities by such name or names as may be specified in the order... and subject to the supervision and control of the Central Government and the provisions of such order, such authority or authorities may exercise the power or perform the functions or take the measures so mentioned in the order as if such authority or authorities had been empowered by this Act to exercise those powers or perform those functions or take such measures."

63. Section 5 of the Environment (Protection) Act,1986 reads: " Notwithstanding anything contained in any other law but subject to the provisions of this Act, the Central Government may, in the exercise of its powers and performance of its functions under this Act, issue directions in writing to any person, officer, or any authority and such person, officer or authority shall be bound to comply with such directions.

64. The matters mentioned in these provisions are as follows:
(*v*) "Restriction of the areas in which any industries, operations or processes or class of industries, operations or processes shall not be carried out or shall be carried out subject to certain safeguards;
(*vi*) Laying down procedures and safeguards for the prevention of accidents which may cause environmental pollution and remedial measures for such accidents;

authority before September 30, 1996.[65] The authority so constituted by the Central Government was to implement the "precautionary principle" and the "polluter pays" principle. The authority was expected, with the help of expert opinion and after giving opportunity to the concerned polluters, to assess the loss to the ecology/environment in the affected areas and to identify the individuals/families who have suffered because of the pollution. It was also expected to asses the amount of compensation to be paid to the said individuals/families. The authority was further obliged to determine the compensation to be recovered from the polluters as cost of reversing the demaged environment. The authority was directed to lay down just and fair procedure for completing this entire exercise.[66] The authority was supposed to compute the compensation under two heads namely, for reversing the ecology and for payment to individuals. The authority should send a statement, showing the total amount to be recovered, the names of the polluters from whom the amount was to be recovered, the amount to be recovered from each polluter, the persons to whom the compensation was to be paid and the amount payable to each of them, to the Collector/District Magistrates of the area concerned. The Collector/District Magistrate was directed to recover the amount from the polluters, if necessary, as arrears of land revenue and disburse the same to the affected persons/families. The authority was directed to issue closure orders to polluter in case he evaded or refused to pay the compensation awarded against him which was in addition to the recovery of the amount of compensation from him as arears of land revenue.[67]

His Lordship imposed pollution fine of Rupees 10,000/- each on all the tanneries in the districts of North Arcot, Ambedkar, Erode, Periyar, Dindigul Anna, Trichi and Chengai M.G.R. and directed the Collectors/ District magistrates of these districts to recover the fines from the tanneries. The money so collected as pollution fine should be deposited, alongwith

(*vii*) Laying down procedures and safeguards for the handling of hazardous substances;
(*viii*) Examination of such manufacturing processes, materials and substances as are likely to cause environmental pollution;
(*ix*) Carrying out and sponsoring investigations and research relating to problems of environmental pollution.
(*x*) Inspection of any premises, plants, equipments, machines, manufacturing or other processes, materials or substances and giving by order, of such directions to such authorities officers or persons, as it may consider necessary to take steps for the prevention, control and abatement of environmental pollution and....
(*xi*) Collection and dissemination of information in respect of matters relating to environmental pollution".

65. See, *supra* n. 48 at 2726.

66. *Ibid.*

67. *Ibid.*

the compensation amount recovered from the polluters, under a separate head called "Environment Protection Fund" which should be utilised for compensating the affected persons as identified by the authorities and also for restoring the damaged environment. The pollution fine was liable to be recovered as arears of land revenue. The tanneries which failed to deposit the amount by October 31, 1996 should be closed forthwith and should also be liable under the Contempt of Courts Act.[68] The authority was directed to frame in consultation with expert bodies like NEERI, Central Board, scheme/schemes for reversing the damage caused to the ecology and environment by pollution in the State of Tamil Nadu. The State Government under the supervision of the Central Government was obliged to execute the scheme/schemes so framed. The expenditure should be met from the "Environment Protection Fund" and from other sources provided by the State Government and the Central Government. Justice Kuldip Singh suspended the closure orders in respect of all the tanneries in the districts of North Arcot, Ambedkar, Erode Periyar, Dindigul Anna, Trichi and Chengai M.G.R. and directed all the tanneries in the above districts to set up CETPs or Individual Pollution Control Devices on or before November 30, 1996. Those connected with CETPs should have to install, in addition, the primary devices in the tanneries. All the tanneries in the above five districts were asked to obtain the consent of the Board to function and operate with effect from December 15, 1996. The tanneries that were refused consent or those who failed to obtain the consent of the Board by December 15, 1996 should be closed forthwith. The learned Judge directed the Superintendent of Police and the Collector/ District Magistrate/Deputy Commissioner of the district concerned to close all those tanneries with immediate effect which failed to obtain the consent from the Board by the said date. Such tanneries should not be reopened unless the authority permitted them to do so. It would be open to the authority to close such tanneries permanently or to direct their relocation.[69]

Finally the learned judge observed that it was not necessary for the Supreme Court to monitor these matters any further and that the Madras High Court was better suited to do the job. He requested the Chief Justice of Madras to constitute a Special Bench known as " Green Bench" to deal with this case and other environmental matters.[70]

68. *Ibid.*
69. *Id.* at. 2727.
70. *Ibid.*

(D) Badkhal and Surajkund Lakes Pollution Case

In *M.C. Mehta* v. *Union of India*[71] the Supreme Court followed the ratio laid down in *Vellore Citizens Welfare Forum*[72] case regarding the concept of "Sustainable Development" In this case, in order to prevent environmental degradation around Badkhal and Surajkund lakes in the State of Haryana which are popular tourist resorts almost next door to the capital city of Delhi and in order to protect them from environmental degradation the Supreme Court ordered that no construction of any type should be permitted now onwards within 1 km radius of Badkhal and Surajkund lakes[73]. This order was in modification of earlier order prohibiting any construction activity within 5 kms radius of these two lakes. The present order was based upon two expert reports prepared by the Central Pollution Control Based and the National Environmental Engineering Research Institute (NEERI) wherein it was opined that large scale construction in the vicinity of these tourist resorts might disturb the rain water drain which in turn might badly affect the water level as well as the water quality of these water bodies. Such construction might also cause disturbance to the aquifers, which are the source of ground water, besides causing disturbance to hydrology of the area.[74]

In this case the Court referred with approval to the "Precautionary Principle" which makes it mandatory for the State Government to anticipate, prevent and attack the causes of environmental degradation and which has became not only part of the Indian municipal law but also part of environment law. According to the Court this was so because of Articles 21, 47, 48A and 51A(g) of the Indian Constitution which gave a clear mandate to the state to protect and improve the environment and to safeguard the forest and wildlife of the country.[75]

It may also be noted that in an earlier case of *M.C. Mehta* v. *Union of India*,[76] the Supreme Court, among other things, gave directions to stop mining operations within the radius of 5 kms from the tourist resorts of Badkhal lake and Surajkund in the State of Haryana.

(E) Dhosani Tank, River Khari and Wet Lands Pollution Cases

In *M/s Ambuga Petrochemicals Ltd.* v. *A.P. Pollution Control Board*,[77] the petitioner questioned in writ petition the order of the A.P. Pollution

71. (1997) 3 SCC 715.
72. See, *supra* n. 48.
73. Se *Supra* n. 71 at pp. 720-21.
74. *Id.* at 718.
75. *Id.* at 720.
76. (1996) 8 SCC 462.
77. A.I.R. 1997 A.P. 41.

Control Board directing the petitioner to close down its industry. The order was issued pursuant to its statutory obligation to take all necessary and effective measures to prevent water pollution. The order for closure was issued on the ground that the petitioner contravened the condition of the consent order by the non-operation of the effluent treatment plant which resulted in the discharge of untreated effluents into Dhosani Tank causing damage to surface and ground water and to the surrounding environment. He was given a show cause notice under section 33A of the Water Act before closure order was finally issued. The main issue before the High Court was whether or not the closure order suffered from any illegality. Since there was no complaint of any procedural unfairness or malafides, the court dismissed the petition, holding that it was satisfied that every aspect of the matter required to be considered by the Board was taken into consideration and that the order was not based upon any extraneous or irrelevant grounds. The court observed that it was not possible to hold that the order passed was "shockingly disproportionate and excessively severe.[78]

In *Narula Dying and Printing Works* v. *Union of India*,[79] the State Government of Gujarat which was the delegate of the Central Government under section 23 of the Environment Act, 1986, issued a closure order directing the petitioners to stop its production activities and to take necessary steps to make the waste water being discharged by the units to conform to the standard specified by the Gujarat Pollution Control Board and not to restart the production activities without the permission of the State Government and Forest and Environment Department. In issuing the closure order, the State Government dispensed with the requirement of opportunity being given for filing objections against the proposed order as required under rule 4(3)(a) of the Environment (Protection) Rules, 1986, issued under section 6 of the Environment Act, 1986. Evidently, the State Government took advantage of rule 4(5)[79a] to dispense with the requirement of hearing on the ground that the release of untreated effluent in "River Khari" caused irreversible damage to the crops and agricultural lands which could not be allowed any longer. The petitioners who obtained consent orders from the State Pollution Control Board committed

78. *Id.* at 46.

79. A.I.R. 1995 Gujarat 185.

79a. Rule 4 (5) of the Environment (Protection) Rules, 1986 reads: " In a case where the Central Government is of the opinion that in view of the likelihood of a grave injury to the environment it is not expedient to provide an opportunity to file objections against the proposed direction, it may, for reasons to be recorded in writing, issue directions without providing such an opportunity".

a breach of the condition of the consent orders by their failure to put the necessary effluent treatment plants which resulted in the lapse of their consent orders. The Gujarat High Court, after examining all the relevant materials, held that the "State Government was fully justified in proceeding under rule 4(5) while exercising its delegated powers for issuing directions under S.5[80] of the Act as in the impugned orders."[81]

Preservation of wetlands is crucial to cleaner and purer environment. Wetlands being bounty of nature do have a significant role to play in the proper development. India, being a contracting party to the Ramsar Convention, an Inter-Governmental Treaty on Wetlands, is under an obligation to promote the conservation of wetlands habitat in India. Therefore, any attempt at encroachment, interference or reclamation should be questioned by environmentalists. This was precisely what was done in *People United for Better Living in Calcutta* v. *State of West Bengal*,[82] where a PIL petition was filed questioning the Salt Lake Development plan which envisaged reclamation of Calcutta's Wetlands[83] for the purpose of the construction of not only residential complexes but also World Trade Centre. The Calcutta High Court, while emphasising the need for harmonisation between the claims of ecology and development, also emphasised on the role of Judiciary in the harmonisation process. In this context, the Court observed:[84]

> "There is no manner of doubt that the issue of environmental degradation cannot but be termed to be a social problem and considering the growing awareness and considering the impact of this problem on the society ... the Law Courts should also rise to the occasion to deal with the situation as it demands in the present day context. Law Courts, have a social duty since it is a part of the society and as such, must always function having due regard to the present day problems which the society faces.

80. Under section 5 of the Environment (Protection) Act the Central Government is invested with power to issue a closure order.

81. See, *supra* n. 79 at 194.

82. A.I.R. 1993 Calcutta 215.

83. Wetlands are vast areas of water-logged land mass. The amount of water in them varies depending on the weather and the time of the year. Sometimes they can be quite dry. Special plants such as reeds grow in wetland areas. Wetlands also provide a home for a host of different wildlife ranging from migratory and local birds to fish, reptiles, amphibians and insects. All these things depend on wetland for their existence.
In Calcutta's wetlands there are about 155 species of summer birds of which 64 species are resident birds and 91 are migratory. There are 90 species of winter birds of which 44 are residents and 46 are migratory.

84. See, *supra*, n. 82 at 228. See also p. 231.

> It is now a well-settled principle of law that the socio-economic condition of the country cannot be ignored by a court of law... and that while dealing with the matter the social problems shall have to be dealt with in the way and in the manner it calls for, since benefit to the society ought to be the prime consideration of the law courts and ecological imbalance being a social problem ought to be decided by a court of law so that the society may thrive and prosper without any affectation".

Disposing of the petition, the court ordered for status quo and advised the state (respondents) to apply to the court for variation of this order with proper materials for further consideration of this court.[85]

(F) Miscellanious Cases

In *Talchar Swasthya Surakshya Parishad* v. *Chairman-cum-Managing Director, Mahanandi Coalfields Ltd.*,[86] a public spirited individual filed a writ petition under Article 226 of the Indian Constitution seeking an injunction against coal mining operations of the respondents on the ground that these operations caused environmental pollution in all the areas near the Talchar area in the State of Orissa which was the site of the operations. It was alleged that there had been flagrant violation of the Water and Air Acts resulting in the pollution of air and water rendering the latter unsuitable for drinking purpose. The High Court, after examining the facts of the case, ordered the State Pollution Control Board to take necessary and appropriate and stringent steps to deal with the problem of alleged pollution.[87]

In *M.C. Mehta* v. *State of Orissa*,[88] the Orissa High Court highlighted the need for the government and the concerned authorities to be alert to the environmental problems. The court held that the authorities should wake up before the matter slips out of their hands. Their approach should not smack of mercenaries. The court directed the state government to immediately act on the reports and take necessary steps to prevent and control pollution of water, which was supplied for human consumption by the discharge of municipal sewage and domestic wastewater.

In *R.R. Singh* v. *State of Bihar*[89] the Patna High Court constituted a committee of experts for ascertaining necessary facts. On the basis of

85. *Id.* at 232.
86. A.I.R. 1996 Orissa 195.
87. *Id.* at 199.
88. A.I.R. 1992 Orissa 225.
89. A.I.R. 1992 Patna 86.

Experts Committee Report the High Court framed a scheme and permitted the distillery company which had been discharging beyond its premises untreated effluents, chemical wastes and sewage, thereby contaminating the water resources and polluting the environment, to restart its manufacturing process with adequate safeguards. The court also applied "Polluter Pays Principle" to meet the medical expenses of the victims of pollution.

In *Attakoya Thangal* v. *Union of India*[90] the Kerala High Court held that the denial of fresh air to breath and sweet water to drink is denial of the right to live. It is, perhaps, the worst that can be done to any generation. No state or society should do it. These are the basic elements, which sustain life itself. In this case tubewell digging to draw water from ground channels was successfully questioned on the ground of environmental degradation.

Lastly, in *Essential Services and Consumers' Association* v. *Jal Shashan*,[91] on the receipt of complaints of contaminated water, the honourable judges of the Allahabad High Courts made spot inspections to verify the veracity of the complaints. The court issued various directions to the local authorities including periodic checks by the official concerned. Interestingly, the court did not make any reference to the Water Act, 1974.

IV. Conclusion

As evident from the above discussion, the Indian higher judiciary has played its activist role admirably well to give not only preventive relief but also remedial justice by giving necessary and appropriate direction to the concerned authorities. In the area of environmental protection which includes the control and prevention of water pollution the judges have shed their inhibitions as arbiters and have taken the role of law and policy makers.

Notwithstanding the commendable role played by the Indian judiciary in the prevention of water pollution it has its own limitations. The judicial efforts have centered around the issue of the effective enforcement of the existing water laws and of the statutory responsibilities of the concerned statutory authorities who have been found wanting in discharge of their duties. It may be noted that the main responsibility for the protection of water resources of the country along with the responsibility of prevention of water pollution lies, ultimately, with the legislative and executive wings of the state. It is unfortunate, as evidenced from some of the cases discussed above, that inspite of the available water laws, the problem of

90. (1990) ker L.J. 580.
91. (1987) All. L.J. 446.

control and prevention of water pollution has become a daunting problem, calling for drastic remedial administrative efforts.

Inspite of the inherent limitation which the courts have in the judicial enforcement of environmental laws, the Indian Supreme Court has expressed it concern for the protection of environment in these words:[92]

> "Environmental concerns arising in this court under Article 32 or under Article 136 or under Article 226 in the High Courts are, in our view, of equal importance as human rights concerns. In fact both are to be traced to article 21 which deals with fundamental right to life and liberty. While environmental aspects concern "life", human rights aspects concern liberty. In our view, in the context of emerging jurisprudence relating to environmental matters as is the case in matters relating to human rights, it is the duty of the court to render justice by taking all aspects into consideration.[93]

92. *A.P. Pollution Control Board* v. *Prof. H.V. Nayudu*, 1999 (1) SCALE 140.
93. *Id.* at 156-157.

RECONCILING THE BURGEONING PRINCIPLE OF CONSTITUTIONAL JUSTICE AND THE CLASSICAL CONSTITUTIONAL THEORIES — A COMPARATIVE ANALYSIS

*Narsinghen Hambyrajen**

INTRODUCTION

While burgeoning concept of Constitutional Justice seems to conflict with many existing constitutional theories, at the same time it can rely on the support of a few such theories. Any worth while study of this principle calls for a comparative approach. Involving the analysis of the relevant issues and concepts in the context of the functioning of the constitutions of certain countries.[1] The three constitutions which will be studied are those of UK, which belongs to the Common law family and of France and Germany which belong to the civil law family[2] Hasty conclusions cannot be drawn, unless all the factors have been taken into consideration.[3] The concepts which have to be analysed are : Higher Norms and written constitutions, supremacy of higher norms, methods of enforcement of constitutional principles. These concepts are complex and are sometimes contradictory as pointed out by Burdeau.[4] These contradictory concepts have to be articulated with other overtly conflicting ones like: Sovereignty of Parliament, Separation of powers, Independence of the Judiciary.

One can imagine the delicate tasks of legal systems to reconcile all these cocepts within the framework of Constitutional justice. So, the comparison is both on the latitudinal plane, to analyse the concepts, and the longitudinal plane to analyse the articulation of these concepts within the three countries mentioned above. The legal provisions and the relevant case-law cannot be analysed in isolation[5]. Ian Harden rightly pointed out

* Director, Law Department, University of Mauritius L.L.B. (Hons) LL.M. (Exeter University)
1. Zeigert and Kotz, INTRODUCTION TO COMPARATIVE LAW, p. 31.
2. Peter De Cruz, COMPARATIVE LAW IN A CHANGING WORLD, pp. 27, 43, 103.
3. J Robert, Le droit Compare Aujourd' hui et demain', REVUE INTERNATIONALE DE DROIT COMPARE, Avril/Juin, 1996, p. 349.
4. Burdeau, UNE RESSURECTION, LA NOTION DE CONSTITUTION, 1990, RDP 5 - Reference to' Dipositions floues et contradictoires.'
5. P Legrand, Comparer, Revue Internationale de Droit Compare, Apvil/Juin, p. 291.

that constitutional issues are at the interface of law and politics. This statement may seem right as a perfect syllogism. However, such conclusion may be wrong, as the Government practice may be such that political control is effective. In fact the full impact of a constitution can best be observed from Government's practice.[6] So, all the necessary precautions will be taken to avoid the usual traps in a comparative exercise. The paper will analyse the question in the following way: Origins and burgeoning of Constitutional Justice in the first part, then the hierarchy of norms will be studied, followed by theological consequences which flow from the analysis. Finally, the enforcement of constitutional justice will be analysed.

A THE CONCEPTS

(i) Constitutional Justice — Its Origins and Burgeoning

Constitutional Justice is a furtherance of Constitutionalism.[7] It is a relatively modern concept, although the concepts of justice and constitution were well-known since the time of monarchy and even before, as expounded by Plato[8] and Aristotle. The Athenians had a concept of norm which was very near to the idea of Constitution. Justice had always been a burning aspiration of mankind.[9] It has often been spearheaded by Revolutionaries.[10] To understand 'Constitutional justice' in the modern sense[11] the concept of Constitution must be appraised. In the abstract sense,[12] a Constitution is the law which delimits the relations between various organs of the State and defines the relations between the State and the individuals[13]. The State itself is subject to the Constitution.[14] Constitutional justice in the formal sense is nothing but resolving of disputes by the Court, arising out of the rules of the Constitution, where organs of the State may be involved or where individuals are being

6. Jowel and Olliver, THE CHANGING CONSTITUTION, Introduction.
7. Indicates that Government power is limited. Constitutional norm and procedures have been designed and institutions set up to enforce such limitations, Cappelleti, JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVES, p. 20.
8. Plato, THE REPUBLIC.
9. V Prakshan, MODERN POLITICAL THEORY, p. 137.
10. *Ibid.*, p. 137. Liberty, Equality and Fraternity (The liberal view of the French Revolutionaries).
11. Another meaning of Constitutional justice : That condition is which citizens must trust their Government to uphold certain rights considered inviolable, M Capelletti, *op. cit., supra* note 7. p. 25.
12. In the concrete sense it is document which embodies the law, O Hood Philips and P Jackson, CONSTITUTIONAL LAW AND ADMINISTRATIVE LAW, p 5.
13. *Ibid.*, p. 5.
14. Charles Debbasch, DROIT CONSTITUTIONNEL ET INSTITUTIONS POLITIQUES, p. 74.

deprived of their fundamental rights. The French and German authors[15] refer to 'Contrôle de la constutitionnalité des lois'.[16] Constitutional review at an embryonic stage can be traced to the time of Holy Empire.[17] The burgeoning of constitutional justice in the modern sense was triggered by the landmark decision of *Marbury* v. *Madison*.[18] Ironically, J.J. Marshall put in practice the result of centuries of European thought.[19] The European countries like France, under the influence of the Revolutionaries, had a deep mistrust of the judiciary and did not implement their own ideas.[20] However, the post-World War II era, consecrated the concept of 'constitutional justice' in Europe,[21] including Germany[22] in 1949. The traumatic experience of the war showed clearly that Parliament alone was incapable of guaranteeing fundamental rights without supervision of the judiciary. The French torn between the dilemma[23] of mistrust for the judiciary and the quest for constitutional justice expanded the role of Conseil d'Etat.[24] Finally, the concept of constitutional justice was consecrated in the 1958 Constitution with the setting up of a Constitutional Council in France. The framers of various European constitutions hoped that such consecration of Constitutional justice would foster the growth of liberal democracy.[25] It is to be noted that the English revolution of 1688 was hostile to the idea of Constitutional justice.[26] The British system remained aloof from the constitutional development taking place in the rest of Europe. However, they developed the idea of 'Constitutionalism,' whereby Governmental powers will be limited by two concepts: Rule of law and separation of powers.[27] UK took a different route to try to achieve the same results as France and

15. Georges Burdeau, DROIT CONSTITUTIONNEL.
16. Donald P. Kommers : JUDICIAL POLITICS IN WEST-GERMANY, p. 29.
17. *Ibid.*, p. 30. 'POLITICAL CONSTITUTIONAL REVIEW IN GERMANY EMERGED INT HE NINETEENTH CENTURY.'
18. 1803 1 Cranch 137.
19. M. Capelleti, *Supra* note 7, p. 25.
20. Richard J Cimins, THE GENERAL PRINCIPLES OF LAW, SEPARATION OF POWERS AND THEORIES OF JUDICIAL DECISION IN FRANCE p. 599. 'The ideology of the revolution was in consequence.
21. M. Capelleti, The Judicial Process in comparative perspective, p. 184, 'Constitutional Justice in Australia since 1945, Japan since 1947, Italy since 1948.
22. C. Stark, MAIN PRINCIPLES OF GERMAN BASIC LAW, p. 23.
23. Cumins, *op, cit.*, note 20, p. 596.
24. S. W. Sheive, 'Central and eastern European Constitutional Courts and the anti-majoritarian objection to judicial review. 'LAW AND POLICY IN INTERNATIONAL BUSINESS, Vol 26, 1994-95, p. 1204.
25. M Capelleti,' Judicial review of legislations: European antecedents and adaptations. HARWARD LAW REVIEW, Vol. 79, p. 1206.
26. *Ibid.*, p. 1207.
27. J Alder, CONSTITUTIONAL AND ADMINISTRATIVE LAW, pp. 38 and 54.

Germany. Can it be successful?[28] The concept of sovereignty of Parliament is the other face of the coin, which up to now has allowed only judicial review to expand at the number of constituitonal review. Some countries, like Mauritius, South Africa and India have made a synthesis of both models. In a framework of constitutional justice, there are number of conditions precedent for it to operate amongst which is the system of hierarchy of Norms.

(ii) The System of Hierarchy of Norms

At one time, even in Europe the hierarchy of norms was not recognised, especially during the period of abslute Monarchy. The king could not subject himself to Higher norms. Gradually this absolute conception changed, whereby the king was bound by certain minimum norms,[29] lest the population could revolt. This was the starting point of the differentiating of law. The same situation prevailed in Germany, France and UK.[30] The turning point for a hierarchy of norms was the French Revolution. The objective of the revolutionaries was to contain the powers of Executive and subject it to law.[31] This marked also the emergence of 'un etat de droit'. This new theoretical framework lent support also to the Liberal State.[32] The 'Rule of law' was already in force in the UK, but it lacked the strong theoretical background. In France, Germany, the judicial order became structured, where the laws were articulated on the principles of hierarchy and subordination.[33] The other logical consequence of this new paradigm is to make this hierarchy effective by an enforcement system. However, the French Revolutionaries were trapped with the idea of Rousseau, according to which law is the expression of the General will, bestowed in Parliament which cannot be limited as opposed to the superiority of the Constitution. It was only in 1958, that the French Constitution gave full significance to the hierarchy of norms.[34] The Germans were relatively more prompt to resolve the dilemma, whilst the British were clear that there was no need for a hierarchy of norms. The British took a very challenging path, to articulate the 'Rule of law' outside a system of hierarchy of norms.

28. *Ibid.*, p. 38. 'The fundamental problem with constitutionalism is that laws are made and enforced by governments, so how can government under law be anything more a hope that our rules will be benevolent.
29. J. Alder, *op. cit., supra* note 27, p. 39.
30. Refers to the Magna Carta - subservience of the King to the idea of law.
31. Chevalier, L'etat de droit, 1988 R.D.P., p. 319.
32. *Ibid.*, p. 319.
33. *Ibid.*, p. 320.
34. *Ibid.*, p. 327.

(iii) Justification of the System of Hierarchy of Norms

The concept of 'L' Etat de droit' with a hierarchical juridical structure was justified by Vienna Normative School, especially Kelsen. Each norm in a state derives its validity from a superior norms.[35] At the top of the pyramid, the Constitution stands as the superior norm. The Constitution itself derives its validity from a higher norm which is presupposed, the Grundnorm.[36] The Grundnorm is immutable and it can be changed only where there is break in legal continuity, eg, revolution. The hierarchy of norms was also justified by Hart's rule of recognition. Once the hierarchy of norms is accepted, the general law (Primary legislation, subsidiary legislation) becomes subordinated to the Constitution and idea of Supremacy of Parliament becomes antagonistic.[37] Some authors justify the Superiority of the Constitution, on the basis that it is a sort of 'social contract' which embodies essential or fundamental features of the State.[38]

Both French law (1958 Constitution) and German law (Basic law) give signficance to the hierarchy of norms, where the Constitution is supreme.[39] French law consecrates a rigorous hierarchy of law with the Constitution at the apex and parallel to it are supra-constitutional concepts such as: Declaration of 1789, Preamble of 1946, Fundamental principles of the Republic. Then, down the ladder, there are International treaties and agreements. It further differentiated between organic laws and ordinary laws of the Constitution. Finally, at the lower end of the ladder, there will be regulations. The UK system does not differentiate between the different laws and even the constitutional law in nothing for an ordinary law.[40] Exceptionally, subsidiary legislation will be subject to judicial review.[41]

35. P. Elefthenades, 'Aspects of European Constitutionalism', EUROPEAN PUBLIC LAW REVIEW. Vol. 20, No. 1 Feb. 1996, p. 31.
36. David G. Morgan, The Indian Essential features,' 1981, ICLQ, p. 332.
37. Carre de Malberg, La Loi, p. 222.
38. D. Morgan, *op. cit., Supra* note 36, p. 324. The idea of 'social contract' cf. Rousseau, is given a new significance in the Indian context, where the constitution assumes a 'social' dimension.
39. Basic Law, Article 1(3). 'The following basic rights shall bind the Legislation, the Executive and Judiciary as directly enforceable law. Refer to Article 61 of the Fifth French Republic.' Organic enactments before promulgation and standing orders of the House of Parliament before they take effect must be submitted to the Constitutional Council for a ruling on their conformity to the constitution.
40. J Alder, *op. cit., supra* note 27. 'The Magna Carta is sometimes regarded as Britain's closest equivalent to a written constitution. In, fact, Magna Carta is an ordinary piece of legislation...'
41. O. Hood Phillips, Constitutional and Administrative Law, p. 577.

(iv) Supremacy of the Constitution/Written Constitution

Both the German and French systems, have consecrated the Supremacy of the Constitution.[42] UK which belongs to the Common law family has not chosen that option, though other variants within the common law families have chosen to place the Constitution as supreme. For example. US, India, South Africa, Trinidad, Mauritius,[43] have done so. Supremacy of the Constitution entails a limit on the powers of Parliament.[44]

Once it is accepted that the Constitution is the Supreme law, a number of mechanisms have to be devised to make this operational. One of them is to embody the law in a single written document.[45] It is a written Constitution, as opposed to an unwritten Constitution .[46] However, the most important feature of written Constitutions,[47] is the 'entrenchment' of the principles. Special protection is given to the provisions of the Constitution. Special or qualified, or unanimous vote in Parliament will be required to amend the Constitution.[48] Some authors qualify such Constitution as rigid, but it is contended that semi-rigid suits best. Rigid Constitution is best reserved to a situation where the Constitution cannot be amended at all.[49] Both the French and German Constitutions consecrate the semi-rigid model, where qualified majorities will be required.[50] In France, if the President so wishes, the referendum can be avoided, provided the

42. La Constitution becomes effective politically first and then juridically.
43. Mauritius, a mixed law jurisdiction with a constitution based on the Westminster Export model has express provision which delays the constitution to be supreme, Section 2 of the Mauritian Constitution.
44. R Cumins, *op. cit., supra* note 20, p. 602.
45. The other mechanisms is controlled by a court or institution. This will ensure and assert the supremacy of the constitution, see Julliard. Difficultes du changement en matiere constitutionnelle: L' amenagement de Aerticle 61 de la constitution, 1974, RDP, 1703.
46. The unwritten constitution does not imply absence of any written document, but the absence of a single document embodying the constitutional law.
47. C Stark, Main Principles of German Basic Law, "The basic law in a written Constitution," p. 99.
48. O Hood Philipps, *op, cit., Supra*, note 41, p.6. "Most European and American constitutions are rigid. The method of amending 'fundamental or constitutional laws varies in different constitutions - legislative sitting in a special way (France) or with prescribed majority or prescribed quoram as Belgium, the convention of a special constituent body as in the United States) : referendum (Switzerland). See also M Capelleti, Hardward Law Rev., Vol 79, p. 1214.
49. D G Morgan, op. cit., supra note 36, pp. 307-308. Referring to the Indian Case of *Kesavananda* v. *State of Kerala* A.IRSC. 1461, "The constitution could not amended so as to abrogate any of its essential features.'
50. Section 89 of the Fifth French Republic and Section 79 of the Badic Law (two third majority is required in both house of Parliament). See also C Debbasch, *op., cit., supra* note 14, p. 98.

amendment is sanctioned by a majority of three-fifths of the votes cast. Both Constitutions prevent certain amendments.[51] At this stage it is important to ask why in written constitutions entrenchment mechanism is important? For some authors, the written form is a guarantee for certainty.[52] Since written, it will be known to the public.

Constitutional lawyers may analyse it critically and this will limit the powers of the legislature. A priori, a written Constitution will exclude general principles emanating from case-law.[53] Is it always so?

Dose a written Constitution with entrenched provisions provide better protection to Fundamental rights? The issue is quite debatable. The advantages of a written Constitution have been pointed out. Some authors and movements still press for a written Constitution in UK.[54] Alternatively, Lord Lester proposed a legislation in between ordinary legislation and entrenched constitutional provision, in an attempt not to conflict with the principle of Sovereignty of Parliament. However, for some authors, like Sir Nocholas Lyell, a written Constitution, is fossilisation of principles which will not be in touch with reality.[55] Allan,[56] on a different premise, argued that without a written Constitution, the powers of Parliament can still be curtailed, so as to protect fundamental rights and liberties. So, a writtten Constitution is not a *sine qua non* for protection of fundemental rights. Procedural justice, through the rule of law can theoretically replace the advantages of a written Constitution. Has it been done so in UK? It would seem that such is not the case in actual practice.[57] Furthermore, some authors use the ideas of political and moral rights of R.Dworkin to temper the omnipotence of the Queen in Parliament.[58]

51. Art. 79(3) of Basic Law' Amendments of this Basic law affecting the division of the Féderation into Laender, the participation on principle of the Laender is legislation or the basic principles laid down in Article 1 and 20 shall be inadmissible. Art. 89 (last subsection) of Fifth French Republic - The Republic form of Government is not subject to amendment.
52. Une Resurrection: La notion de Constitution, 1990. RDP, p. 5.
53. *Ibid.*, p. 5.
54. Institute for Public Policy Research - A written constitution for the United Kingdom - They stressed the need for a written constitution and the need for entrenchment of rights.
55. Sir Nicholas Lyell (Attorney General in UK) Wither Strasbourg? Why Britain should think long and loud, before incorporating the European Convention on Human Rights, 1997 European Human Rights Law Review, Issue 2 - The author pointed out that a written constitution in the ex-USSR did not afford any better protection.
56. TRS Allan, 'Legislative Supremacy and the rule of law : Democracy and Constitutionalism,' 1985, Cambridge Law Journal, p. 112. According to the author, the Rule of Law has been underestimated and it can be used to legitimise the intervention of the Court to rule out unconstitutional legislation.
57. Lord Lester, 1997 European Human Rights Law Review, supra note 54.
58. J Jaconelli, 'Constitutional review in an unwritten constitution,' 1985, International Comparative Law Quarterly, Vol 34, pp. 627-628.

(v) Supra-Constitutional Concepts/ Written Constitution

Furthermore, it can be found that a Constitution can be complemented by supraconstitutional concepts. So, a written Constitution is not necessarily antagonistic to general principles.[59] Originally, the French Constitutional Council was set up to maintain the balance between the various powers and to control the legislature.[60] However, the landmark decision of 16th July 1971[61] on the Freedom of Association was a turning point of the impact of case law recognised by the Republic were given constitutional validity.[62] Constitutional interpretation can lend considerable support to the concretisation of supra-constitution concepts into positive law. Does this amount to a 'Government des judges?[63] On the contrary, many authors agree with the course taken by the Council.[64] From 1971 onwards, the Constitutional Council has asserted its role as guardian of the fundamental rights and has been quite prolific.[65] In Germany. The Constituitonal Court has been quite active and has made use of supra-constitutional concepts also.[66] The higher courts in England have also created supra-constitutional concepts which have not been used to foste constitutional review and to promote Human Rights.[67]

(vi) Principles and Theories Conflicting Against Constitutional Review/Supremacy of the Constitution

The first principle which conflicts against constitutional review is the theory of separation of powers. This doctrine lent support to the theory of Supremacy of Parliament. These two principles characterised English, German and French law. Sovereignty of Parliament is still a main pillar of British constitutional law. This concept was pushed to its extreme by

59. G Morange, Une categorie juridique ambigue - les principes generaux de droit, RDP, 1977(2), p. 765.
60. L Philip, la portee du controle exerce par le Conseil Constitutionnel, 1994, RDP, 531. Sec also views of Favoreu "Le Conseil Constitutional regulateur des pouvoirs publics', 1967, RDP, p. 65.
61. Favorell & Philip, Les grandes decisions du Conseil Constitutionnel, 8th edn, Dalloz 1995, pp. 229-323.
62. Granrut, Faut-it accorder aux citoyens le droit de saisir le Conseil Constitutionnel? 'L' oeuvre realisee par le conseil Constitutionnel pour preciser les liberte anisi proteges est considerable.
63. Emeri, Government des juges ou veto des sages?.1990 RDP, p. 335. The author argues that the Constitutional Council has given a normative value to the Constitution and 'bloc de la constitutionalite.
64. Jean Rivero qualified the 1971 decision as a historical one which questioned definitely the principle of Sovereignty of the law.
65. Favoreu, Le droit Constitutionnel Jurisprudentiel, 1985, RDP, pp. 339 and 404.
66. Kommers, Supra note 15, pp. 209-210, "Yet the court has formulated certain 'unwritten constituitonal principles".
67. Bernard Chanrebout, Droit Constitutionnel et Politifque, p. 46.

Dicey.[68] Such a concept in its extreme form cannot allow Constitutional Review.[69] and can also lead to abuse.[70] For a certain period of time, the Revolutionaries in France placed the supremacy of law as the guiding principle and this prevented any constitutional review from being effective.[71] Rousseau's conception of the law. places the judiciary and executive in a subordinate position. The German system also held similar views and was not ready for constitutional review. The French revolutionaries also were adamant on separation of powers,[72] unlike the American constitutional lawyers who adapted the theory by coining the principle of checks and balances. There was apprehension that the judiciary would encroach on the legislature.[73] Another important principle which inhibits constitutional review is that of Independence of the judiciary[74] which would drag the judges in the arena of politics.[75] According to some authors, however, practice shows that the members of the Council in France once appointed are not necessarily answerable to their political masters.[76] Another criticism against constitutional review is that it is anti-majoritarian.[77] Such argument does not stand on various grounds. Firstly, in most European countries, including Germany, France and UK, it is Liberal Democracy which prevails.[78] Secondly, constitutional reivew enhances the overall democratic quality of the political process by protecting fundamental rights. So it is less vulnerable to the anti-majoritarian[79] objection. It can be seen that these countries, especially France and Germany have tried to unify and reconcile the various contradictions among the constitutional principles. Theories like separation of powers, majority rule (classical

68. Jowell & Oliver, *op. cit.*, supra note 6, p. 10. Sovereignty as a concept was first developed by Bentham and it was refined by J Austin.
69. D Feldman, Public Interest Litigation and Constitutional Theory in Comparative Perspective, 1992, Modern Law Review, p. 44.
70. D Feldman, *ibid.*, p. 46.
71. R Cummins, op., cit supra note 20, p. 599. 'Laws adopted by the people express the general will (volonte generale) and cannot be subejcted to any higher control. Rousseau's theory of the general will is applied in practice to a parliamentary system by regarding their members as limited to the role of expressing the will of their constituents.
72. *Ibid.*, p. 598. Montesquieu does not clearly distinguish the judiciary from the executive in one of this texts. He let a heritage where the courts and the administration are considered as two aspects of the same function.
73. C. Debbasch, *op. cit., supra* ntoe 14, p. 85.
74.
75. Institute for Public Policy Research, *op. cit.*, supra note 54, p. 8.
76. *Ibid.*, pp. 38-40.
77. F L Morton, Judicial review in France: A comparative analysis, 1988, A.J.C.L. p. 95. 'an assault on the volonte generale.
78. M Duvere, Instiutions politiques et droit constitutionnel, pp. 203-352 (Liberal democracy implies that the monority should be oppressed, according to the philisophy of J.S. Mills).
79. S.W. Sheive, op. cit, supra note 24, p. 1220.

Democracy), Independence of the judiciary, Respect of the General will, Parliamentary Sovereignty are still present, but they have been curtailed or mitigated, where the overriding principle remains the supremacy of the Constitution, or rather the qualified Supremacy of the Constitution.[80] The Constitution itself derives its legitimacy from Popular Sovereignty of Parliment. with a subordinate role to the other principles. Following the preliminary conclusions drawn, an ultimate consequence should flow or otherwise supremacy of the Constitution has no significance and the lofty ideal will remain dead letters.[81]

B. Enforcement of Constitutional Law

(i) Court or What?

Should the enforcement of the constitutional rules and standards of the constitutional rules and standards be by a Court or a political body? In US, the control of the constitutionality is done by the Supreme Court.[82] This is so in a number of common law countries.[83] Civil law countries did not choose such option for a number of reasons. Firstly, they have to articulate constitutional review with Separation of powers and Sovereignty of the people. Secondly, the judiciary is a career-based one and the judges may not be competent with the new task. There are so many judges at the apex of the Judiciary that there is lack of authority to the constitutional judgements, especially in the absence of the *stare-decisis* doctrine.[84] The British do not have any separate court to control legislations or delegated legislations, unlike the French, which have a 'Conseil d'Etat' and a Constitutional Council. The Supreme Court and High Court cate for judicial review and it is also theoretically possible for it to cater for Constitutional Review.[85] In Bonham's case,[86] constitutional review was in

80. The term 'Qualified Supramacy of the Constitution' is more apposite, because the Constitution itself makes provision for its amendment by speical procedures or by referendum in French case. So, in a way, it is the 'General Will'. Sovereignty of Pepole which prevails.
81. Rial, Les incertitudes de la notion de constitution sous la verne Republique, 1984 RDP, p. 588, 'L' absence de controle de la constitutionalite rend platonique cette affirmation...'
82. M Capelleti, ' Judicial Review of Legislation, European antecedents and adaptation,' Harvard Law review, vol 79, p. 1240.
83. Sec. 83 of the Mauritian Constitution - The Supreme Court is expressly entrusted with constitutional jurisdiction, unlike US Constitution which is implicit.
84. M Capelleti, *op. cit., supra* note 82, p. 1245. Career judges may shy away from the type of policy-making decisions that are involved in judicial review.
85. Arguments of T.R. Allan, *op. cit.*, supra note 56 and J Jaconelli, op. cit., supra note 58. See also the anachronistic instance of constitutional review in UK as early as 1610 in Dr Bonham's case.
86. Dr Bonham's case, 1977 Eng. Rep. 646. Sir Edward Coke stated, 'when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge it to be void.

operation but the practice was abandoned. In Germany and France two specialised bodies[87] were set up. Are they political organs or judicial organs? Kelsen at the very beginning, pointed out the political nature of constitutional review. A *priori* both seem to be political organs, since they are appointed by political organs. The German system allows a fairer representation of the various political organs.[88] The German system allows a fairer representation of the various political strands than the French one allowed.[89] The Council in France until 1982, was dominated by members belonging to the conservatives, the Right. This has drawn more acid criticisms[90] than the German court. The German 'Court', in spite of its appellation is recognised as political organ.[91] The nature of the French Council has attracted heated debate within 'La doctrine' Protagonists have listed down a number of pointers which qualify it as political organ[92] or judicial organ.[93] From the mass of controversial argumants, it is best to qualify the Council as 'politico-juridical organ' or to retain the formula used by Morton.[94]

Even if the compostition is political, the judges in both systems tend to be neutral.[95] The German judges[96] should hold judicial qualifications, unlike the French members of the Council. However, this sort of shortcom-

87. German Constitutional Court - French Constitutional Council.
88. Art. 56 of French Constitution (President of Republic, President of National Assembly, President of the Senate (3 each) Art 94 of German Badic Law (half by Bundestag and half Bundesrat).
89. Favoreu, Droit Constitutionnel. Jurisprudential., 1985, RDP, p. 402.
90. L Favoreu, Le Conseil Constitutionnel et le President de la Republique dans le cadre de l'alternance (1981-1986) - Pouvoir-edn. 1991-Le Conseil Constitutionnel - Criticism of ex President F Mitterand 'Cour Supreme da Musee Gevin, chapeau derisoire d'une democratie, il n'est aujourd'hui defendu par personne. Son role est de faire souffrir le droit pour servir le pouvoir.
91. D Kommers, *op. cit., supra* note 16 p. 55.
92. M Davis, The Law/Politics - The French Conseil Constitutionnel and the US Supreme Council, 1986, AJCL, p. 45.
93. F Luchaire - Le Conseil Constitutionnel est-elle une juridiction 1975, RDP p. 28. It is political organ derived from Universal suffrage - The 'Doctrine' rallies behind the judicial thesis of Walline, Rivero, Favoreu, Philip, Hauriou etc. The political school lays emphasis on its composition. A more attractive thesis is that the Council is an institutional organ which goes more towards the creation of law, instead of its destruction. See Julliard - Difficultes du Changement en matiere constitutionnele: L'amenagement at 1' article 61 de la Constitution 1974. RDP, pp. 170-6.
94. Morton, *op., cit.*, supra note 77, p 106, "have been able to cloak, so to speak, their political function under legal forms.
95. M Waline, The Constitutional Council of the French Republic, 1963, p. 487, A number of mechanisms have been devised to ensure political neutrality.
96. Kommers, *op. cit. Supra* note 16, p. 87.

ing is redressed by actual practice.[97] The tenure of office is the same for France and Germany.[98] They cannot be removed from office and their mandates are non-renewable. Such tenure of office tries to reconcile independence of the 'judges' and also the 'alternance' which allows to reflect the political landscape.[99] Contrastingly, the tenure of office of the Higher Court in England is indefinite with an age of settlement and the appointment is obviously non-political.[100] However, practice shows that the British judges are often accused of political stance in judicial review cases.[101]

(ii) The Saisine

In UK, anybody can seize the High Court for Judicial Review if he has a *locus standi*. The procedure for 'leave' is viewed as a screening process. The French saisine is quite restrictive and it was even worse before the amendment of 1974.[102] Only certain political authorities are allowed to seize the Council.[103] Such mechanism is not in line with the framework of democracy. Eminent lawyers have been pressing for a more extensive 'saisine'[104]. The French system can lead to the existence of unconstitutional law, since there is no control by 'Voie d'exeption'. Criticisms against widening the saisine were also formulate . It would open the *floodgate* and *install* a 'Governement de juges'.[105]

The second argument is not serious, since the Council is subjcet to the Constitution. The floodgate argument can be mitigated by certain effective mechanisms developed by the Germans.[106] First, individuals can seize the

97. Schartz, New eastern Constitutional Courts, 1997, p. 759. Referring to Germany. In spite of political selection, practice shows that judges since appointed show little difference to court and Legislature that appointed them.
98. 9-year terms for French Constitutional Council and 12-year terms for German judges - both non-renewable mandate.
99. Morton, *op. cit, supra* note 77, p. 99 'the ideological disposition of the Conseil Constitutionnel is more responsive to changes in public electoral behaviour than US Supreme Court.' It reconciles Independence and Accountability.
100. Alder, *op. cit., supra* note 27, p. 277.
101. Woolf, Judicial Review : A possible programme for reform, 1992, Public Law, p. 220.
102. Morton, *op. cit., supra* note 77, p. 90.
103. Article 61(2) - The President of the Assembly, the President of the National Assembly, the President of the Senate or sixty deputies of 60 senators.
104. Grandrut, 'Faut-il accorder avec citoyens le droit de saisir le conseil constitutionne? 1990 RDP 310. jurists like Duverfger and even the President of Constitutional Council, M.R. Badinter was for the idea of extending the saisine. The ex-President M.F. Mitterand was also for the tea.
105. *Ibid.*, p. 314.
106. M. Singer, 'The Constitutional court of the German Federal Republic: Jurisdiction over individual complaints,' April 1982, ICLQ, p. 331.

court only and when their basic rigths are being infringed. Secondly, they have to apply for leave of the court. A special division of the Court (Senate) will act as 'sieve' mechanism.[107] Furthermore, the individual should have exhausted all other remedies. A third mechanism is the imposition of a fine for frivolous complaint, since a simple letter can trigger the process. Finally the complainant should have the 'locus standi'[108]. The German's 'saisine' is better than the French one. Besides, the political saisine,[109] it opens up to individuals and it resolves the problem of 'floodgate' effectively. So, it is more in line with principles of democracy. The highest Courts in UK, House of Lords and Supreme Court are open to individuals, but they lack competence for constitutional review.

(iii) Competence

Both German and French systems have limited jurisdictions. The two bodies cannot resolve all controversies between organs and levels of Government.[110] In relative terms, the competence of the German court is wide.[111] The decisions of both courts would be binding.[112] The French Constitution can give advisory opinions in exceptional circumstances.[113] It is obvious that the English has always auto-limited itself and denied any competence.

(iv) Types of Review

Abstract v. *Concrete Review* — The Germen Constitutional Court allows both abstract and concrete review. Concrete review arises out of an ordinary law-suit.[114] This has the advantage of striking out any unconstituitonal law at any stage. The French system does not allow this and it can be considered as a shortcoming.[115] Abstract judicial review attracts more the ante-majoritarian criticism also.[116] Constitutional review in France is only possible by 'voie d'action' and not by 'voie d'exception;

107. *Ibid.*, p. 33 - Sumarry processure may also be used.
108. M. Singer, *op. cit. Supra* note 106. "The appellant's own rights rather than that of another person, must be at issue.
109. Kommers, *op. cit supra* note 16, p. 106 - The political saisine comprises ; Federal Govt. a State Govt. or one third of the members of Bundestag.
110. Kommers, *ibid.*, p. 104., G Burdeau, Le droit Constitutionnel note 16. 'Pour nombreuse quelles sont, ses attributions sont enumeres de facon limitative'. p. 677.
111. Kommers, *Ibid.*, p. 677.
112. Burdeau, *op. cit supra* note 110 and art 16. of the French Constitution.
113. F Lucharie, 'L'Union Europeenne *et la* constitution, RDP 1995, p. 585.
114. Kommers, *op. cit., supra* note 16, p. 105, 'The ordinary court will certify any constitutional question to the Constitutional court.
115. Granrut, *op. cit. Supra* note 62, pp. 312-313.
116. S.W. Sheive, *op., cit. Supra* note 24, p. 1217.

German constitutional law allows both. Furthermore, a posteriori control is not possible in France and this may be viewed as a shortcoming.

(v) Formal Assessment and Conclusion

The analysis can allow us to make the following observations. It shows that the German system, through its implementation of the principles is more effective. At the theoretical level, the German system and French system have consecrated more or less the same principles and they faced the same dilemmas and contradictions in their constitutional history. However, the German Constitutional Court is more equipped at the level of constitutional provisions and the corollary legislations to uphold the Supremacy of the Constitution. The French Constitutional Council required a lot of courage to develop the supra-constitutional concepts and uphold fundamental rights of the citizens. A number of amendments can be brought to make it more effective. The argument that a 'Governement des juges' may take over can be dispelled because when the Council is upholding the values of the Constitution or consolidating fundamental rights, it is consolidating Democracy. Constitutional control serving the cause of fundamental rights cannot be against Democracy.[117] The Council up to now has been relatively neutral and has been espousing judicial activism where it should[118] and 'judicial restraint' where need be. The German Court also have been creative, but to a lesser extent than the French one, possibly because the required provisions were already present.

How is the UK system? At a conceptual level, UK has stuck with its principles of Sovereignty of Parliament and this has prevented Constitutional review in the technical sense. However the Courts, by using techniques of interpretation[119] and other supra-constitutional concepts, has been bold to protect the fundamental rights of citizens, but it has not always been successful. However, the court itself was never willing to challenge the Supremacy of Parliament. It is obvious that the English system is not like the previous Apartheid system in South Africa, which was created by the application of the doctrine of uncontrolled Sovereignty of Parliament, but encroachment on individual rights is not fanciful.[120] The system did not fall into the extreme, because a number of Conventions and principles

117. G Bacot, La declaration de 1789 et la constitution de 1938, RDP 1989, p 687.
118. B Cayla, Les nouvelles methods du Coseil Constitutionel, RDP, 1987, p. 673.
119. *Anisminic Ltd.* v. *Foreign Compensation Commission*, 1969 2 AC 147-This can be considered a sport in the constitutional history, just like Boham's case.
120. Sydney Kentridge, parliamentary Sovereignty and Judiciary under a Bill of Rights. Some Lessons from Commonwealth, Spring 1997, Public Law, p. 105.

come into play.[121] However, the system also overestimated the impact of the Rule of law and its principles of procedural justice. Some authors, like Allan[122] argued that the fundamental principle of rule of law has not been sufficiently used by the courts to promote the idea of 'Constitutional Justice,' Up to now, compared to France and Germany, UK has breached the European Convention more.[123] This is pointer towards the inadequacies of the British system. Germany has the best record.

Analysis of 'la doctrine' within UK and outside UK, shows the relative weakness of the system to uphold 'Constitutional justice.' The European integration is already a first blow to the sacrosanct principle of Sovereignty of Parliament. Can the system sustain the pressure from within and outside to remain in isolation, a sort of rare species? France and Germany have tried to reconcile the conflicting principles and have devised mechanisms to uphold the principles. They have known different degrees of success. The two systems have consolidated the structure of Liberal Democracy and 'Sovereignty of the people' with the principle of 'Constitutional Justice'. They can still be improved.

121. Responsible Govt., Separation of powers etc.
122. T.R.S. Allan, 'Constitutional rights and Common Law.' 1991. Oxford Journal of Legal Studies, p. 453.
123. Sir Nicolas Lyell, *op., cit.*, note 139. UK breached the condition convention 46 times compared to 3 or 4 times by Germany.

POLICY AND LEGAL FRAMEWORK FOR AIR QUALITY MANAGEMENT IN NEPAL

*Dr. Amber Prasad Pant**

1. Air Quality Situation

As compared to other countries, such as India, Japan & other developed countries, virtually no quantitative & qualitative studies have been undertaken to examine the actual situation of air quality in Nepal. In a recent survey, it is reported that the air quality is increasingly deteriorating everyday and the pollution has already crossed the level of internationally acceptable standardas.[1]

Sources of air pollution in Nepal are varied and include combustion of fossil fuels, vehicular exhausts, industrial emissions and effluents, unmanaged solid wastes and smoke emissions from combustion of biomass. Suspended particulate matter and gaseous chemiculs are leading air pollutants and are potential health and ecological hazards.[2]

In rural Nepal, people do not have much information about air quality. However, it is a fact that rural people are also facing this problem. As the people rely mainly on fuelwood as a major source of energy, indoor air pollution is the most widespread problem caused by the high per capita use of biomass fuels for cooking and heating purposes without adequate ventilation. A number of lung, respiratory and eye diseases prevalent among Nepalese women, are ascribed to indoor pollution. The improved cookstoves (Chulo) are not accessive to everyone.[3] So, millions of Nepalese people are affected by such air hazards.

Air quality has deteriorated in the urban areas of Nepal due to vehicular emission, industrial discharges and solid wastes. The most serious pollutants are sulphur dioxide, nitrogen trioxide and carbon. Of particular concern is the high lead concentration. The main contributor lead pollution is the leaded gasoline. Poor vehicle maintenance and the low octane level

* Associate Professor, Nepal Law Campus. Tribhuvan University, Nepal. M.A. M.C.L; Ph.D (Delhi).

1. *Newletter NCS*, Vol. II No. 1 IUCN, Kathmandu p. 1 (1991).
2. *Id.* p. 2.
3. *Ibid.* See also, N. Belbase, "Fragmentary Environmental Law: Complication Galore," *Id* vol. III, No. 2/3 p. 3.

of leaded gasoline exacerbate the problem.[4] As regards vehicular pollution, it has resulted due to growing number of vehicles in the cities, practice of importing old vehicles and use of leaded, often substandard and adulterated fuel, poor vehicle maintenance, narrow and dilapidated roads and poor traffic management.[5] In fuel adulteration field, we find adulteration of petrol with kerosene coupled with poor refining, improper storage, dirty tankers and poor petrol station storage, causing higher emissions. So, in urban areas, haphazard growth of human settlement, industrial establishment and a dramatic increase in the number of vehicles as well as the increase in the smoke and dust particles emanating from brick klins, cement, tile factories, stone quarries and other air polluting industries have worsened air pollution. Several factors have contributed to this human health hazard, including the lack of proper zoning and the absence of enforceable air quality standards.[6] Besides causing direct damage to human health, the fallout from polluted air has contaminated the surrounding agricultural lands.[7] The air quality of Nepal, including that of Kathmandu Valley, as reported in "A Citizens Report on Air Pollution in Kathmandu: Children Health At Risk, 1998",[8] is thus a serious concern of government and people of Nepal.

2. Existing National Policies for the Control of Air Pollution

One of the tools for controlling and checking the deterioration of air quality in Nepal, as in other countries has been the formulation and enforcement of National Policy with respect to air quality control. In Nepal, we have following major National policies in this field.

National Conservation Strategy 1987

This policy came into force from 1988. In this strategy, it has been recognised that increasing urbanisation and an expanding industrial base are major contributors to the problems of air and other pollution adversely affecting the quality of human life and health. For this, it requires definite policy and legislation covering following issues.

- urban zoning and the provision of green belts and parks in densely populated areas,
- the planning, installation and maintenance of water, sewage and storm drainage systems in urban and suburban areas,

4. *Ibid.*
5. H.M.G., Nepal, Nepal Environemt Policy & Action Plan p. 53 (1993).
6. *Id.* p. 51.
7. *Supra* n. 3 N. Belbase.
8. A Citizens Report on Air Pollution in Kathmandu: Children's Health at Risk", leaders (1998).

— industrial effluent discharge, and noise abatement standards, correlative mitigating and or preventive measures,
— building, construction, treatment and handling of solid waste in urban and suburban areas,
— drinking water and sewerage systems in rural areas,
— the establishment of an air, and water quality monitoring and evaluation system.

It has further been mentioned that a comprehensive network of air and water quality monitoring stations will be established under the aegis of the Dept. of Irrigation, hydrology and Meterololgy, the Dept. of Health and DWSS assisted by RONAST and the appropriate Dept. of Tribhuvan University.[9]

Besides, it has been declared that the data respecting air quality will cover suspended particulates, carbon dioxide, carbon monoxide, oxides of nitrogen sulphur dioxide & radioactive contamination.[10]

In the process of implementing this strategy, three EIA guidelines have been prepared which also have a role in maintaining air quality:

— National EIA guidelines 1993.
— Industry Sector EIA Guidelines 1996.
— Forestry Sector EIA guidelines 1995.

Nepal Environment Policy and Action Plan, 1993

The policy was prepared to give effect to the decisions of the UN Conference of Environment and Development 1992. It has been stated in this policy that the deteriorating quality of air and water in many urban areas is imposing significant social and economic costs on the population. Thus, solutions to air pollution require to encourage industrial enterprises to reduce emissions and to treat more of their own waste.[11] For minimising the indoor air pollution, the plan emphasizes that the development of alternative source of energy to fuelwood provides the best long term solution. Such alternative may be gases, electricity, smokeless Chulos (stoves). A revitalised smokeless Chulo programme is necessarily accompanied by education programme to inform people of the health risks associated with long exposure to smoke. In industry sector, incentives to relocate industry away from population centres and zoning with a view to

9. *Id.* p.134.
10. *Ibid.*
11. H.M.G., Nepal, Nepal Environment Policy & Action Plan p.51 (1993).

prevent new industries from being set up in inappropriate locations, offer one solution to the problem.[12]

It further requires less polluting technology, subsidies to pollution control and to encourage greater operational efficiency and finally EIA.[13] For checking vehicular pollution, the plan emphasizes on an integrated approach that tackles all these problems. It requires following steps to be taken for its solution:

— to reduce the present incentives to import older vehicles.
— a system for the pollution testing of vehicles.
— to set up air monitoring centres in high population density areas. One possibility would be for Nepal to join the Global Environment Monitoring System run by the UNFP, utilizing its technical assistance in setting up an appropriate system.

Besides, considerable emphasis has been placed in developing standards for air and water quality.

Industrial Policy 1992

It prescribed strategies to minimise the adverse effect on environment including air quality while establishing, expanding and modernizing the industrial units. Industrial licence is required to those industries related with defence, public health & environment as mentioned in Annex 2.

The Ninth Plan 1997 - 2002

The plan embodies following main policies:

— system will be identified for ensuring maixmum participation of general public.
— each agency will be encouraged for EIA.
— conservation programmes will be promoted.
— the progressive vehicle tax system will be developed & implemented for control and management of the escalating smoke, dust and other pollution in urban areas particularly Kathmandu, and for levying vehicles tax on the motor, car and other vehicles in the villages and municipalities.
— environmental standards will be fixed up.
— a data and information bank will be established.

12. *Id* p.52
13. *Ibid.*

— environment Act will be effectively implemented.
— INGO and other private sectors will be engaged.
— proper steps will be taken for managing solid and other wastes.
— environment health program will be launched.
— institutional arrangements will be made.
— local women and youth will be encouraged.
— international treaties will be implemented.

3. Laws

The Constitution of the Kingdom of Nepal, 1990

Article 26(4) embodies the following policy mandates:

"The state shall give priority to protection of the environment and also to the prevention of its further damage due to physical development activities by increasing the awareness of the general public about environmental cleanliness and the State shall make arrangement for the special protection of the rare wild life, the forests and the vegetation."

With the above provisions, some cosntitutional responsibilities and duties have been vested upon the State for safeguarding the environment against its further damage due to physical development activeities.[14]

The Environment Protection Act 1997

In order to give effect to constitutional mandates, special "Environment Protection Act 1997" (enforced from June 24, 1997) and "Environment Protection Rules 1997 (enforced from June 26, 1996) have been brought into existence, These Acts and Rules have made appropriate provisions for dealing with pollution control, IEE and EIA, conservation of national heritage etc.

Section 7 of the Act provides for pollution control which is as follows:

"Prevention and Control of Pollution:

(1) A person shall not cause pollution or allow pollution to be caused in a manner which is likely to have significant adverse impact on the environment or harm human life or public health or shall not emit, discharge sound, heat, radioactive from any machine, industrial enterprise or any other place above the prescribed standard.

(2) If it is found that a person has been significantly adversely effecting the environment, relevant agency may impose necessary conditions in relation to that or may prohibit from doing such act.

(3) The Ministry may, by publishing a notification in the Nepal Gazette, prohibit the use of such matter, fuel, equipment or plant whose use has significantly adversely effected the environment or is likely to have significant adverse impact on the environment.

(4) Other provisions relating to prevention and control of pollution shall be as prescribed."

14. Dr. Amber Prasad Pant, *"Sustainable Infrastructure Development: Principles & The Nepalese Experience"* Nepal Law Review Vol. 12, No.1 p.10 (1998).

Chapter 3 of the Rules has provided various provisions under rules 15 to 20 for preventing and controlling pollution. These provisions include provisions for stopping emissions and discharging solid waste against the standards (rule 15) for installing and maintaining properly the equipment or treatment plants (rule 16), etc.

In Section 8 of the Act, the appointment and qualifications of the Environment Inspector have been provided. The responsibility of the said Inspector is to supervise whether abatement or control of pollution is done in accordance with the Act or regulation.

Section 12 of the Act empowers the relevant person designated by the Secretariat or the Agency to collect the sample of air, water etc. discharged by any industry or body or vehicle for examination. Similarly, section 15 empowers HMG to give concessions and incentives to industry and other bodies for pollution control. Section 16 empowers Ministry to form various committees for achieving the purpose of the Act. Where damage and loss to any person or organisation has resulted from doing something contrary to this Act or rules, the pollutant is liable for paying compensation ((Sec.17). Besides, the prescribed office may prohibit the work with immediate effect & impose a fine upto an amount of one hundred thousand rupees if there is a violations of the Act or rules (Sec. 18).

Section 24 empowers the HMG to frame rules including for matters relating to sources of pollution, standards, prevention & control of pollution.

Sectoral Acts

Industrial Enterprises Act 1992

As provided in industrial policy, this Act provides that an industrial licence is required if it is related with defence, public health and environment. Section 11 clearly provides that licence or registration certificate shall contain provisions regarding concessions, exceptions, facilities that will be given to industrial enterprises and prescribed conditions to be fulfilled by them. It is stated herein that permission will be granted for reduction upto 50 percent at once or within 3 years from the taxable income for investment by an industry on equipment and processes to minimise pollution.

Section 13 also provides that the Industrial Promotion Board established under the Act can direct the industries to make arrangements for controlling environmental pollution. The Act gives priority to industry based on waste products and industry manufacturing pollution control devices. (Annx IV).

Finally Section 25 (2) empowers HMG to punish those who do not comply with the conditions mentioned in the licence or registration certificate.

Motor Vehicle and Transportation Management Act 1993

It is provided in the Act that HMG may determine standards in the following area in order to ascertain whether or not a vehicle is roadworthy: (see. 23).

(*a*) mechanical condition of the vehicle.

(*b*) length, breadth, height, make or appearance of the vehicle.

(*c*) amount of pollution discharged by the vehicle.

(*d*) life span of the vehicle.

No vehicle may be registered by the relevant officer if these conditions are not fulfilled (Sec. 24 (1)). The Dept. of Transport Management may issue an order to any or all Transport Management offices to withheld the registration of Vehicles. This order may be issued when it deems that the registration of any vehicle should be withheld, pursuant to section 14 for the interest of the public with respect to pollution traffic congestion, road conditions or other reasons specified in Sec. 24.[15]

15. See also, N. Belbase, THE IMPLEMENTATION OF INTERNATIONAL ENVIRONMENTAL LAW IN NEPAL, p. 84 IUCN (1997).

Pursuant to sub-sec. 1 of Section 24, HMG has specified in 1998 the following standards as against the 1994 standards for petrol and diesel engine vehicles in order to control vehicular pollution in Kathmandu Valley:[16]

1. *Petrol engine vehicle:*

(*a*) Carbon monoxide emitted by four wheeler vehicles manufactured till 1980 should not exceed 4.5 percent by volume.

(*b*) Carbon monoxide emitted by vehicles manufactured in 1981 or after 1981 should not exceed 3 percent by volume.

(*c*) Carbon monoxide emitted by three wheeler vehicles manufactured till 1991 should not exceed 4.5 percent by volume.

(*d*) Carbon monoxide emitted by two wheeler vehicles should not exceed 4.5 percent by volume.

2. *Diesel engine vehicles:*

(*a*) smoke density emitted by all types of diesel engine vehicles manufactured till 1994 should not exceed 75 Hatridge smoke units (H.S.U.).

(*b*) Smoke density emitted by all types of diesel engine vehicles manufactured in 1995 or after should not exceed 65 H.S.U.

The above stated standards shall come into force from 1st Shrawan 2055 B.S. for two wheeler vehicles and from 1st Magh 2054 B.S. for other vehicles except two wheeler.

This vehicle pollution standards have repealed the vehicle emission standards fixed in 1994.

Civil Aviation Act 1958

The Act, as amended in 1977 has also empowered HMG to make rules on controlling environmental pollution caused by airplane (Sec. 3). Violation of such provision of section 3 may be liable for imprisonment upto three months or fine upto one thousand rupees or both.

16. See, *Nepal Gazette* Vol. 47 Extraordinary 49 (Poush 28, 2054 B.S.). In 1994, however, the following standards were specified for Kathmandu Valley.
(*a*) smoke density of diesel engine vehicles should not exceed 65 Hartridge smoke units (HSU), and
(*b*) carbon monoxide emitted by petrol engine vehicle should not exceed 3 percent by volume.
In 1994, taxi cabs, three wheeler cabs, public transit systems and trucks were exempted to follow emissions standards.

Labour Act 1992

The Act provides several provisions for wholesomeness of environment including for removing the deposition of dust and pollute air and vapour in the working room.

Electricity Act 1992

Section 24 provides that while carrying out electricity generation, transmission or distribution, it shall be carried out in such a manner that no substantial adverse effect be made on environment by way of pollution and other reasons.

Petroleum Act 1983

Section 5 (1) (b) provides that all activities associated with the extraction, production, distribution of petroleum and its products should be undertaken without polluting the environment.

Pashupati Area Development Trust Act 1987

The Act empowers executive committee to manage and maintain drinking water, water pipe, sewerage, to prevent, control pollution and to plant trees in the area while constructing houses.

Solid waste (Management and Resource Mobilisation) Act 1987

The Act aims to remove solid waste and pollution caused by it (Preamble and Sec. 4 (9). Many activities have been prohibited under section 5 (1) and penalty prescribed under Section 5 (2).

Urban Laws

There are three main Acts for regulating the urban areas: Kathmandu Valley Development Authority Act, 1998. Town Development Act 1998 and Municipality Act 1992. All these Acts have some provisions for environmental protection and pollution control.

Forest Laws

One main law regulating forest is the Forest Act 1992 which emphasises among others, on community participation as was reflected in Forestry Master Plan 1988 and 1989. Chapter 9 provides for user's group for the management and utilization of community forests. Prohibited actions and penalties have been provided in sections 49 and 50 respectively.

Besides, National Parks and Wildlife Conservation Act 1973 has also provided for forest conservation (Sec.5).

Land Laws

Land use related laws include land (Survey and Measurement) Act 1961, Land Reforms Act 1964, and Land Revenue Act 1977. These Acts prohibit cultivation and registration of public lands or state forest areas.

4. Conclusions

As discussed above, the air quality is not within the acceptable standards in Nepal even though the developmental, land use and industrial activities of Nepal are occurring at a relatively slow rate and the average consumption of energy is very low compared to other countries.

The international treaties to which Nepal has become a party in this field[17] are not implemented properly. No definite policies and laws are in existence to implement them to solve the Nepal's problem in the field of air quality.

In the field of policy there is no specific policy for dealing with all types of air quality problems of rural and urban areas. Similarly, there is no comprehensive Act or rule to deal with this problem. Besides, there is no reliable treatment of sewerage, no satisfactory controls of vehicular exhaust levels or pollution of industries there is no systematic monitoring of air quality. The laboratory facilities are also very limited. Even after enforcing the Environment Protection Act 1997 and Rule of 1997 form June 26, 1997, the emission standards have not been fixed up as per the laws. In the absence of such standards, the purpose of the policies and laws in this field has become ineffective. The fixation of vehicle emissions standards is also not properly implemented. Besides, there is no landmark

17. These treaties include:
- UN Framework convention on Climate Change, 1992.
- UN convention on Biological Diversity, 1992.
- Vienna Convention on the Protection of the Ozone layer 1985.
- Montreal Protocol on Substances that Deplete the Ozone layer, 1987.
- London Amendment on Montreal Protocol on Substances that Deplete the Ozone layer, 1990.
- Treaty Banning Nuclear Weapon Tests in the Atmosphere, in outer space and under water, 1963.
- Treaty on Principles Governing the Activities of States in the Exploration and use of Outer Space including the moon and other celestial Bodies, 1967.
- Basel Convention on the control of Trans-boundary Movements of Hazardous Wastes and Their Disposal, 1989.
- UN Convention to Combat Desertification in those countries experiencing serious Drought and/or Desertification, particularly in Africa, 1994, etc.

decisions of Supreme Court in the field of air quality. Thus there is an urgent need for the implementaition of the policies, laws and the relevant Supreme Court directions in this regard.

With a view to achieve the purpose of maintaining the air quality, the following suggestions are made for its betterment.

Firstly, there should be a Clean Air Act or comprehensive Clean Air Rule to be framed under the present Act for covering every type of problems related to air quality of rural and urban Nepal.

Secondly, there should be proper implementation of air quality laws.

Thirdly, perceptions and attitudes of those involved in making policies and laws and those providing for their implementation should be changed from being selfish, to being public service minded, which, I am sure will result in general good. In this context. all state machinery have to act sincerely with commitment and dedication.

Fourthly, there should be people's support and check on state actions. For this, people should be empowered by education, awareness and economic upliftment.

Fifthly, an atmosphere should be created by which there would be no hindrances of any for carryingout and implementing the policies and laws.

FRAUD AND MISREPRESENTATION IN BUSINESS NEGOTIATION: THE ISSUE OF DRAWING BRIGHT LINE : AN AMERICAN PRESPECTIVE

*Mr. Purna Man Shakya**

INTRODUCTION

Negotiation is a complex process. It involves sharing of information, opinion and intentions which may not be based of facts, law or findings. These exchanges of information are made in negotiation process either voluntarily or on the demand of the other party. Some times a positive statement is made, some time the other party just maintains silence on the inquiry made by other party and some time a party may just go on nodding at what the other party is saying. Each of theses actions or inaction may have its own legal implications in business negotiations. Much however will depend on the surrounding circumstances and the context in which they were made. Ignorance and negligence often could lead to criminal and monetary liabilities. Hence it is important to know as to what kind of behaviour in a given context is permitted and what is not. To do that is certainly not easy . Firstly, the common law on fraud and misrepresentation has to be interpreted in the negotiation context. Secondly, there is a constant attempt to modify common law on fraud and misrepresentation by enactment of state and federal statutes. Failure to be aware of these legally binding rules of conduct often lead to high costs in business deals. So the objective of this study is to :

1. make a study of negotiation process in business deals;
2. make a study of the implication of common law on fraud and misrepresentation in business negotiation;
3. make a study of statutes which modify common law on fraud to create a duty to disclose;
4. make a study of the problems of being guided by these legal norms in business negotiation; and
5. make recommendations for safe and efficient negotiation.

* LL.M, Delhi; LL.M., Columbia; Lecturer, Faculty of law, Tribhuvan University.

OBJECTIVES OF NEGOTIATIONS

The objective of business negotiation invariably is profit maximization and avoidance of all possible losses. The maximization of profit in a given context may involves either creation of value or sharing of value or both. Creation of value involves cooperation and working together for mutual benefit, and sharing of value involve competition and conflict.[1] Business negotiations for the most part involve creation of value for mutual benefit and then sharing it in proportion acceptable to both.

In these negotiations the parties often meticulously value the outcome of the proposed settlement and try to extract the maximum share of the pie. These negotiations could be very long, protracted and intense. The reason why the parties prefer to labour for negotiated settlement is the fact that in a given set of facts each party is in possession to confer benefit or cause loss to other.

In the modern world of complex and competitive business, effective negotiation skill has become indispensable to strike a deal, compromise or a plan of action. With the advancement of science and technology even the means of negotiation has become highly technical. There is a constant search of new opportunities by business entities for investments and joint ventures. There is a constant alignments, realignments, splits, mergers, acquisitions and takeovers. In such complex atmosphere of competitative business, failure to negotiate with skill often leads to loss in profit and opportunities.

It is however not suggested that a business negotiation is always a zero sum game. It is often an exercise for creation of value. This is particularly true with negotiation for merger and acquisitions. Often the aim of such negotiation is to create a synergy and thereby produce maximum profit. The idea of merger negotiation often is to maximize profit by working together instead of competing with each other. This often lead to long and protracted negotiations between two or more companies. These kinds of business negotiations involve both the creation of value and sharing of value. But the negotiation some time could also end in bitter war of hostile take overs and extreme defensive moves. This is often the result when the parties fail to agree on the share of the pie. Similarly business negotiation of other kinds also could be equally complex and competitive. Business negotiations could involve different and varied subject matter such as lease, loan, franchise, sale, purchase, guarantee, mortgage, project finance and so on. Many times negotiation involve millions of dollars. It may even involve personal stakes for negotiations in the outcome of the negotiation.

1. See: Murray, Rau and Sherman, "NEGOTIATION", pp.43-68; Lax and Sebenius, "THE MANAGER AS NEGOTIATOR" pp. 88-153.

Success in negotiated settlement could mean promotion for the officers of a company and failure could mean loss of job. High stakes in negotiation often make the parties in negotiation vulnerable to ethical considerations. Their desperation for negotiated settlement on favorable terms could often lead to misrepresentation of facts and figures that are crucial in negotiation. The parties often find it hard to resist the temptation to lie. They may therefore conceal the negative facts, exaggerate positive side of their offer, or even mislead the parties of certain basic information to induce the other party to accept the offer.

Deals made on the basis of misrepresentation often run short of their life. It is either rescinded or terminated on the discovery of the truth. It could not only jeopardize the long term bushiness relation with affected party but even lead to civil and criminal action in the court. Hence it is important that a negotiator in business deals become aware of the bright line that separates what is a permitted lie in a negotiation process and what is not.

CAN YOU LIE IN NEGOTIATION?

The answer to above question is simple. You cannot lie in a way that would constitute fraud or misrepresentation actionable in law and you ought no to lie, irrespective of legal consequences, if it is likely to be relied upon by the other party for taking decision to her own detriment. In the negotiation process the parties very often try to present themselves as very rigid when they are actually flexible, quote a very high price as an asking price when they are willing to settle for much lesser price, give a high opinion of the product performance when they know that its performance is poor, exaggerate the positive side of the offer and play down the concessions made by the other party and so on. These are common and accepted behavior in negotiation and the affected party often do not take it as actionable wrong. But the law is not the way people often think it to be. There are clear lines drawn and one could be in serious trouble if she or he crosses those lines and thereby cause injury to other. Taking up this issue, G. Richard Shell in his article entitled "When is it Legal to Lie in Negotiations" concludes, "As the recent legal cases discussed here will demonstrate, what moralist would often consider merely unethical behavior in negotiations turns out to be precisely what the court consider illegal behavior. In the light of rather broad legal standards that are beginning to govern bargaining behavior investigators should consider research on how legal incentives affect negotiator's conduct."[2] He also emphasized

2. Shell, G. Richard, *"When is it legal to lie in negotiations?"* in SLOAN MANAGEMENT REVIEW, Spring 1991, pp. 93-101.

that all the executive training programs need to be aware of the legal consequences of deceptive bargaining tactics.

Fraud and Misrepresentations In Bargaining Process

In a business negotiation the parties invariably bargain before entering into a deal. In the process of bargain, the parties exchange information, opinion, and beliefs on certain facts. There is often deception and misrepresentation. In most of the cases deception in negotiation is basically meant for inducing the other party to accept an offer. For instance a seller of a house may lie to the buyer as to its zoning restrictions, seller of used car may temper with mile meter to mislead the buyer of its use, a person may sell a parcel as a good piece of land for building house when she knows that it actually has quick sand, a person may try to sell an insolvent business as a solvent one and so on and on. But in the great bulk of cases the object of deception is basically to induce the other party to accept an offer. In such cases the resulting contract is merely voidable. However, not all deception in negotiation *per se* become actionable.

Many times the parties lie to induce another party to enter into a deal does not materialize. In such cases the lie has no legal consequence as it failed to materialize into contract unless the other party has justifiably relied on such deception to his detriment. One of the cases where a party was held liable for his conduct in negotiation was *Hoffman* v. *Red Owl Stores.*[3] In this case Red Owl Stores had promised to give Mr Hoffman franchise to operate one of the Red Owl Stores in Wautoma, Winsconsin on condition that Hoffman acquired experience of store business. Hoffman was assured that once the experience of store business was acquired $ 18,000 should be enough for buying franchise, Mr. Hoffman was made to incur lot of expenses to acquire the experience on the suggestion of Red Owl Store representative. But in the end when it was time for making franchise agreement, Red Owl Stores backed out from its commitment of $ 18,000 as a franchise price. It instead demanded $34,000 as a payment for franchise right including $ 13,000 as an outright gift. Mr. Hoffman later sued Red Owl Stores. Red Owl was held liable for his deceptive conduct in pre-contract negotiation because his misrepresentation had been justifiably relied upon by Hoffman and he had incurred substantial loss.

Some of the instances of bad faith negotiation include continuing the negotiation with a party to keep him on hold or to show some third party that there is a competing candidate or ever to deprive him of alternative business opportunity. Some time a party may just walk away from

3. 26 Wis. 2d 683, 133 N.W. 2d 267.

negotiation after the counter party has revealed his trade secret.[4] Courts have often punished such misuse of bargaining process under the principle of equitable estoppel if the other party has relied to his detriment on such misrepresentation.[5]

The American contract law does not recognize the general duty to negotiate an agreement in good faith. The common law recognize the implied duty of the parties to be have in good faith and fair dealing only in contract performance and not in contract negotiation. Hence the parties often insist on entering into an agreement to negotiate in good faith before starting an actual negotiation on the deal. This is usually the case in a negotiation that is costly and protracted. Many times the parties even impose a duty on the other party to disclose all the material facts, a restriction on soliciting competing bide, liquidated damages for breaking negotiation for no cause and so on. In the absence of such restrictive covenant, parties freedom to bargain is often considered as unlimited. These kinds of restrictive covenants are used for negotiations related to merger and acquisitions and infra-structure projects such as hydro-power, oil exploration and so on. However where a contract has been successfully negotiated by the use of deceit, the recipient of misrepresentation may avoid the contract. If the contract is avoided the person who engaged in deceit not only loose the right to enforce the contract but also become liable to pay back all the benefits received and also pay consequential and incidental damages caused by such deceit.

In contract law the remedy offered for such wrong is varied and flexible. In *Williams* v. *Logue*[6] a defrauded seller was allowed restitution of an $8 calf that had grown into $75 cow. For a liability to arise, under contract law, a negotiation must have: 1. made some assertion which is not in accord with the fact; 2. the assertion must be either fraudulent or material; 3. the assertion must be relied on by the party in manifesting assent; 4. and reliance of the recipient must be justified. Under the contract law a party has a right to avoid a contract if there was a misrepresentation of material fact which induced the recipient to give consent. Unlike in tort, the contractual liability for misrepresentation do not necessarily depend on state of mind. In torts the recipient must show that the misrepresentation of a fact was both fraudulent and material where as in an action to avoid a contract it is enough for a recipient to show that the misrepresentation of a fact was either fraudulent or material.[7] A party has a right to avoid a

4. See: *Smith* v. *Draveo Corp*, 203 F. 2d 369 (7th Cir. 1953).
5. See: Restatement Second, Section 87 (2), 90, 139.
6. 154 Miss 74, 122 So. 490 (1929).
7. See: *Barrer* v. *Women's National Bank*, 761 F2d 384 (4th Cir. 1985), See: Restatement Second Sec. 306, 476 (1), 477.

contract even if the misrepresentation of material fact was innocently made. But in terms of relief the law of contract is more restricted than the law of torts. In torts the damages are awarded on the basis of injury and if the conduct of the defendant is outragious then the court often award punitive damages. In contract damages are awarded to make a wronged party whole while in tort damages are awarded with a view to protect the society as a whole from such mischiefs.

Requirement of Scienter

Any misrepresentation of a material fact in a negotiation process to induce the other party to enter into contract is deceitful conduct. But to constitute a legal wrong under the law of tort, there has to be a scienter. In other words a person who makes an assertion not in accord with fact must do so with full knowledge. This requirement of scienter, however, has been watered down by the courts. The courts have often interpreted reckless disregard for truth as equivalent to knowledge of truth. This concept was applied by a federal circuit court in *Computer Systems Engineering Inc.* v. *Qantel Corp.*[8] In this case a party was held liable for misrepresentation for recklessly inflating the performance capability of computers and other equipment to induce the buyer to accept the deal. In tort, a person can be held liable for negligent misrepresentation if the facts and circumstance of the case indicate that a party making such negligent misrepresentation had a duty to take care that what he represents is not false and misleading. The courts have held a party liable for misrepresentation even though it was made innocently if the person failled in making reasonable investigation before making such statement.[9] So a negotiation has to be extremely careful in what he asserts in negotiation so as to avoid any legal liability. He must not only avoid making intentional misrepresentation but he must also be careful not to be reckless in making important statements on material facts. In certain sensitive cases where the recipient is likely to reasonably rely on the statement without further investigation, a negotiator has to be extremely careful and should avoid making any categorical statement unless he is sure.

Under the law of contract the requirement of scienter is even less. If a party in the negotiation knowingly misrepresents a fact with an intention

8. 740 F2d 59 (1st cir, 1984).
9. See: *Meracle* v. *Children Service Society*, 149 Wis.2d 19 (1989); also see: *Nierengarten* v. *Lutheran Social Service*, 963 N.W. 2d 181 (1997). In this case the court again held the adoption agency guilty for negligence. The court laid down four pronged test for negligent misrepresentation. They are : (1) Defendant made a representation of a fact; (2) the representation was not true; (3) the defendant was negligent in making the representation; and (4) the Plaintiff relied on the representation.; *GIBBS* v. *ERNST*, 538Pa. 193, (1994).

to mislead the other party, then the recipient gets the right to rescind the contract even if the fact misrepresented is not material. But these kinds of cases are usually rare. Liability for avoidance or rescission of a contract wherein fraudulent misrepresentation do not have materiality generally require the party to prove that such misrepresentation did in fact succeed in inducing the recipient to enter in to contract.[10]

Misrepresentation of Material Fact

In the negotiation process parties are obviously not expected to lay down all his trump cards before his counter part. In the bargaining process each party is naturally expected to use different kinds of strategies to extract maximum from the other party. To be honest and tell the opponent about his or her weakness, concerns, reservation price and the best alternative to negotiated settlement (BATNA) would be foolish. Hence in a negotiation a party either expects the other to disclose his expectation or takes the strategy of quoting a very high asking price though he is really prepared to settle for much lesser price. A party often does this to anchor the bargain to an advantageous point. Similarly a party may also try to give an impression that her reservation price stands at much higher level than what it actually is. A party may even down play the concessions made by the other party and effectively conceal her underlying interest, concession made by the other party and effectively conceal her underlying interest, concerns and worries to avoid exploitation in negotiation. These behaviors in a way do constitute misrepresentations but they are not really material ones. The expectation and reservation price of a negotiator are subjective issues and could not be considered as a material fact. These misrepresentations are not to be taken seriously. Taking this fact into consideration, the Model Rules for Professional Conduct exclude such misrepresentations as misrepresentation of material fact for the purposes of rule prohibiting lawyers form making false statement to a third party.[11]

For a person to be liable under tort or contract, there has to be misrepresentaion of material fact. A fact is something the existence of which can be objectively proved or disproved. For instance, an assertion that a machine is perfectly workable when in fact it does not, an assertion that a company is solvent when in fact it is insolvent, an assertion that a ring is made of diamond when in fact it is not, an assertion that a ring is made of diamond when in fact it is not, an assertion that a car is two years old when infact it is five years old or an assertion that a surgery will cure the disease when infact it cannot, constitute misrepresentation of material fact.

10. See: Farnsworth, E. Allan, "Contract", Second Edition, p. 259.
11. See: Rule 14.1 of the Professional Code of Conduct for Lawyers.

These are some of the positive assertions of fact that can be proved wrong. But the question becomes little difficult when it comes to the question of misrepresentation on one's state of mind, opinion or intentions. These are not easy to prove or disprove in the court of law. But nonetheless they are not out of context in fraud or misrepresentations in negotiation process. There is no reason why they should not be considered as a material fact if it can be proved or disproved in the court of law. To quote a famous dictum by Lord Bowen in *Edington* v. *fitzmaurice.*[12] "The state of a man's mind is as much a fact as the state of his digestion." In *State of National Bank of El Paso* v. *Farah Mfg. Co*,[13] the loan agreement provided a clause which enabled the Banks to accelerate the loan collection if they consider any change in management to be adverse to the interest of the Banks; Farah wanted to come back as a CEO in the Farah Manufacturing Co. This was objected by the creditor banks. But the banks were not prepared and in fact they have already decided not to accelerate the loan collection (which would mean forcing the Co. in to bankruptcy) in the eventuality of appointment of Farah as a CEO. The banks however made a false threat to the Co. and said that they would declare a default and padlock the Co. if Farah was reelected as CEO. The court held the banks responsible for fraud. "The representation that a default would be declared and the company bankrupted and padlocked if Farah were elected as CEO concern a material fact and amount to more than a mere opinion, judgement, probability, or expectation on the part of the lenders."[14]. Hence a negotiatior has to be careful about making any statement of intentions or opinions. He has even got to be very careful in making any conclusive statements. For instance in *Virginia Bank Shares Inc.* v. *Sandberg*,[15] the plaintiff, the holder of 85 percent share sought proxy from minority share holders for the purpose of freeze out merger saying $42 per share was a good price while the fact showed the value of share to be $62 or more. In the shareholder action against the plaintiff under Rule 14a-9 of SEC Act for making fraudulent statement in proxy solicitations[16] the court held that even the conclusive statements are material fact. Similarly if the opinion is based on facts it can be a material fact. For instance an opinion of an expert based on findings of the research of data would be undoubtedly a material fact. But if the party in negotiation merely expresses a doubt, guess or expectation then they cannot be material fact for the purpose of

12. L.r.29 Ch. Div 459, 483 (1882).
13. 678 S.W. 2d 661 (Tex.Ct App. 1984).
14. *Ibid.*
15. 111 S.Ct 2749; L.Ed 2d 929 (1991).
16. Rule 14a-9 of SEC is the anti-fraud provision applicable to proxy solicitations. The rule prohibits "false and misleading' statement of "material fact" in proxy solicitation.

misrepresentation.

The negotiation in important deals often get recorded verbatim and signed as memos. These records could be used to prove or disprove a misrepresentation of material fact. They could even be used as an aid to interpret the terms of an agreement. Usually under the parol evidence rule a party is prohibited from introducing any evidence of negotiation to contradict the terms of the written agreement.[17] Hence the negotiators are advised to make it a point to see that the final contract agreement negates any false representations made by them in the negotiation process.[18]

Most of the misrepresentations in negotiation take place by way of oral or written statement. But there are time when conduct by itself amount to assertion of a fact. For instance shaking of a head could be denial of a statement and a nodding of a head could be confirmation of a statement. These conducts could be misleading. For example drawing a cheque generally amounts to a representation that there is sufficient fund in the account on which it is drawn.[19] Similarly, in the negotiating, a party must always refrain from making a statement that is half truth and which has the effect of misleading the other party. For instance, in a case, where the vendor told the buyer that the property on sale is a multi-family housing suitable for investment but failed to reveal that the zoning law prohibited such use, the court held that there was misrepresentation of fact.[20] Thus a half-truth that is true as to the facts stated but fails to include a qualification necessary to prevent a false inference is a misrepresentation.

Duty to Disclose

The common law rule do not hold a person liable unless he or she made an affirmative statement misrepresenting a fact. This rule of duty not to disclose has often provided undue incentivé to a clever negotiator to "be silent and be safe" on important issues. But there are exceptions to the rule. Some are created by courts and some created by statutes. The trend is more toward expanding the duty to disclose.[21] In this context the chances for a negotiator to take shelter in duty not to disclose rule is getting thinner and thinner. There is a constant pressure on the courts and regulatory authorities to require the business negotiations to be transparent to ensure fair

17. See: Restatement Second Section 215.
18. See: Shell, G.Richard, *"When is it Legal to Lie in Negotiation?"* Sloan Management Review, Spring 1991, pp. 93-101.
19. See: *Klocken* v. *Keser*, 29 Colo. App. 467, 488 P2d 1135 (1971).
20. *Kannavos* v. *Annivo*, 357 Mass 42, 247 N.E. 2d 708 (1969).
21. "Courts have often departed from the no duty to disclose rule by carving out exceptions to the rule and by refusing to adhere to the rule when it works injustice." *Ollerman* v. *O Rourke G.* 94 wis 2d 17, 30, 288 N.W. 2d 95, 102 (1980); also see: Restatement Second 161.

dealing, market reliability and consumer protection. There are basically four circumstances where a business negotiator has an affirmative duty to disclose certain facts.

Fiduciary Relationship

When a person is in fiduciary relation with the other party in negotiation, the law requires her to disclose all the material information in her possession to the other party. When a CEO negotiates with the shareholders of the company to buy their shares or sell them the treasury shares of the company or when a controlling share holder negotiates with the minority shareholder for the purchase of their shares in acquisition process or when a trustee negotiates with the creditors for foreclosure of security interest on their behalf the law requires them to disclose all the material information to the other party. The notion of fiduciary is often extended to include various commercial actors such as banks, franchisers, Insurance Co, and other commercial players who deal with business partners on a some what-less-than arms length basis. In insurance contract negotiation, for instance, both the insurer and the insured have a duty to disclose certain facts to each other. Insurer is required to fully disclose the scope of coverage and insured must fully disclose the health risks. Any non disclosure by either party could mean fraud.

Superior information not accessible to other side

When the non disclosing party has an inside information vital to the transition that is not accessible to the other party and when it would be inequitable to allow a barging without disclosure of such information, law imposes an obligation on such party to disclose the information. For instance, it is the duty of an owner of a house to disclose that the house is termite infested.[22] An employer has a duty to disclose contingency plan to shut down the project for which employee was hired.[23] A company must disclose shaky financial condition of a company to the applicants of its shares. All these rules enforce equity and good conscience and it is enforced to avoid injustice. This rule however do not require a party to disclose the information he has collected out of his own effort or research which is otherwise equally accessible to other party. Information acquired

22. *Miles* v. *McSwegin*", 388 N.E. 2d 1367 (Ohio 1979). Also see *Swinton* v. *Whitinsville Sav. Bank*, 311 Mass. 677,42 N.E. 2d 808, 141 A.L.R. 965. In this case Massachusets court did not hold the seller liable for non disclosure. It held that the common law rule did not require the vendor to disclose, But this case has been widely criticized and courts in other states have not followed its line of approach.
23. See: *Berger* v. *Security Pacific Information Systems Inc*, No 88 CA 0822 (Colo. App. April 5, 1990).

by fair means or the acquisition of which do not involve trespass or detriment to other is in a way property of such person.[24] She should have every right to use such property in the negotiation to her own advantage. To require such information to be disclosed for the benefit of the other party would be inequitable. It would not only promote complacency and dependency on the negotiating parties but also discourage initiatives for research, investigation and monitoring. For instance an antique dealer need not disclose his knowledge about the value of an antique to the vendor. Similarly a stock purchaser need not disclose his information and assessment about company's performance to the seller unless the buyer is in fiduciary relation with the seller. A buyer of land for example need not disclose his information about the removal of zoning restriction in such land.

But the rule of 'duty to disclose' is much more strict on the seller. So in the negotiation for sale a vendor has a duty to disclose all the latent defects in the product he is trying to sell. And in order to get rid of implied warranty rule a vendor is also advised to disclose all the defects in the goods and disclaim the warranty. As a clever negotiator one would always put such disclosures in writing and disclaim any implied warranty in negotiated settlement.

Need to Correct

In the business negotiations parties make assertions related to market conditions, rules and regulations governing the trade, the political environment for investment and so on. These assertions often determine the course of negotiation and influence the parties decision making process. So it is very important for a party to make a correct statement of such facts. In a long and protracted negotiations the facts and assumptions may change. If a party asserted a fact in the beginning of the negotiation and if the facts have changed since then, then it is the duty of the party making such statement of facts to disclose the change of facts to the other party.[25]

Corporate law and duty to disclose

If a party is negotiating a deal with his own company or in which he holds the position of a controlling shareholder or an officer, the law requires him to disclose all the conflict of involved in the transaxtion.[26]

24. Restatement Second Section 161 (b) tries to distinguish such situation by limiting relief based on non-disclosure to cases in which the non-disclosure amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing. Also see: *Phillips* v. *Homfrey*, L.R 6 Ch. App. 7709 (1871). If a person learns of mineral deposit in the land after trespassing the vendor's land he is expected to disclose it for it is not fair dealing.
25. See: Restatement Second, Section 161 (a).
26. See: Sec. 144 of Delaware General Corporation Law.

Failure to disclose such material fact by an interested director or controlling shareholder would make such transaction suspicious and would be declared void if it could not be proved fair and equitable. So in a negotiation of a deal of such kind disclosure of conflict of interest cleans the transaction from the taint of selfdealing. Perhaps the most important provision dealing with a duty to disclose in share transaction is Rule 10b-5 of Security Exchange Commission.[27] The broad language of Rule 10b-5 governs disclosers in all purchases and sales of securities from face to face negotiated transaction in the shares of closed corporations to open market purchases of shares in public corporations. Rule 10b-5 prohibits insider trading on stocks and securities without disclosure of information material to the share transactions. In *SEC* v. *Texas Gulf Sulphur. Co*,[28] the court invalidated all share transactions by insiders who had confidential knowledge of discovery of large oil deposits. In this case the officers of the company and the technicians involved in oil exploration had engaged in massive purchase of TGS shares before such discovery was publicly announced.[29] In addition Rule 13d of SEC limit share purchase by potential bidder up to 5% of the total share of target co. without disclosure of intentions.

Lawyer's duty to disclose

When an attorney is negotiating on behalf of his client, he has certain special duty of disclosure under the Model Rules for Professional Conduct. For instance if there is a drafting error and that would lead to incorrect

27. Rule 10b-5: "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality commerce, or of the mails or nay facility of any national securities exchange,
(a) To employ any device, scheme, or artifice to defraud,
(b) To make any untrue statement of a material fact or to omit to state a material fact necessary on order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."
28. 401 F. 2d 833 (1967).
29. Giving the reasons for invalidating the transactions the court in *SEC* v. *Texas Gulf Sulphur. Co.*, ruled "The insiders here were not trading on an equal footing with the outside investors. They alone were in position to evaluate the probability and magnitude of what seemed from the outset to be a major ore strike; they alone could invest safely, secure in the expectation that the price of TGS stock would rise substantially in the event such a major strike should materialize, but would decline little, if at all, in the event of a failure, for the public, ignorant at the outset of the favorable probabilities would likewise be unaware of the unproductive exploration, and the additional exploration costs would not significantly affect TGS market prices. Such inequities based upon unequal access to knowledge should not be shrugged off as inevitable in our way of life, or, in view of the congressional concern in the area remain uncorrected."

statement of the issues agreed upon between the contacting parties, the error is apropriate for correction between the attorneys without client consultation.[30] An attorney is also under an obligation not to allow her client to use her opinion, document or any other representation for committing crime including fraud. For instance if a client discloses to the attorney about the financial crash in the company just before signing a statement of representation and if he insists on keeping this a secret to avoid deal break, and attorney has duty to advise the client not to do so. If he insist on misrepresentation, the attorney has duty to withdraw from the representation of client, disown the draft representation prepared by her and even disclose this to the other party to prevent the client from committing fraud, if such disclosure do not violate the client attorney confidence under Rule 1.6.[31]

Non Reliance as a Defense

In a negotiation, parties bargain over a number of issues. In the pursuit of striking a favorable deal, negotiators often make misleading statements with a view to induce other party to accept the offer. But these misrepresentations *per se* do not trigger legal liability for such negotiator. Law requires the recipient of misrepresentation to prove that she relied upon such misrepresentation and her reliance was justified. If she could not prove that she justifiably relied upon such misrepresention or in the alternative if the defendant could prove that she did not rely on the misrepresentation, the case fails on that ground. The reliance of the recipient on misrepresentation must have been one of the reasons to agree for negotiated settlement. However, such misrepresentation need not be the only or predominant reason for negotiated settlement.[32] The courts are often flexible to ensure equity and justice.

The courts usually do not insist on strict proof of reliance once the recipient is able to show that there was an intentional misrepresentation of material fact to induce the consent for negotiated settlement. However, if the misrepresentation was not fraudulent or if it was not material then the

30. See; ABA Informal Opinion 86-1518.
31. Model Rule 14.1 : *Truthfulness in statement to others.*
In the course of representing a client, a lawyer shall not knowingly:
(a) make a false statement of material fact or law to a third person; or
(b) fail to disclose a meterial fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6
Also see: David Geronemus, *"Lies, damn lies and unethical lies"* from HOW TO NEGOTIATE ETHICALLY AND EFFECTIVELY, Business Law Today, Vol. 6, Number 5, May/June 1997.
32. *Light* v. *Jacob*, 183 Mass. 206, 66 N.E. 799 (1903; *Foley* v. *Holtry*, 43 Neb. 133, 61 N.W. 120 (1984 ; Restatement Second Sec. 167; UCC 3-406.

court would insist on strict proof of justified reliance by the recipient. A negotiator obviously has a good defense if the recipient carried out independent investigation to verify his misrepresentation. In a case the plaintiff had carried out independent investigation to verify the vendor's claim that the land had enough water. The court held that the recipient did not rely upon the misrepresentation of the vendor.[33] However, if the investigation was abandoned because preliminary findings of investigation seemed to confirm the statement of misrepresentation the recipient is not precluded form avoiding the contract. In the absence of such proof a court may presume that a person who has started an investigation has knowledge of the fact.[34] It must also be noted that common law do not impose obligation on the recipient to carry out investigation to verify the misrepresentation made by person in negotiation.[35]

A negotiator may also defend on the ground that her misrepresentation was so obviously false and known to the recipient that it could not have been relied upon. For instance a person cannot justifiably rely on a statement that says sun rises on the west. This kind of statement do not make sense. Similarly if the statement is couched in a way to express suspicion, guess or luck then they are also not to be taken seriously.

Assertion of opinion on the other hand pose a difficulty. In the negotiation parties make exchange of different kinds of opinions. Some may provide justifiable basis for reliance and some may not. Each has to be judged in its own context. If an opinion is couched in conclusive language or if it presumes the existence of certain definite fact situation then it is a material one and any reliance on it may be justified. But if an opinion is based on one's own hunch and do not imply knowledge of any fact then there may not be justification for the recipient to rely on it.[36] In the negotiation for sale of goods or property it is but natural for a vendor to give an exaggerated opinion on the value and quality of the things on sale. Since it is a matter of commonly accepted trade practice, the buyer has no right to rely on such statement of opinions.[37]

Many times business negotiation involve complicated legal issues. Business negotiations involving foreign investment, merger, acquisitions, takeovers, project financing, franchise agreement and security transactions are often led by attorneys. In these kinds of negotiations attorneys discusss

33. *Andrus* v. *Iric*, 87 Idaho 471 (1964).
34. See: *Mc Karmic & Co.* v. *Chiders* 468 F 2d 757 (4th Cir. 1972).
35. See: *Causineau* v. *Walker*, 613 P. 2d 608 (Alaska 1980).
36. See: *Spiess* v. *Brandt*, 230 Minn. 246, 41 N.W. 2d 561 (1950); *Farnsworth* v. *Fuller*, 256 Or. 56, 471 P. 2d 792 (1970); *Twing* v. *Scott*, 80 Wyo 100, 338 P.2d 839 (1959).
37. See *Kimball* v. *Bangs*, 144 Mass. 321, 11 N.E. 113 (1887).

the legal implications of porposed agreements, case law, rues and regulations and so on. As a matter of trade practice a party is expected to have his own attorney or legal adviser to take care of legal issues raised by an attorney representing counter part. But some time a party may have to totally rely on the representations made by an attorney representing other party. This is usually the case where a business negotiation has to do with international transaction and the governing law is that of foreign country. An attorney in such negotiation is expected to make a statement of law which he honestly believes to be true. If an attorney knowingly makes a false statement of law in such business negotiation, she would not only violate Rule 14.1 of the Professional Code of Conduct of Lawyers but she may even be liable for fraud.[38] A false statement of law by a lay person may not have substantial weight. But the same is not true for a lawyer. Thus if a lawyer makes a statement of law to a lay person, the lay person is entitled to take account of the lawyer's special expertise and to assume the lawyer's professional honesty, and the layperson may justifiably rely on the opinion even though the two have an adverse relation in negotiating contract.[39] A negotiating lawyer may also get in to trouble if he affirms a statement of law by another party which he knows is not correct. Law dose not require him to assist the other party on the issues of law but at the same time law does not permit an attorney to mislead the negotiation by affirming a statement of law which she knows is not correct. In such situation an attorney may just raise the question mark on the statement of law and get rid of liability.

Recommendation

To be able to negotiatie effectively in business negotiations without crossing the bright line that differentiates permissible lies from that are not, it is advisable for a negotiator to have a general idea about the laws on fraud and misrepresentation. If the negotiator is a lawyer then the level of legal knowledge expected from her is obviously higher . It will however be wrong to expect a business person to know the technical details of law on fraud and misrepresentation in different contexts. But it is not difficult for them to be informed about the basic principles of fraud and misrepresentation. A business person who cares to be informed about the basic principles of law on fraud and misrepresentation would be able to save herself and her firm from the civil and criminal liabilities.

Law on misrepresentation and frauds has been constantly evolving and the trend is to create a duty to disclose as an exception to the common

38. See: *Supra* note 31.
39. Farnsworth, E. Allan, "Contracts", Second Edition, P. 267.

law rule of *"duty not to disclose"*. These exceptions are created by legislative enactments and court rulings to avoid injustice. One is not excused from her duty to disclose for ignorance of law. It will be advisable for business negotiators to be informed about the specific areas of business negotiation where law imposes a duty on a party to disclose a certain fact. And where there is no duty to disclose one can be safe in adopting the strategy of *"be silent and be safe"*. Some of the basic guidelines to a business negotiator could be as follows:

1. You may misrepresent on your expiration price or reservation value. They are not considered as material fact. This guideline may not work where a market operates on fixed price and where there is not trade practice of bargain.
2. Never make a statement of fact unless you are sure of its truthfulness. If you are not sure of its truthfulness, avoid making any statement on such fact. Or one may just make a statement of guess or hunch or wish.
3. Statement of half truth should always be avoided. Silence is safer than a statement of half truth.
4. A statement of opinion, intention or conviction can be a material fact. Never make such statement unless you mean it and is true.
5. Misrepreentation can be by words, written or spoken. It can also be by silence and inaction. It can also be infered from the conduct. It is always better to ask yourself as to whether I am misleading another party by keeping silent or doing some action.
6. It is advisable for a negotiator to read the document carefully before signing it. You should make it a point to see that the writing negates the misrepresentations if there are any.
7. A person is invariably under a duty to disclose if he is in fiduciary relation of trust and confidence.
8. You have a duty to disclose the information in your possession if it is material to the transaction and if the other party has no access to it. However if the information you have is the result of your own research or legitimate effort then you have every right to use it for superior bargain.
9. A rule on duty to disclose is strict on seller. Seller should disclose the latent defects in the goods unless the sale is on the express condition of "as is, where is" and on express denial of warranty of merchantibility. Under the rule of *Caveat Emptor* the buyer is expected to take care of external defects. Seller is not held liable for external defects unless the seller gives and implied warranty for such defects.

A SURVEY OF INTERNATIONAL LAW AND CURRENT ISSUES RELATING TO PROTECTION OF CULTURAL PROPERTY

*Manju (Virmani) Chellani**

I. INTRODUCTION

The importance of art, aesthetics and culture in the shaping of our lives and societies is indubitable. The level of their development in a given civilization determines its quality, grandeur and stability. Over the years gifted craftspersons have been respected, sometimes indeed revered, for the skill and vision with which they have produced artistic masterpieces. These works are precious and irreplaceable; but not just for their inherent beauty. Some of them are proud pillars of ancient civilizations surviving till today and many are sole representatives of cultures and customs long past gone. Together, they form the expression of man's creative genius.

As such, it is natural that the protection of these works and sites should be a pressing concern of the international community. Nations accept that they have a duty to protect the cultural property of other nations as well as which technically "belongs" to their boundaries. No society with any claim to intellectual sophistication can hold any one culture's manifestations as being superior or worthier of protection. Each is a road to the storehouse of universal thought, and continued cultural interchange is essential for a cosmopolitan understanding. All of us feel pride in being able to view foreign sculptures, paintings and monuments of surpassing beauty as part of common human heritage.

Governments have a special interest in the preservation of cultural property, often overriding the traditional concept of property. For some purposes, it is invested with the status of private property; for other purposes, it is characterized as public or quasi-public property. Even when the property is privately owned, governments impose restrictions, vide their special responsibility to preserve the nation's cultural patrimony.

The immense value and importance of cultural property has its flip side too. It faces ravages of time and nature, extinction by war, theft and other violations; as such it poses challenges to governments of parent-countries

* Research Scholar (Ph.D.), Faculy of Law, University of Delhi.

which have to protect it. Most of these problems have international implications and are beyond the capacity of individual nations to control. For example, in 1960, the 30 feet high statue of Ramses II at Abu Simbel in the Nubian monuments of the Upper Nile in Egypt was threatened by flooding from the newly-constructed Aswan High Dam. International community, led by the United Nations Educational, Scientific and Cultural Organization (hereinafter referred to as UNESCO), organized campaigns to save all of these monuments.[1] Their efforts were highly effective and timely. Simultaneously, however, the need for a permanent legal and administrative structure to protect threatened sites and objects was recognized. A number of significant issues are involved here which can be dealt with only within realms of international law.

These issues have been analyzed and presented in various fora. Scholars have approached this branch of law from a number of viewpoints e.g. criminal liability, issue-based discussions, discrepancies between the international and domestic law. The attempt of this article is to comprehensively put together the more relevant debates and the imperative international mechanisms dealing with them, in order to provide an overview of all the legal ramifications of cultural property.

II. A Survey of the Existing Legal Framework

The international law protecting cultural property is not, as yet, very well organized and the various regimes dealing with different aspects do not always dovetail. Following are brief commentaries on the important international and regional arrangements. Latter are obviously not international in character but they can sometimes suggest models or trends to be emulated in the future. The inclusions are those conventions, protocols, principles, drafts etc., which have had a real and perceptible impact.

1. International

A. Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954[2] and Protocol, 1954[3]

Second World War witnessed destruction of cultural property at a hitherto unimaginable scale. The laws of war forbid plunder of art treasures during times of armed combat or belligerent occupation. But the confiscation and seizure by the Nazis of private property including

1. See *Protection of Mankind's Cultural Heritage*. Sites and Monuments (UNESCO Report 1970). pp. 39-60.
2. Reprinted in 249 United Nations Treaty Series 240 (effective August 7. 1956); hereinafter referred to as 1954 Convention.
3. Reprinted in 249 United Nations Treaty Series 358; hereinafter referred to as 1954 Protocol.

invaluable pieces of art showed no respect for these laws. Hence, after the World War II, the need for a more specific protection was felt. The London Charter of 1945[4] and the Nuremberg Trials made plunder a war crime. The 1949 Geneva Conventions and Protocols[5] also lay down that unjustified and wanton destruction and appropriation of property is a grave breach of international law. Moreover, attacks on specially protected and clearly recognized historical monuments works of art or places of worship are also under their ambit.

Major efforts were made to define the framework of protection to be accorded to cultural property during belligerency and thus the 1954 Convention and Protocol came about. They apply to a broad range of conflicts including acts of war: even of undeclared and internal conflicts not of an international nature. The Convention is based upon the idea that the cultural property within any national boundary is of importance both to that nation and to the entire world. It recognizes that each State holds and administers the property at least in part, for common good and owes minimum protective acts to the international community. Given that the Convention exists to protect it during belligerency, the definition of cultural property ought to be given the most liberal interpretation.

This Convention brought about an amalgamation of provisions relating to cultural property hitherto scattered among many legal instruments and emphasized that the national and international actors must organize the protection in times of peace, in order to be effective. The Convention seeks also to define the rights of bona fide purchasers of confiscated art and its 1954 Protocol enjoins each State-party importing cultural property from occupied territories to seize and retain it until the end of hostilities, to be returned to the previously occupied territory. To ensure integrity of property under their control, States are also enjoined to prevent illegal exportation and to indemnify any good faith purchasers if the exportation does take place. Hence protection, duties and accountability of belligerent and neutral States have been expanded by this Convention.

B. The UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 1970[6]

UNESCO aimed this Convention towards bringing about cooperation between art-rich and art-importing nations in stopping the "impoverish-

4. Reprinted in 82 United Nations Treaty Series 279.
5. Reprinted in 75 United Nations Treaty Series 287.
6. Reprinted in 10 International Legal Materials 289; hereinafter referred to as 1970 UNESCO Convention.

ment of the cultural heritage of the countries of origin." This is one of the major international legal instrument operating to protect cultural property from threats of organized theft and illicit trade. Each member State is expected to enact legislations to fulfill this aim. The Convention defines cultural property as "property of which on religious or secular grounds, is ... of importance for archaeology, prehistory, history, literature, art or science" and lists the materials it includes. The enforcement provisions apply only to that cultural property which was registered previously as belonging to collections of museums, religious or public monuments, or institutions. Hence it does not deal with newly discovered artifacts and illicit trade therein. The objectives of the Convention are in form of principles and impose no enforceable obligations upon the member-States. Prevention of illicit trade is required only to be in accordance with the existing national legislation. Convention stands silent where a country's export laws authorize import of property which is exported illegally from the country of origin.

Clearly the Convention is not a very effective tool but it does urge signatories to recognize values associated with cultural protectionism and to implement the Convention with whatever means it may have at its own disposal. No binding dispute-resolution method is provided for; the Convention merely extends the "good offices" of UNESCO in dispute-settlement.

Though not responding satisfactorily to all of these issues it should have addressed, the 1970 UNESCO Convention is still a very important international instrument dealing with the severe problems of theft, clandestine excavations and illicit trade.

C. The UNESCO Convention for the Protection of the World Cultural and National Heritage, 1972[7]

This Convention is founded upon the principle that cultural heritage is part of the "world heritage of mankind". Certain sites are of paramount importance and member-States commit themselves to those located in their own and in other States' territories. Each party submits to UNESCO a list of sites which qualify for protection as per certain criteria viz. representation of unique achievement, exertion of considerable influence during a certain time period, providing evidence of a lost civilization, illustrating a traditional way of life or association with beliefs of universal importance. The *World Heritage Committee* draws up a *World Heritage List*, based upon submissions of member-States and reports by international organizations. Only the sites on the World Heritage List receive protection under the Convention. Hence, the Convention deals with cultural heritage not at large but only when considered significant by nations.

7. Reprinted in 1037 UNITED NATIONS TREATY SERIES 151; hereinafter referred to as 1972 UNESCO Convention.

World Heritage Fund provides resources for training, equipment, publicity and professional expertise for restoration of monuments and natural reserves. Individuals are also encouraged by World Heritage Committee to find funding and develop projects for protection of sites on the list.

The Convention has proved to be a useful and popular conservation instrument. One of the best known examples of its work is its role in halting construction of a dam on the Gordon-below-Franklin River, which would have flooded a large area in southwest Tasmania.

D. Additional Protocols of 1977[8]

The protection of cultural property was not given much importance in the Geneva Conventions of 1864, 1906, 1929 and 1949. However, the expansion of the activities of the International Committee of the Red Cross also led to developments in international humanitarian law, especially from the end of 1960s. The Diplomatic Conference of the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva, 1974-77) adopted two Additional Protocols. Each contains a specific provision relating to protection of cultural property, in times of conflict.

E. The Intergovernmental Committee for Promoting the Return of Cultural Property to Its Countries of Origin or Its Restitution in Case of Illicit Appropriation, 1978[9]

The Intergovernmental Committee was set up in response to the need felt by the international community for a body to deal with the claims of repatriation and restitution of the cultural property taken away from the former colonized States (this issue has been dealt with in detail in a later section of this article). It consists of 20 member-States of UNESCO, elected by its General Conference, keeping in mind geographical distribution and the potential contribution they can make to the Committee-process. This membership is on a rotation-basis.

8. Reprinted in 16 INTERNATIONAL LEGAL MATERIALS 1391.
9. See GENERAL CONFERENCE OF UNESCO RESOLUTION 4/7. 6/5 (1978); hereinafter referred to as Intergovernmental Committee.

The workings of the Committee has revealed that countries have widely different views on how protection should be accorded to cultural property. The Committee's task is to promote bilateral negotiations for return or restitution of cultural property, particularly from times of colonization and military occupation. The Committee has always emphasized on bilateral arrangements; indeed, it is only when all bilateral avenues have been exhausted that the parties have a recourse to the Committee. It is a "good-offfices" and arbitration Committee, promoting cooperation and negotiations, especially of a professional nature at bilateral, multilateral and regional levels. It also assists countries to build representative collections and prepare national inventories, to implement recommendations and advise UNESCO on relevant issues.[10] In its 1989 session, some of the Intergovernmental Committee's specific recommendations were:

(*i*) Promotion of bilateral agreements;

(*ii*) Stressing the necessity of preparing inventories;

(*iii*) Recommending creation of healthy museum structure as one of the measures to protect cultural property in the country of its origin and ensure its return or restitution to them;

(*iv*) Stressing that silence on the part of member country on the issue of restitution of cultural property would amount to complicity in illicit traffic of cultural property and

(*v*) Country of transit should come forward to make request of restitution of cultural property to the country of its origin.

The Committee is generally viewed as being sympathetic and a potentially powerful restitutive mechanism.

F. Protocols to the Convention on Conventional Weapons, 1980[11]

Article 6 of Protocol II to the Convention provides that:

"1. Without prejudice to the rules of international law applicable in armed conflict relating to treachery and perfidy, it is prohibited in all circumstances to use:...

10. For a detailed account of the working sessions of the Intergovernmental Committee, see Greenfield, Jeanette, THE RETURN OF CULTURAL TREASURIES (United Kingdom: Cambridge University Press, 1989) and web-site of the UNESCO.

11. Reprinted in 19 INTERNATIONAL LEGAL MATERIALS 1523.

(b) booby-traps which are in any way attached to or associated with:...

- historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples:...

Article 2 of Protocol III states:

"1. It is prohibited in all circumstances to make the civilian population as such, individual civilians or civilian objects the object of attack by incendiary weapons"

This Convention and Protocols also reflect the developments in international humanitarian law and apply in the times of conflict.

G. The UNIDROIT Convention on Stolen or illegally Exported Cultural Objects, 1995[12]

This Convention was issued by the International Institute for the Codification of Private International Law (UNIDROIT). It was an effort to strengthen the protection provided hitherto to cultural property. This Convention is also non-retroactive and focusses mainly on the return and restitution of both stole and illegally-removed/exported cultural objects and states this objective in its Preamble and Article 1. It talks about cultural "objects" of which the definition is the same as of cultural property in the 1970 UNESCO Convention except that the objects covered are not exclusively those "designated by the State". This indicates that even private owners have recourse to legal remedies.

On the positive side, this Convention gives priority to naitonal laws if they are more favourable to repatriation. Otherwise, the State-parties are required to follow the law laid down in the Convention. This counters the weakness of the 1970 UNESCO Convention which has no enforceable provisions with regard to repatriation and defers towards domestic legislation. Issues such as time limitation of claims, the criteria for diligent acquirers and the compensation to them have also been dealt with more precisely in this Convention, making for easier interpretation and implementation.

2. *Regional*

A. European Cultural Convention, 1954[13]

This Convention aims to bring together the endeavours of the countries of Europe towards common action and policies. Each party under-

12. Reprinted in 34 INTERNATIONAL LEGAL MATERIALS 1322 (1995); hereinafter referred to as the 1995 UNIDROIT Convention.

13. Reprinted in 218 UNITED NATIONS TREATY SERIES 139 (effective January 8, 1955).

takes to safeguard and develop "its national contribution to the common cultural heritage of Europe". The Convention lays further responsibility upon them to view the cultural objects of individual European countries as the common cultural heritage of Europe and to accord protection and access to them . Both the national and international interests of a country are taken into account; preservation going hand in hand with reasonable access for all cultural holdings.

This Convention may also serve as a guide to groups of developing nations with similar heritage. They can contribute their respective sources on a regional basis for preservation of the most important common holdings. Cultural heritage is often a merging of many nationalities and/or societies, at different points of time and may not be the heritage of only one country e.g. India and Pakistan.

B. European Convention on the Protection of the Archaeological Heritage, 1969[14]

This Convention aims to suppress the illicit dealing in archaeological objects, treating them as witnesses to civilizations and sources of scientific information. Protection of archaeological history is to be the concern of all European States. Prevention of illicit excavation is described to be the first step towards this. Parties undertake to define and protect the archaeological sites, control access and excavation; and encourage exchange of information. They also agree to develop more stringent acquisition-policies for State-owned museums, with a view to discourage illegal excavations.

However, the member-states are not obliged to legislate on the matters undertaken in the Convention, making it more aspirational than action-oriented in nature.

C. Draft European Convention on Offenses Relating to Cultural Property, 1984[15]

Being a Draft Convention, it is not law. But it is a very significant development in the regional and international legal corpus. It provides a framework for international cooperation in the discovery and restitution of illegally-removed cultural property. Contracting States are to undertake measures to increase public awareness; to acknowledge the gravity of a harmful act affecting cultural property; and by establishing municipal law, to prosecute and penalize the offenses committed.

14. Reprinted in 8 INTERNATIONAL LEGAL MATERIALS 736.
15. 33d. Sess., CDPC (84).

The offenses in respect of which the implementation of the Convention would be of a mandatory nature are thefts of cultural property, appropriating cultural property with violence or menance and receiving of cultural property purusant to one of the above-mentioned offences.

The Draft Convention is generally considered to be an effective and important development with a far-reaching potential since it deals directly with a host of legal problems.

D. Convention on the Protection of the Archaeological and Artistic Heritage of the American Nations, 1976/ Convention of San Salvador, 1976[16]

This is also known as the Organization of the American States (OAS) Treaty. It adopts the position that in order for it to be legal, the export of all cultural property has to be authorized by the owner-State. The legality of the consequent import is also contingent on this. The ownership of cultural property is to be a matter for domestic legislation though. Cooperation and assistance among member-States in protecting the indigenous culture of the Americas is the key-note of this Convention. Each State has the responsibility of identifying, registering, protecting and preserving the cultural property under its control.

The said cultural property includes American monuments and fragments thereof, dated prior to contact with European culture; monuments from the colonial era and the 19th century; objects originating after 1850 which the States have recorded as cultural property. Other cultural property specifically declared by a member-State is also under the purview. Also included are items of foreign origin, legally acquired by a member-State.

The Convention is a movement towards preventing illegal art traffic. Unfortunately, the Convention does not make clear the modalities of a legitimate art exchange. The equitable balance between promotion of art-exchange and preservation of cultural heritage, which the Convention probably tried to reach to, has not been achieved.

E. Conference of South Asian Association for Regional Cooperation, 1986[17]

The Resolutions which were passed in the Conference included sharing of archaeological and historical information as well as expertise, research and archaeological data between the SAARC member countries.

16. Reprinted in 15 INTERNATIONAL LEGAL MATERIALS 1350.
17. Hereinafter referred to as SAARC Conference.

Recommendations were also made that members should not let their territories be used for clandestine traffic and illicit trade. Furthermore, they should identify and correct inadequacies of existing domestic legislation. However, the SAARC Conference did not directly talk about bilateral treaties on restitution of cultural property though this was implied in the mutual-cooperation clause.

3. Non-governmental means

Principal among the international non-governmental organizations dealing with cultural property is International Council for Museums (ICOM). In 1977, ICOM declared that restitution or return of objects essential for a nation's cultural identity is of major importance and constitutes an ethical principle. The ICOM Assembly then decided to assist in this course of action, responding to the efforts of UNESCO. It has now created a system of non-governmental cooperation, primarily among museums of the world. It has persuaded national bodies such as the American Association of Museums, to adopt new or to improve upon existing code of ethics. In the same vein, individual institutions have been encouraged by ICOM to adopt better acquisition policies[18]. ICOM has also promoted the return and restitution of objects by beginning the Museum Exchange Programme in 1978[19] which has four functions:

(*i*) collecting information and relevant practical details about museums willing to exchange or loan objects or receive loans; (*ii*) proposing different forms of contract for the adoption of bilateral agreements between museums; (*iii*) offering technical legal advice for solving any problems which may arise in carrying out the exchanges and (*iv*) acting as negotiator between the institutions concerned.

ICOM's achievements have been laudable, especially in the field of promoting cooperation in the return of cultural property. This will be discussed in the next section.

18. For a detailed account of the work of the ICOM, see Nafziger, J.A.R.: *Regulation by the International Council of Museums: An Example of the Role of Non-Governmental Organizations in the Transnational Legal Process*. 2 DENVER JOURNAL OF INTERNATIONAL LAW 231 (1972).

19. See also Monreal, *Problems and Possibilities in Recovering Dispersed Cultural Heritages* in *Return and Restitution of Cultural Property* (Special issue). 31 MUSEUM 49, 57, No.1 (1979); as noted in Nagziger, J.A.R., *The New International Legal Framework for the Return, Restitution or Forgeiture of Cultural Property*, 15 JOURNAL OF INTERNATIONAL LAW AND POLITICS 789, no. 4 (1983), at p. 800 (n. 64).

III. SIGNIFICANT ISSUES

A lot of thought and debate has taken place over these issues, encompassing as they do, concepts of historical justice, national identity and present day economic benefit. Some issues have been resolved satisfactorily, some are controversial and yet some other have taken interesting turns, which may eventually lead to indigenous solutions.

1. Repatriation and restitution of cultural property

Though deprivation of cultural property is not a new phenomenon and has taken place over ages, the past few centuries of colonialization have witnessed large-scale instances. Durig 1960s-the major period after decolonialization-some claims were made for return/restitution of objects taken away during colonial periods. In the absence of relevant international law, they met with only limited success; but they left behind some important procedural openings.

These claims began to receive more serious attention in the last few decades with the growth in anthropological thought and human-rights jurisprudence. Legal measures and diplomatic measures are being used to correct historical wrongs.

Discussions went on within the United Nations too, over the fate of cultural property now in possession of former colonizing states. But this did not bring about a powerful instrument/arrangement. The 1970 UNESCO Convention does talk about repatriation of cultural property but it does not have retrospective effect. This means that it does not apply to most of the property which was taken away in colonial period before the Convention came into effect. The Convention deals primarily with the return of goods which have been subjects of the more recent illicit trade, discussed in a later section of this article. Though Article 11 provides that export and transfer of ownership of cultural property under compulsion, arising directly or indirectly from occupation of a country by a foreign power is illicit, the provision is only prospective.

Former colonies have recourse only to the 1978 Intergovernmental Committee which is the only body with the necessary mandate; and bilateral negotiations. The Committee has generally been unable to do much for the few cases brought before it for a variety of insurmountable reasons, e.g. State of present location not being a UNESCO-member or the location not being known at all.

Bilateral means are proving to be more hopeful. Negotiations can be made at levels of governments or museums. Museums, especially, employ anthropologists and they are more understanding and respectful of claims of other cultures and can facilitate by persuading their colleagues and

officials to follow suit. ICOM has been able to promote more ethical standards among museums with respect to attitude towards such property and restitutive policies. Its achievements include, among others, the return of objects to Mexico, Panama and Peru by five museums in the United States; seventeen artifacts from Australia to Papua New Guinea in 1977 and two canoe-prow carvings from Australia to the Solomon Islands in 1978. It must be remembered, however, to keep negotiations out of public eye as cultural property issues are heavily charged with sentiments of patriotism and national identity. Excessive sensationaliaztion and press coverage can distort the perspective.

It is clear that, apart from ICOM and bilateral negotiations, no really effective restitutive international mechanism is available as yet to former colonies. It remains to be seen if the 1978 Intergovernmental Committee develops into a dynamic instrument or whether bilateral means take over in the new climate of ascendancy of third world politics. Nevertheless, it can be argued that the principles and spirit forming the conventions on cultural property should be applied to prior claims which have the same moral sanctity even if not legally covered by the existing legal mechanisms.[20]

As for the claims apart from those of the former colonies, albeit pertaining only to the times of conflict, the relevant mechanism is the 1954 Protocol. It directs State-parties to take into custody cultural property imported illegally into its territory from any occupied territory and arrange for its return at the close of hostilities. Applying prospectively however, this instrument also cannot be taken recourse to by European or other States to claim back objects taken before its application e.g. during the second World War. The only recourse they have is to file suits in the courts of the concerned individual country under its domestic legislation which can prove to be difficult, expensive and drawn-out. Results depend on the efficacy (or lack of it) of the applicable legislation.

The 1995 UNIDROIT Convention deals with the return and restitution of stolen and illegally-exported cultural objects. Generally proclaimed to be a strong restitute mechanism, its efficacy will be evinced by the practical examples coming before it.

2. Efforts of Private Individuals

International law does not deal with private claims. However, a fairly recent case has exhibited that initiatives taken by a private individual can

20. For historical background and detailed analysis, see Prott, L. B., *Repatriation of Cultural Property*, UNIVERSITY OF BRITISH COLUMBIA LAW REVIEW Special issue 229 (1995).

bring results. In 1981, thieves dug out a dozen Roman bronzes from John Browning's farm, in United Kindgom (U.K.) The farm was the protected site of a Roman villa and temple. These bronzes were sold in the United States (U.S.) to another private individual named Levy. Since U.K. was not a member of the 1970 UNESCO Convention, Browning could not ask for national assistance in getting the bronzes returned. He filed a case in U.S. courts; but after prolonged legal proceedings, decided to settle out of court. Under the agreement, Levy would keep the bronzes till his death after which they would be donated to the British Museum as part of English National Heritage[21]. While it would be unrealistic to expect many individuals to launch on missions of this magnitude, the way has been paved. This case has given some openings which can be taken up by groups of concerned individuals, non-governmental organizations and so on.

3. Art-theft and illicit trade

A fast growing international market for *objets d'art* has made the ubiquity of illicit art trade second only to the drug-smuggling trade. Huge demands are created by urban art dealers, increasing numbers of nouveau-riche who want something to show for their money, investment firms who view art as a commercial commodity, souvenir-hungry tourists etc.

Some nations have more "attractive" cultural property than others. This may not necessarily go hand in hand with an ability to protect or preserve it. This results in unduly strict export controls without the infrastructure to implement them. Illicit trade booms and the cultural integrity of the nation is compromised without the economy getting any boost. Of course, not all cultural objects fall in the same category, needing the same protection. Duplicates and recent creations cannot have the same historical value and should not be equated with unique or ancient items.

Licit, as opposed to illicit, trade appears to be the better alternative. Objects most essential to the cultural identity could be selected and retained by the government-rest could be used in trade. It would also promote a healthy interchange of cultural knowledge and appreciation. Inviting financial and technical assistance from the international community could result in more efficient administration of sites and preservation of objects. However, most nations evince little interest in promoting relevant legislations inspite of art-trade being so lucrative. Merryman[22] has

21. For a discussion of this case, see Villanueva, R.H., *Free trade and protection of cultural property: the need for an economic incentive to report newly discovered antiquities*, 29 GEORGE WASHINGTON JOURNAL OF INTERNATIONAL LAW 547 (1995).
22. See Merryman, J.H., *What do Matisse, Van Gogh and Hitler Have in Common?* UNIVERSITY OF BRITISH COLUMBIA LAW REVIEW Special issue 273 (1995).

tried to analyze the reasons for this and for treating international trade in objects even not stolen as illicit. He says that export controls on cultural property are justified by *protectionist* and *retentionist* interests. Preservation of context for cultural objects is the basic value of protectionism. The importance of the object for information and accessibility is also a justification for protectionists who also argue that by denying access to foreign markets, the incentive for clandestine excavations and removals is reduced. On the other hand, protectionists' arguments may not always be realistic as export and preservation laws are difficult to enforce; their easy evasion practically ensuring a black market. Furthermore, persons running the illicit trade remove objects hurriedly, without any professional skill or love. No documentation is done-unless falsified-and the context may be forever lost to history. The very nature of this trade compels the buyer to keep his new possession nuder covers, depriving it from public access and study. Internationalists also argue that preservation of a universally significant object in a foreign museum with large public access is preferable to leaving it vulnerable to physical destruction or languishing in museum-basements of parent country. This facilitates no cultural purpose or understanding between different cultures. Protectionists, however, retort that these viewpoints are supported only by wealthy art-collecting nations whose sole interest in accumulation of objects of beauty and historical richness is as status-sumbols. There is no regard for the spirituality and national identity embodied in them.

Retention is characterized by the desire to retain the object within national territory. It can take the extreme form of keeping all valuable historical objects within national territory inspite of lack of any significant relation to history or culture. For example, in 1993, France refused to permit export of a privately-owned painting by a Swiss artist named Jean-Etienne Liotard and in 1992, of a privately-owned Van Gogh painting. Export would not have harmed their physical condition and they held no significant place in France's cultural history. In some cases, however, retentionism comes with the knowledge that some of their best cultural representations may be lying in other countries instead of in their own. This plugs down all trade which would not happen if they had a reasonable collection of their best products. After all, cultural property is a non-renewable resource.

There are certain countries which "launder" objects of illicit trade by supplying them with expertise in artworks and antiquities. Without their cooperation, traffickers would be deprived of much of their profit and safety. By promulgating more stringent regulations, these countries would require their residents to be more responsible dealers and experts. They

would have to inquire more deeply into the provenance and authenticity of the art object brought before them. It should be remembered that an object of dubious provenance gains respectability by being documented by a professional.

Similarly, museums have a responsibility to refuse to authenticate cultural objects which do not meet a high acquisition criteria. This is particularly true of those "art-market" states where the dealers are not *required* to give guarantees. Auction houses would be servicing their trade better, too, if they apply standards of acquisition just as ethical. These would require certification of title and close scrutinizing of provenance. This, in turn, would make the illegal trafficker think twice before making large investment in such items as he would have lesser avenues of resale.

The 1970 UNESCO Convention requires its member-States to cooperate in preventing the export of stolen property from source nations and its import into other nations. Also, source nations may request other States to take steps to recover and return cultural property that was illegally taken and then re-located in the requested State.

The Convention places significant responsibilities upon the source nation to control the objects leaving their country. Certain cultural property is recognized as inalienable and part of the State's cultural heritage and this comes within the protection accorded by the Convention. However, the definition of cultural property under the Convention is broad and can be read to include any work of art legally in the country as no specified length of its stay in the country is required under it.

In order to allay the fears of art-rich (generally the developing) nations that the lure of wealth offered by western nations would eventually impoverish their cultural deposits, it is required that the major art-importing nations should ratify the 1970 UNESCO Convention and make all-out efforts to prevent mass depletion of cultural sites, globally.

A ready example comes to mind which would serve to illustrate the foregoing. An eighth century statue of Lord Buddha which went missing from a Bodh Gaya Stupa in Bihar about a decade ago. is back in India. It was traced to the Metropolitan Museum of Art in New York and then returned to India recently after the negotiations conducted by the Archaeological Survey of India with the Museum's authorities once it was established that the artifact did, in fact, originate from India. This return took place without any monetary compensation in exchange.[23]

23. *Antiquity Act to be made more stringent.* THE HINDU (April 1, 1999).

4. Economic issues

As pointed out in the previous section, illicit trade is carried on by unauthorized persons for quick profits. Many of them are residents of areas where cultural property is situated. A section of them are professional in this field but many are off-and-on miscreants. They are generally paid just a pittance by the foreign buyers which they agree to - sometimes due to dire poverty. Had they been honest and reported findings of cultural objects on their areas the government may have confiscated or razed their lands, destroying homes and crops. Either way, they stand to be the losers.

Therefore, national legislations should provide economic incentives to report findings of artifacts. These findings may have taken place during farming, building or razing; they may be known to a community over generations.

Some nations have come up with creative solutions to deal with this dichotomy. Italy has lured *tombaroli*-grave robbers into digging at sites chosen by archaeologies. *Tombaroli* find a steady employment better and are knowledgeable enough to guard sites from former colleagues[24]. China has auctioned off a large number of not-so-essential cultural objects so that the nation, and not individuals, should benefit from the proceeds.

It is still debatable whether discovery and reporting of new cultural property ought to lead to promotion of tourism. It has been observed in numerous instances that the much sought-after tourism is eventually the arbiter of changes in stable, traditional lifestyles and customs. Some may consider this as erosion of the intangible cultural property of the nation.

IV. Conclusion

The international law dealing with the various aspects of protection of cultural property is still evolving. There is as yet no cogent answer to many problems. Sometimes, it is difficult to carve out a solution which would elicit an all-round approval. The surrounding issues are emotive ones; involving sentiments of national identity, cultural patrimony and respect for heritage and sometimes, even religion. Countries have a dual responsibility-national and towards international community. Cultural property has always had a vulnerable existence due to its irreplaceable and unique nature and the underlying aim of all countries should be to break its link with exploitations of all kinds. Despite efforts of the international and

24. See Merryman, J.H., *The Protection of Artistic National Patrimony Against Pillaging and Theft* in Art Law: Domestic and International. (Leonard D. Duboff ed., 1975); Church, *supra note* 150, at 226n 229; as noted in *supra note* 21, at p. 575 (n. 281).

national law, cultural property continues to face threats; pollution and consequent degradation being the most recent one.

Some suggestions are mooted below, addressing the issues taken up in this article and some other queries which have not been discussed in detail.

Exchange or long term loan of objects between the countries may reduce the craze of acquiring another nation's patrimony. Even if an object has gone out legally to another country temporarily for exhibition and is lost, proper compensation should be paid to the country of origin. The object can be returned when or if it resurfaces. Another creative solution by individual nations could be the manufacture and export of duplicate pieces and minor ethnographic specimens to satisfy the international market without compromising on significant art. Yet another step would be the development of more regional legal mechanisms as alternatives to weak international protection.[25] This would lead to a standardization of legal procedures in various directions e.g. period of limitation in regard to the restitution of stolen property and requirements for a purchaser to prove his bonafide intentions. In fact, more stringent laws for the purchaser may limit the diaspora of illicit art-trade as the potential purchaser would have to be more cautious in investing in an object which may be taken away from him.

The establishment of an international forum for claims of all kinds may lead to faster disposal of cases with a number of ramifications.

A new arena of reciprocity can be between the international provisions for the protection of environment and cultural property. These two areas converge many a time in actual practice. Environmental law is getting increasingly pro-active in protecting cultural property with its own tools. In a recent decision-*M.C. Mehta* v. *Union of India and others*[26]—the Supreme Court emphasized upon the importance of the Taj Mahal as a representative of the ancient Indian civilization and the necessity to prevent it from environmental pollution and the subsequent degradation of its beauty and character. Furthermore, directions were issued to the Government of India to decide whether Agra should be declared as a heritage city. The nexus of the cultural property law with such dynamic

25. The author is indebted to the discussions in Colley, M., *The effect of efforts to control illicit traffic in legitimate international commerce in art* 8 Georgia Journal of International and Comparative Law 462 (1978) and Sinha, D.K., *Retrieval of Indian Antiquities Smuggled Abroad* in Facets of Indian Civilization: Recent Perspectives (J.P. Joshi chief ed.) vol. III (Delhi: Aryan Publishers, 1997).

26. A.I.R. 1997 S.C. 734.

regimes could result in the more powerful protection of what Professor Nahlik has put in the following words:

"The human individual is mortal and generations follow one upon the other. It is nevertheless possible for every generation, however fleeting its existence, to leave here below an immortal trace of its genius, embodied in a work of art here, an historical monument there or cultural property in another case. We should never forget the relationship between what is fleeting and what, alone, can endow people and their works with perennial qualities. Vita brevis... Ars longa.[27]

27. See, Nahilk, S.E., *La Protection internationale des biens culturals en cas de conflit armé* 120 RECUEIL DES COURS DE L'ACADEMIE DE DROIT INTERNATIONALE no.II (1967); as quotes in Toman, Jiri, THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT (United Kingdom : Dartmouth Publishing Company Limited and UNESCO, 1996) at p. 20 (n. 41)

THE POPULATION LAW: TWO LANDMARK JUDGMENTS FROM RAJASTHAN

*Dr. Usha Tandon**

Honourable Mr. Justice B.R. Arora of the Rajasthan High Court deserves appreciation for delivering two socially relevant land mark judgments in *Saroj Chotiya* v *State of Rajasthan*[1] and *Mukesh Kumar Ajmera* v *State of Rajasthan*.[2] The Judicial recognition of growing population as "one of the major problems which India is facing today", though late, is timely.

In upholding the validity of the impugned legislations, the Division Bench of the Rajasthan High Court has recognised the role, which law can play in controlling the burgeoning population of India.

The purpose of this article, which is mainly informative, is to sensitize the readers about the role of law in population control in India.

II

As per 1991 Census, India's population has reached a figure of 846.30 million.[3] In the world today India, ranks second in population numbers, the first being China. While India has only 2.4 percent of the world area it has 16% of the world population. Although China is at present the most populous country in the world, India is more densely populated than China.[4] May 11, 2000 has recently been declared by the Government of India to be the date when India will have one billion people.[5] According to the latest estimates, India will surpass China in population by the year 2050. Thus, in the 21st century, India will have the questionable privilege of being the most populous country in the world.

* Reader, Campus Law Centre, University of Delhi, Delhi.

1. AIR 1998 Raj 28 (DB).
2. AIR 1997 Raj 250 (DB).
3. Registrar General and Census Commissioner of India 1991, *Primary Census Abstract, General Population Series 1*, Vol. 1, P. vii India.
4. The density of population in India is estimated to be 267 persons per sq. km as per the results of 1991 census. In 1987, it was estimated to be 256 persons per sq. km. as against 120 for that of China for 1987. See Planning Commission, *India's Population Policies and Perspectives*. May (1989).
5. United Nations Fund for Population Activities, *Pop Times*, vol 1, No. 2, October 1999, p. 1.

Although the 1991 census recorded a marginal decline in the annual growth rate of population from 2.22 per cent in 1971-81 to 2.11 percent in 1981-91, this would still mean an addition of 18 million people to the country's population annually which is equivalent to the population of Australia. The annual increase is the highest of all the countries in the world including China which is the most populous country at present.

The fast rate of growth means that the economy has to grow faster to protect the already low level of per capita availability of food, clothing, housing, employment etc. If one were asked to name one single problem, which ails India most, the answer certainly is poverty. And if one were to diagnose a single factor responsible for poverty most, the answer would be population. A statement of India's population problem is summarized as follows:

"How can India raise the standard of living of her people and cut down the still relatively high death rate when it is so difficult to support the existing population even at a low standard of living. Demographically India is running so fast that economically despite all the progress being made, she is almost standing still".[6]

An examination of India's present standard of living shows that the greatest obstacle in the path of overall economic development is the alarming rate of population growth. The main problem of India's economy is its poverty or low standard of living of the majority of people. About 40 per cent of India's population have been languishing for decades under abject poverty. Today about 32 crore people do not get even two square meals per day.[7]

Staggering 16 per cent of rural population of India has access to less than Rs 3 a day, which is less than the price of one kg. of potatoes. Another 18 per cent are slightly better off they can scrap together Rs 5 a day. The National Council of Applied Economic Research, after four years of study of 33,000 rural household in 16 States looking at 300 parameters has come out with a human development profile of rural India.[8]

According to Government, those earning less than Rs 11,000 a year are said to be below the poverty line. According to NCAER survey, however, the all India annual income in village India is Rs 4,485. In Orrisa and West Bengal the annual per capita income is Rs 3,028 and Rs 3,157

6. S Chandrashekhan, *India's Population*, 23 (1967).
7. K B Sahay, "Ghost of Malthus", *HT* (ND), 11 July 1997.
8. Hearafter called NCAER.

respectively. It is considerably lower than Bihar's Rs 3,169, Uttar Pradesh's Rs 4,185, Madhya Pradesh's Rs. 4,166 and Rajasthan's Rs. 4,229. The higher per capita in rural India is in Punjab Rs. 6,380 followed by Haryana where it is Rs. 6,368. But even these affluent States have pockets of rural poverty. Thirty two per cent of the rural poor in Punjab and 27 per cent in Harayana live below the poverty line.

In a developing country in general, and in a democratic country like India, in particular, where welfare of the common man is the ultimate goal, it is to be ensured that the standard of living improves steadily, the per capita income shows an upward trend, the daily necessities of life are made available and are within the reach of common man.

India has a contradictory picture of a rising national income and a depressed per capita income. Incongruous though the situation is, the explanation is at hand: a rising population pegs down the per capita income because more people share the available cake. Even if the pie is bigger and fatter, the pie sharers are too numerous for the poor pie.[8a]

Thus, the population question is not merely quantitative but also qualitative in nature, as the implication of population growth upon the quality of life and the well being of the people is vitally important.

An increasing population is the biggest impediment to the nation's effective progress. The problem is indeed basic as it is the root of all other miseries and it also makes their solution practically impossible. The goals and aspirations of the people of India as enshrined in the Preamble, as well as in the Directive Principles of State Policy, of the Constitution of India, that India will usher in prosperous, progressive and modern State where people will be given full benefit of justice, equality and full opportunity have been belied over the years because of the reason, that the growth of the population has not been controlled by the law and the legal system.

III

Rajasthan Municipalities Act 1959 was amended in 1992 [9] to provide for disqualification for a person to be elected as a member of the municipality who has more than two children. To section 26 (*xiv*), a proviso (*e*) was added by the amendment in order to have an effective check on the tendency of the growing population. To give a philip to the National Family planning Programme a disqualification was, therefore, introduced, with some exceptions, for being elected as a member or

8a. SL Ogale, THE TRAGEDY OF TOO MANY, 3 (1969).
9. Act No. 32 of (1992).

Chairman of Institution of Local Self government in the urban areas, i.e. the municipalities. According to the Act a person, notwithstanding that he is otherwise qualified, shall be disqualified for being chosen as the member of the board if he has more than two children.[10] However, it further provides that the birth within three years from the date of the commencement of the Rajasthan Municipal (Amendment) Act 1992, of an additional child shall not be taken into consideration for the purpose of disqualification, and a person having more than two children (excluding the child, if any, born within three years from the date of such commencement) shall not be disqualified for so long as the number of the children he had on the date of such commencement does not increase.[11]

Rajasthan Panchayat Raj Act 1995 under Sections 19 (L) and 39 lays down the disqualification for election to the Panchayat Raj institution on account of the birth of an additional child in the family, raising the number of children to more than two.

With a view to demonstrating strong political will and commitment for population control, the Constitution (Seventy Nine Amendement) Bill, 1992[12] was introduced in the Rajya Sabha by Shri ML Fotedar the then Minister of Health and Family welfare on 22.12.1992. The Bill seeks to amend the Directive Principles of State Policy (Article 47) to provide that the State shall endeavour to promote population control, and to add to the fundamental Duties (Article 51 A) one more duty to promote and adopt the small family norm by the citizens. Since the elected representatives need to set an example and act as role models for the people they represent, the Bill proposes to add an additional Schedule under which a person shall be disqualified for being chosen and for being a Member of either House of the Parliament or either House of the Legislature of a State, if he has more than two children. These amendments were however, to have prospective effect and were not to apply to any person who had more than two children on the date of commencement of the proposed amendment or within a period of one year of such commencement. The Bill was referred to the Parliamentary standing committee which recommended passage of the

10. Rajasthan Municipalities Act 1959, Section 26(xiv). Similar disqualifications have been provided by Delhi and Orissa also. See The Local Government in Delhi (Disqualification for Membership) (Small Family) Act 1998 (Act. No. 5 of 1998); Orissa Zilla Parishad (Amendment Act) Act No. 17 of 1993. In *Malaya Kumar Mohanta* v. *Collector Mayirbhang* (AIR 1999 Ori 5), the working of Orissa Amending Act came into opeartion. In this case the election of respondent No 4 was set aside by the Orissa High Court, as he was found ineligible to contest the electrons as his fourth child i.e. his daughter was born in the year 1995.
11. *Ibid*, Section 26 (xiv) proviso (e).
12. Bill No. LXXX of 1992.

Bill without any changes. It however, suggested that the Bill be discussed in a meeting of all political parties so as to ensure its smooth passage in Parliament.[13] Unfortunately, the Bill did not see the light of the day.

It is against this background that I propose to discuss the two cases that have been mentioned earlier.

IV

In *Saroj Chotiya* v. *State of Rajasthan*[14] the validity of the proviso (e) of section 26 (*xiv*) of the Rajasthan Municipalities Act, 1959 were challenged on the ground that they were violative of Articles 14 and 21 of the Constitution of India. It was argued that they were discriminatory; and were against the basic human dignity and the basic institution of marriage and human behaviour; and that there was no co-relation of these provisions with the object sought to be achieved.

In this case, Smt. Saroj Chotiya was declared elected as a member of the Municipal Board, Ratangarh on 28.9.95. On 9.12.95 she gave birth to the third child. On 30.11.96, a notice under the Act was issued to her, by which she was asked to explain as to why she should not be removed from the post of the member of the board as she has incurred the disqualification under section 26 of the Act by giving birth to the third child.

While highlighting the population problem of the country. The Division Bench of the Rajasthan High Court through Justice BR Arora observed:

"Growing population is one of the major problems, which India is facing today, it assumes more importance because it has hampered the national progress. Limited natural resources can not meet the ever-growing number in larger proportion, India among the developing nations, was the first to recognise the perils of unchecked population growth and, also, the first to start the population control programme. This was the motivating factor before the legislature for enacting these provisions".[15]

While rejecting the contentions raised by the petitioners, the Court ruled that:

"Section 26 (xiv) and proviso (e) are not violative of Article 21 of the Constitution. They do not put any unreasonable restriction on the natural human right of procreation of more than two children. Article 21 of the Constitution provides that no person shall be deprived of life and personal

13. Government of India, Ministry of Health of Family Welfare, ANNUAL REPORT, 9 (1993-94).
14. *Op cit supra* n. 1.
15. *Id* at 30.

liberty except according to procedure established by law. The impugned provisions provide a disqualification to person having more than two children for he is being elected or of his continuance in that office after he/she incurred that qualifications. These provisions have been enacted to control the menace of population explosion. The population explosion is more dangerous than hydrogen bomb. Rights to privacy and liberty are not absolute rights. A reasonable restriction can be imposed by the legislature for compelling interest of the State. The validity of the provision has to be judged by appreciating the need and the problem at a particular point of time, for which the law has been enacted. The law has been enacted to curb the menace of population growth. For the purpose of stabilization of population, providing a disqualification, looking to the limited resources of the country, is in the larger interest of the country. The legislature, thus, actuated with the public policy and to effectuate the public benefit enacted these provisions which do not offend Article 14 or 21 of the Constitution. The restrictions have been laid down with a social purpose and these provisions are not against any basic human dignity nor are they against the basic institution of marriage and human behaviour".[16]

The court referred to the judgement of the Supreme Court in *Air India* v *Nargesh Mirza*[17] where their lordships of the Supreme Court, considering the danger of overpopulation and the necessity of family programme, observed:

"In the first place provision preventing the third pregnancy with two existing children would be in the larger interest in the health of Air hostess concerned and also for the good upbringing of the children. Secondly, while dealing with the rule regarding prohibition of marriage within four years, same consideration would apply to a bar of third pregnancy where two children are already there because when the entire world is facing with problem of population explosion, it will not only be desirable but absolutely essential for every country to see that the family planning programme is not only whipped up but maintained at sufficient level so as to meet the danger of overpopulation which if not controlled may lead to serious social and economic problems throughout the world."

In *Mukseh Kumar Ajmera* v *State of Rajasthan*,[18] sections 19 (L) and 39 of the Rajasthan Panchayat Raj Act 1995 were challenged as unconstitutional. However, the division bench of the Rajasthan High Court upheld the validity of the impugned provisions and held that "the

16. *Id* at 32.
17. AIR 1981 SC 1829 *Id.* at 1855.
18. *Op cit supra* n. 2.

restrictions imposed in section 19(L) neither outraged the dignity of a person nor it infringes any of the fundamental, legal or common law right or a marital right of procreation of a child."[19]

V

Hon'ble Mr. Justice B R Arora has very rightly observed that:

"The power to deal with population matters effectively and efficiently stems from the social policy contained in the Directive Principles of State Policy contained in Articles 39 (e) and (f), 41 43, 45 and 47 of the Constitution of India. The objective enshrined in these articles can be achieved effectively only if the rapidly growing population is controlled otherwise all the social policies will remain in vacuum. Imposing the condition of disqualifying a person having more than two children, from contesting the election of municipal board which is the institution of local self government in urban area, is the first step to achieve this goal."[20]

It may also be observed that the Constitution of India resolves to secure social justice to the citizens of India. It is the obligation of the State to secure the well being and progress of the people, to strive for the establishment of an egalitarian society. Thus, there is a constitutional responsibility on the State to maintain the population level most conducive to the national welfare.[21]

Fertility regulation is a very sensitive area where law should tread with caution. But at the same time if people don't have adequate social awareness about their responsibilities, it falls on law, being an instrument in the hands of the States for achieving its socio-economic objectives, to lay down the social norms which in course of time by persistent persuasion and in built pressure will become fully acceptable to the people. In a country like India which is tradition bound and where illiteracy is rampant, the role of law as a norm setter in the population field becomes all the more important.[22]

It is true that in India, law has a difficult role to play. In the West, generally speaking law follows the public opinion. In India, on the other hand, law should mould public opinion, remove traditional attitudes and foster new values particularly in the field of reproduction. The law should be revolutionized in the nation's social and economic development

19. *Id* at 260.
20. *Supra* n 1 at 31.
21. B.P.S. Sehgal, POPULATION CONTROL AND THE LAW, 59 (1989).
22. P.S. Sangal *"Law and Fertility Regulation"* HEALTH AND POPULATION – PERSPECTIVES AND ISSUES, 3 (1-2) p. 134 (1980).

passing through the route of reducing the rapid population growth in India. Almost any law, it may be said, has some kind of demographic effects.

The impact, which certain laws may have on the size and structure of population, is clear. Such laws as those governing family relations, abortion, sterilization, contraception, taxation, child welfare, all aspects of education, gender equality, environmental protection etc, are closely related with population phenomena.

It is high time that the judiciary while interpreting the above mentioned Directive Principles of the State Policy and the various laws, should highlight the gigantic problem of population control in India and assume an active role in solving this problem through their educative, persuasive and law making judgements.

"POST - MORTEM OF THAT CONFIDENCE MOTION" WHICH RESULTED IN THE DISSOLUTION OF 12TH LOK SABHA

*Ashutosh K. Agarwal**

A Confidence Motion was moved by the BJP Government on 17.4.99 in Lok Sabha following AIADMK's withdrawal of support. The motion was defeated by one vote resulting in the collapse of the Government. In this case the vote of non-BJP politician who was the CM of Orissa at that time and who was not an active MP was viewed with concern. He was allowed to vote under protest. His vote was against the confidence motion.

We have to look at the constitutional propriety of the proceedings in the light of the scope of two articles viz., Art. 101 (2) regarding disqualification from membership of Parliament and Article 100 about voting in Houses. Article 101 (2) provides, "No person shall be a member" both of Parliament and of a House of the Legislature of a State, and if a person is chosen a member both of Parliament and of a House of the Legislature of a State, then, at the expiration of such period as may be specified in rules made by the President, that person's seat in Parliament shall become vacant."

In the instant case Mr. Gamang was not an active MP (Lok Sabha), he was the CM of Orissa but was retaining his membership of Parliament pending expiration of the period specified in the rule made by the President. In other words, he was enjoying a lien of his MP ship in Lok Sabha, and nothing more. Of course we have to go by this interpretation, for, if we presume that Art. 101(2) confers dual legal rights, one as MP (Lok Sabha) and the other as CM (Orissa) we may face serious abnormalities. He may, as he had actually done, vote against the Government with legal impunity, without facing the pains of facing general elections if Parliament is dissolved as he was already a CM. The voting right might not be exercised conscientiously in such cases. It would therefore, be better not to interpret Art. 101 (2) in a way that allows an individual to become repository of dual rights, one as a CM and the other as an MP simultaneously. Only an active MP may be deemed to have exercised his voting

* B.Sc (Hons.), LL.B., Delhi University.

right conscientiously. Let us not have room for doubting the propriety of the exercise of voting right. We should give one and only one interpretation of Art. 101 (2) viz that it gives only a right of lien over MPship for a certain specified period and noting more. Accordingly, Mr. Gamang was not qualified to vote in Confidence Motion.

Now we have to examine the issue of the validity of proceedings in Lok Sabha in which Mr. Gamang, who was considered as disqualified from voting, had actually voted. Article 100 (1) says "Save as otherwise provided in this Constitution, all questions at any sitting of either House or joint sitting of the Houses shall be determined by a majority of votes of the members present and voting, other than the Speaker or person acting as Chairman or Speaker". Decision to defeat confidence motion was taken by majority of 271 votes out of 540 MPs.

Article 100(2) says "Either House of Parliament shall have power to act notwithstanding any vacancy in the membership thereof, and any proceedings in Parliament shall be valid notwithstanding that it is discovered subsequently that some person who was not entitled so to do sat or voted or otherwise took part in the proceedings."

It may be appreciated that on that fateful day the voting was first done by voice vote but a decisive division could not be worked but. Voting by electronic machine was carried out which too was not in perfect order and hence voting by ballot was effected. When ballot papers were being distributed, it was discovered for the first time that Mr. Gamang was sitting in the House claiming his membership of the House under Article 101(2) which was not warranted for the above reasons.

There was protest from the treasury benches who asked not to give ballot to Mr. Gamang. But Mr. Laloo Prasad Yadav and other MPs said he was qualified to vote through ballot as he had already participated in the voice and the electronic voting. It is submitted that it was wrong interpretation given to Art. 100 (2), as the earlier two instances had failed to beget any decisive result. If any of them had been decisive and perfect, Mr. Gamang's vote would have been valid but since the right of Mr. Gamang was challenged before he actually cast his vote through the ballot, he could not enjoy the benefit of Art. 100(2). This provision condones voting exercised by a person who, though not qualified, was subsequently found to have voted. In the instant case the individual (Mr. Gamang) was discovered to have been disqualified before he actually voted which makes it a case different from the one contemplated under Article 100 (2).

Since there had been no precedents of this sort in the history of Parliament, Mr.Gamang was allowed to cast his vote by the speaker. There

was constraint of time. The fact that the speaker was under an erroneous belief that Mr. Gamang was qualified to vote in the proceedings of Confidence Motion while as per the Constitution he was not, made it a case of estoppel against law which is in fact no estoppel. There could be no estoppel against law, which means that if a person is given rights under a statute and if he gives them up at one stage voluntarily and later tries to enforce those rights, the principle of estoppel cannot be pleaded against him. In this case the Speaker had the right to disqualify Mr. Gamang from voting but he allowed him under erroneous belief that he was qualified to vote. The situation is same as that of a tenant who agrees to pay rent more than that is fixed under Rent Control Act and thereafter files a petition before Rent Controller for fixing a fair rent. The landlord cannot say that tenant is estopped from filling such a petition, because the right is one which is given to the tenant by a statute.

It may be noted that had Mr. Gamang not voted which went against the motion of confidence, there would have been a tie in which case the speaker's vote would have been decisive to decide the fate of the Confidence Motion as he was from BJP camp.

Article 100 (1) says, "The Chariman or Speaker, or person acting as such, shall not vote in the first instance, but shall have and exercise a casting vote in the case of an equality of votes".

The Government Should and could have retained power by moving the Supreme Court prior to the notification of Lok Sabha elections but now the XIII Lok Sabha has since been constituted it remains a matter of academic/legal interest only.

NOT CARING FOR THE HIV PATIENT'S ENTITLEMENTS[1] — A COMMENT ON THE SUPREME COURT'S DECISION IN *Mr. "X" v. Hospital "Z"*[2]

R. Sreekumar[3]

"There's too much said for the sake of argument and too little said for the sake of agreement." — Cullen Hightower in Quote[4]

This comment is begun with the humble submission that the underlying message in the above mentioned quotation is well reflected in this hastily delivered judgement. In the process, the apex court seems to have missed out on a golden opportunity to set things in the right perspective and direction. Firstly, the facts of the case:

The appellant is a doctor and till about 26-11-1995 was discharging his duties as Assistant Surgeon - Grade I in the Nagaland State Health Service, after which he left Kohima (Nagaland) and started working and residing at Madras.

In the meanwhile, while he was in Nagaland State Health Services, he was directed by the Government of Nagaland to accompany one Itokhu Yepthomi who was suffering from aortic aneurism to go to 'Z' Hospital at

1. This is dedicated to the appellant in this case and to those who have laid down their lives fighting valiantly against the senseless and vicious discrimination of an ignorant society as well as to those who are continuing to do so without even a trace of malice towards such a society.
2. (1998) 8 SCC 296.
3. LL.B. final year (1998 -99), Campus Law Centre. Presently pursuing LL.M. from Faculty of Law, Delhi University and working as a Research Assistant in the Prison Reforms programme of the Commonwealth Human Rights Initiative, (C.H.R.I.) New Delhi. I would like to express my gratitude towards the following people, namely:
   - Prof. B.B. Pal.de for the initial inspiration and the subsequent guidance which he kept on giving.
   - Ms. Meenakshi Arora, Advocate, Supreme Court, who had represented the appellant in the court, for giving the necessary factual background in which the case was argued before the SC and the result thereof.
   - Dr. Rohini Badran, intern with LNJPN hospital, New Delhi for the help she rendered by procuring the WHO's Global AIDS Strategy, NACO's guidelines on combating HIV/AIDS, etc.
4. Quotable Quotes, Reader's Digest, September 1998.

Madras for treatment. There, the patient was posted for surgery on 31-5-1995 which, was cancelled due to shortage of blood. On 1-6-1995 the appellant and the driver of the patient were asked to donate blood for the patient. On taking and testing their blood samples, the appellant's blood group was found to be A (+)ve. On 2-6-1995 the patient was operated for aortic aneurism and remained in the said hospital till 10-6-1995 after which he was discharged.

In August 1995, the appellant proposed marriage to one Ms. 'Y' which was accepted and the marriage was proposed to be held on 12-12-1995. But before that could happen, the marriage was called off because the concerned authorities of hospital 'Z' informed Ms. 'Y' and her family *Directly* that as a result of the blood tests conducted on the sample taken form Mr. 'X' on 1-6-1995, he was found to be HIV(+)ve. *The point to be noted for the time being is that Mr. 'X' was not at all informed before the information was passed on to Ms. 'Y'.* Subsequently, the appellant went to the respondents hospital at Madras where, after a series of tests, his status as HIV (+)ve was confirmed. Meanwhile, since the information had been leaked out to the public in general, the appellant was severely criticised and ostracized by his community. This forced him to leave Kohima around 26-11-1995 and thereafter, he started working and residing at Madras.

The appellant then approached the National Consumer Disputes Redressal Commission, New Delhi, for damages against the respondents, on the ground that the information which was required to be kept secret under the medical ethics was disclosed illegally and therefore, the respondents were liable to pay damages.[5] But the commission dismissed the petition as also the application for interim relief summarily by it's order dated 3-7-98. The point to be noted here is that the ground of dismissal as given by the commission was that *"the appellant may seek his remedy in the civil court".*[6]

5. Vide Original Petition No. 88 of 1998.
6. Firstly, the National Consumer Disputes Redressal Commission seems to have acted in a highly arbitrary manner, by adopting a short-cut and thus washing it's hands off, from any responsibility whatsoever. As is clear from the apex court's decision in *Indian Medical Association v. V.P. Shantha & Ors.* AIR 1996 SC 550, where inter alia, the court held that... services rendered to a patient by a medical practitioner by way of consultation, *"diagnosis"* and treatments, both medial and surgical, would fall within the ambit of "service" as defined in S. 2(1)(O) of COPRA O (Consumer Protection Act). That being so, the Commission had the jurisdiction to try the petition and it's act of summary dismissal was nothing short of passing the responsibility of belling the cat to a civil court. Also, more importantly, keeping in view the average period of 4-10 years by when an ordinary civil court is able to finally decide upon a matter, it is beyond comprehension as to how the Commission expected the appellant to get an expeditious and judicious justice in a civil court?

It was against this summary dismissal by the commission that the appellant approached the Supreme Court by way of Special Leave Petition.[7] Unfortunately, the Supreme Court also dismissed the petition summarily after a unilateral hearing which lasted hardly for 4-5 minutes.

Before we proceed further, this author would like to humbly submit the following essential points for a due and reasonable consideration by the discerning reader, namely:-

1. That, this comment is being written without any bias whatsoever against anybody and especially against women since, AIDS and other such diseases do not even know nor do they adhere to any such bias or discrimination. Hence this attempt is merely an objective analysis of a common problem which all of us are facing imminently.

2. As for the argument that the timely action of the respondent hospital saved the lady Ms. 'Y' and that her "right to life" was protected, all that needs to be said is that it would have made no difference at all had she been in the place of the appellant.

3. The question is not as to who was saved in time nor is it the justification of any vested right (if at all there was any) of the appellant to get married and infect his prospective spouse. Neither is it the question whether in such cases even if damages are payable then whether it would be sufficient enough to obliterate what has already happened and thus restore the medical status of the appellant back as HIV(-)ve.

4. Whereas, an objective, equanimously impartial and a humanely sensitive approach to the problems in the society is the necessary qualification for any lawyer, the same is direly needed in the present area of HIV/AIDS. Since, we are also a part of the common society, we too, seem to be affected by the taboos and misinformation prevalent in the society leading to a discriminatory attitude and a hands-off approach. For countering this, we need to base our understanding of the problem, as in the words of Hon'ble Mr. Justice Michael Kirby, President of the International Commission of Jurists, on a true understanding of the nature of this disease, it's implications in a society, etc. supported by solid medical evidence and not on what the media or a misinformed society at large has to believe in this regard.[8]

5. Just because promiscuity, lesbianism and homosexuality are among the via media through which this infection spreads, it is not at all fair and sane to presume that whosoever is found to be HIV (+)ve, has necessarily contracted the infection from either of these sources only. Such a painting of all patients with the same brush is not the mark of the members of a sane and civil society.

6. Just because the issues of lesbianism and homosexuality are associated with the spread of the virus which, are still a taboo with people and towards which, the society at large has not developed and matured to take an objective and equanimous view, it does not mean that we take a biased and a myopic attitude towards people infected with the HIV or found to be suffering from AIDS.

7. None of us, including the reader and this author are above and beyond the reach of this menace which, has come to stay. Not just the HIV but also other more contagious, voracious and many a times more deadly infectants like the Ebola virus have come to stay and take their toll. Looked at from a macro level, the advent of all these and those which are yet to come, is just a way by which, Nature tries to balance it's resources against the exploding population which is growing like an uncontrolled nuclear chain-reaction. Looked at from the macro level, YOU and I, our emotional expectations, predilections, fantasies, prejudices, etc. do not matter. What matters is the wholesome balance of the universe which, Nature tries to achieve through a variety of permutations and combinations.

8. But it does not mean that we all throw our arms up and adopt a hands-off approach and proclaim, "Let then Nature take it's own course". Because, then, when it comes to us, then only would we

Secondly, what was basically and essentially contended by the appellant was that the principle of *"Duty of Care"*, as applicable to persons in the medical profession, includes the duty to maintain confidentiality and since this duty was violated by the respondents, they are liable in damages to the appellant. Moreover this is not the first time that a case of an HIV infected person had come up before any judicial body. Way back in 1995 the Bombay High Court had in a landmark decision (the citation of which is not available with this author) ruled that the names of both the petitioners, (where the husband alone was infected with the HIV but was otherwise in good health) were to be suppressed. Both were allowed to use pseudonyms, namely Mr. M X and Ms. Z Y. The policy of the public sector corporation (where the husband was working as a casual labourer) which permitted discrimination on the basis that those employees found to be infected with the HIV or found to be suffering from AIDS were to be summarily dismissed from service, was held as violative of articles 14, 15 and 16 of the Indian Constitution. (See the February 1999 issue of the journal, From the Lawyers Collective).

7. No. 4641 of 1998.

8. See the February 1999 issue of the journal, From the Lawyers Collective.

understand the value, power and need of a society which has the following as it's motto: *All for One and One for All.*

9. Lastly, but most importantly, it is very easy to point fingers and jump to unilateral conclusions, to categorise people as good and bad. But these do not go anywhere in trying to solve the problems. *Here we need a change in our attitudes from 'I, ME & MINE'* to *'OURS'*. As Gandhiji had rightly said,

"Three-fourths of the miseries and misunderstandings in the world will disappear, if we step in to the shoes of our adversaries and understand their standpoint."[9]

The objective of this comment is also to bring to light and focus certain other issues as well, which need our attention when the society is changing in a fast and dynamic way.

Firstly, the contentions raised on behalf of the appellant were,

- That, the principle of *'Duty of Care'*, as applicable to persons in the medical profession, included the duty to maintain confidentiality and this duty was violated by the respondents.
- Consequently, the appellant's *'Right of Privacy'* had been infringed by the respondents by disclosing that he was HIV (+)ve without informing him about it first, and therefore, they were liable in damages.

The main objective of these contentions was not to claim damages but to fix *Accountability* for the present acts of the doctors of the respondent hospital in question and thus ensure *Responsibility* on the part of the concerned authorities in their subsequent acts of similar nature.[10]

9. Gandhi Peace Diary, 1999.
10. The claim for damages, as is evident in the particular circumstances of this case was a matter incidental in nature and of a distant consequence and concern since, the award of damages in itself could not have restored his lost status back to what it had been. Thus the efficacy of the concept of damages being able to restore the status of a person back is an entirely different issue, it is not proposed to be made the subject matter of discussion here. Thus, we are not to be guided by the issue of damages and their utility in this case, nor by the test whether it is so payable under the Law of Torts. This is so, because, something more fundamental than these incidental issues are at stake which have a great bearing upon the unity and wholesome welfare of the society at large. Therefore, we-the lawyers, judges, teachers and students have a greater responsibility to be more alert, to such often casually dismissed but potentially explosive issues since, we are supposed to be better educated than the ordinary citizens of any society when it comes to these issues. It is time now that we consciously realize this duty and live up to it.

Before the decision of the court is commented upon, it is submitted that, on reading the judgement as a whole what appears clearly is that the Supreme Court has read motives into the above mentioned contentions by saying that in effect, the appellant was vehemently trying to seek the enforcement of his "right to marry", even in the face of being infected with HIV. With due respect it is submitted that on going through the facts as have been stated by the court in it's own judgement, it is amply clear that this was not his case.

With this preliminary Caveat, let us proceed to analyse the judgement to understand the treatment given to the appellant-doctor by the apex court.

In paragraph 6 of the judgement[11], the court took up the first contention of the appellant, namely the principle of "Duty of Care".

"Duty to maintain care and confidentiality has it's origin in the Hippocratic oath, which is an ethical code attributed to the ancient Greek physician Hippocrates[12].

This responsibility is common and coordinate in nature for all of us. Nobody is inferior or superior in these issues as man being an imperfect creature is bound to fumble howsoever hard might we try to be perfect in our actions. But the world does not end there nor is our duty over by simply criticising anybody and everybody. All of us have this duty to cooperate and synchronise with each other in the sense that we have to compliment each other's strengths and supplement for each other's weaknesses and shortcomings.

11. See Supra n.2 at pg.302 of the judgement.
12. The Hippocratic oath contained in the manuscripts of Hippocrates, Corpus Hippocraticum, is as follows: "I swear by 'Z' the physician and Aesculapius and health and all heal and all the gods and goddesses that according to my ability and judgement I will keep this oath and this stipulation - to reckon him who thought me this art equally dear to me as my parents, to share my sustenance with him and relieve his necessities if required, to look upon his offspring in the same footing as my own brothers and to teach them this art if they shall wish to learn it without fee or stipulation and that by precept, lecture, and every other mode of instruction I will impart a knowledge of the art to my own sons and those of my teachers and to disciples bound by a stipulation and oath according to the law of medicine but to none others. I will follow that system of regimen which according to my ability and judgement, I consider for the benefit of my patients, and abstain from whatever is deleterious and mischievous. I will give no deadly medicine to anyone if asked nor suggest any such counsel, and in like manner I will not give to a woman a pessary to produce abortion. With purity and holiness I will pass my life and practice my art. I will not cut persons labouring under the stone but will leave this to be done by men who are practitioners of this work. Into whatever houses I enter, I will go into them for the benefit of the sick and will abstain from every seduction of females or males, of freemen and slaves. Whatever, in connection with my professional practice, or not in connection with it, I see or hear, in the life of men, which ought not to be spoken of abroad, I will not divulge as reckoning that all such should be kept secret. While I continue to keep this oath unviolated, may it be granted to me to enjoy life and practice of the art, respected by all men, in all times, but should I trespass and violate this oath, may the reverse be my lot."

It is on the basis of the Hippocratic oath that, the International Code of Medical Ethics has also laid down as under,

- " A physician shall preserve absolute confidentiality on all he knows about his patient even after his patient has died."[13]

Here, in this country, there is the Indian Medical Council Act, 1956, which controls the medical education and regulates the professional conduct. This was amended in 1964 whereby a new section, namely S.20-A and clause (m) to S.33 were added. The relevant portions of both these provisions are reproduced below:

- *"S.20-A. Professional conduct* - (1) The Council may prescribe the standards of professional conduct and etiquette and a code of ethics for medical practitioners.

  (2) Regulations made by the Council under sub-section (1) may specify which violations thereof shall constitute infamous conduct in any professional respect, that is to say, professional misconduct, and such provision shall have effect notwithstanding anything contained in any law for the time being in force.

- *S.33 Power to make regulations* - The Council may, with the previous sanction of the Central Government, make regulations generally to carry out the purposes of this Act, and without prejudice to the generality of this power, such regulations may provide for -

  (a) - (l)* * * * * * * * * *

  (m) The standards of professional conduct and etiquette and code of ethics to be observed by medical practitioners."[14]

It is under these provisions that the Code of Medical Ethics has been made by the Indian Medical Council which, inter alia, provides as under: "Do not disclose the secrets of a patient that have been learnt in the exercise of your profession. Those may be disclosed only in a court of law under orders of the Presiding Judge."[15]

It is contended that the doctor's duty to maintain secrecy has a correlative right vested in the patient that whatever has come to the knowledge of the doctor would not be divulged and it is this right which is being enforced through these proceedings."[16]

13. See paragraph 9 of the judgement, pg. 303.
14. *Ibid.* Para. 10.
15. *Id.* Para. 11.
16. *Id.* Para. 13.

Then, in the next two paragraphs the court has explained the jurisprudential terms of "Right" and "Duty" (as per the definition given by Salmond) and their jural relationships.

"According to Salmond, "Right" is an interest recognised and protected by moral or legal rules. It is an interest the violation of which would be a legal wrong. Respect for such interest would be a legal duty. In order, therefore, that an interest becomes the subject of a legal right, it has to have not merely legal protection but also *"legal recognition"*. The elements of a *"legal right"*[17] are that the "Right" is vested in a person and is available against a person who is under a corresponding obligation and duty to respect that right and has to act or forebear from acting in a manner so as to prevent the violation of the right. If, therefore, there is a legal right vested in a person, the latter can seek it's protection against a person who is bound by a corresponding duty not to violate that right."[18]

But this concept of a "Leal Right" is not all comprehensible and sacrosanct in itself, for the following reasons, namely -

- Firstly, it's contents vary from one legal/moral system to another system. It is determined by the particular ideology on which the particular system is based and professes it's adherence to. Interest in private property is sacrosanct in Capitalist systems (like the USA) and hence it is "recognised" and overzealously "protected" so as to form a "Legal Right". Whereas in Communist systems (like China, where, though a slight turnaround is visible in the recent times), it is identified as the basic source of all kinds of exploitations and therefore is over-zealously disbanded and distributed/acquired by the State in it's own name. Hence, in such systems nobody has nor can anyone claim any "Right to Property". Thus it all depends upon the 'Will' and philosophy of the people at the helm of affairs in each State and on their perceptions and priorities in life.

- Secondly, accepting and admitting the utilities which the notion of Rights serve, it is also submitted that we have reached a stage where without the notion of Rights, we have ceased to treat, respect, and love our fellow human brethren as human beings at least. It is a fact independent of even Article 21 that we all are equally entitled to live as anyone who, amongst us is individually entitled to live.

- Thirdly, what if something is not recognised by the existing system? It does not necessarily imply that just because something

17. Emphasis supplied by the author.
18. Emphasis supplied.
19. *Ibid.* Para 15 at pg. 304.

> is not recognised by the State, it does not have any existence or validity in our conscience or in Nature. It amounts to something like, deliberately closing ones eyes and then declaring from a politically superior pedestal that: "I, the ruler of this State hereby declares that there is no Sun and Moon in this State, from now on."!

Ofcourse, intervention of law in the form and nature of Article 21 and the like was necessitated to obligate those who refused to respect the natural fact of equality. The aim of such an intervention and attempt being to achieve greater order, cohesiveness, cooperation and unity in the civil society.

Today, as in the words of Prof. Bikhu Parekh[20], anything which is a matter of love, compassion, common concern or even common-sense has to be necessarily reduced to the language of "Rights" and "Duties" before we are "Legally" entitled to them!

Hence, it is not always safe to determine as to what is appropriate and what is not merely in terms of it's "Legality". This was amply clear when Adolf Hitler was in power. Whatever he uttered and ordered for, was "Legal", since it came from the supreme authority in the State who, was backed up by and had an effective control over the German law enforcement machinery. Hence, even if orders to execute Jews were apparently and so to say "Legal", but then, even an ordinary layman at the first instance itself will declare it to be grossly violative of the very human existence and dignity. But since we are following the ordinarily accepted standards of what is "Legal" and what is not, it is there for the whole world to see as to what happened thereafter.

There are many known instances where people are living together even after a diagnosis of HIV/AIDS. This shows that, where there is love, compassion and forgiveness, there is Humanity and Godliness which, is more cohesive and constructive for a human-society. Whereas in this kind of an adoption of the argument of "Rights", "Suspended Rights", "Unenforceable Directive Principles of State Policy", "Duty without any correlative right", etc. there is nothing but the pure 'logic' of man which, as opposed to intelligence is always analytical and destructive in nature. Whereas Intelligence always adopts the process of Creative-synthesis and it always creates something better than what is present now.[21]

20. See, A Critique of Marxist notion of Rights by Prof. Bikhu Parekh as given in the case material of Campus Law Centre for Jurisprudence- I for the year 1998-99.
21. From Osho Rajneesh's discourse on the seven kinds of religions in our mindset, which inter alia include that of Logic and Intelligence, which are the opposites of each other and where, logic is below intelligence.

Thus, the approach of basing our actions on Intelligence is much more better and preferable than basing it on mere analytical Logic.

Thus, in cases like the instant one, instead of routinely falling back upon the accepted norms of the day, we have to be more alert to the ever changing winds of change and be more courageous enough to see whether the changed scenario is accordingly adjusted to, by us. It only requires a finer degree of "Humane-Consciousness" on our part, to be alert and rise above the myopic and argumentative arena of "Legally recognised and protected rights and duties".

Then, after explaining that the Hippocratic oath is not enforceable as such in a court of law as it has no statutory force, the court discusses the law in England. There, it is provided that the exceptions to this rule permit disclosure, *inter alia*, "in very limited circumstances, where the public interest so requires. Circumstances in which the public interest would override the duty of confidentiality could, for example, be the investigation and prosecuting of a serious crime or where there is an immediate or future (but not a past and remote) health risk to others."[22]

Thereafter, the court has referred to the guidelines on HIV infection and AIDS as laid down by the General Medical Council of Great Britain which, provides as under:

> "When diagnosis has been made by a specialist and the patient *after appropriate counseling*[23], still refuses permission for the general practitioner to be informed of the result, that request for privacy should be respected. The only exception would be when failure to disclose would put the health of the health-care team at serious risk. All people receiving such information must consider themselves to be under the same obligation of confidentiality as the doctor principally responsible for the patient's care. Occasionally the doctor may wish to disclose a diagnosis to a third party other than a health-care professional. The Council think that the only grounds for this are when there is a serious and identifiable risk to a specific person, who, if not so informed would be exposed to infection... A doctor may consider it a duty to ensure that any sexual partner is informed regardless of the patient's own wishes."[24]

22. See *Supra* n. 2 at pg. 304, Para 16.
23. Emphasis supplied.
24. See Supra n. 22, para 17 (emphasis supplied).

Based on this, the court rejected the argument of the learned counsel for the appellant and held that, the "duty to maintain confidentiality on account of the Code of Medical Ethics formulated by the Indian Medical Council cannot be accepted as, the proposed marriage carried with it the health risk to an identifiable person who has to be protected from being infected with the communicable disease from which the appellant suffered. The right of confidentiality, if any, vested in the appellant was not enforceable in the present situation."[25]

Now, these two paragraphs of the judgement merit some analysis.

The General Medical Council of Great Britain is very right about the necessity of a prior appropriate-counseling, etc. Then it has carved out an exception by laying down that: "The only exception would be when failure to disclose would put the health-care team at risk." This is fair enough. But then the Council does not stop there and leaves no scope for any mischief and closes up the exception with the mandatory provision that: "All people receiving such information *must*[26] consider themselves to be under the same obligations of confidentiality as the doctor principally responsible for the patient's care."

The position is more or less the same in India as well on this issue. The directives of the Government of India and the National AIDS Control Organisation (NACO) which, has it's cells in almost all major hospitals across the country, are all pointing in this direction only.

Then the British Council says that, "Occasionally the doctor may wish to disclose a diagnosis to a third party other than a health-care professional. the Council think that the only grounds for this are when there is a serious and identifiable risk to a specific person, who, if not so informed would be exposed to infection.... A doctor may consider it a duty to ensure that any sexual partner is informed regardless of the patient's own wishes."

But here it is important to note that even from a purely argumentative point of view, Ms. 'Y' at that time was not a sexual partner. Also, the point that the doctor has a duty to inform others, *"regardless of the patient's own wishes"* is also not appropriate. This would have been appropriate if and only if even after appropriate counseling (and repeated counseling, if necessary), Mr. 'X' would have insisted on getting married to Ms. 'Y' without intending to inform her of his status or in the alternative, if he would have intended to engage in unprotected sexual relationships with Ms. 'Y'.

25. *Ibid.* at pg. 305, Para 19.
26. Emphasis supplied.

Here, Ms. 'Y' at best was a potential/prospective sexual partner for Mr. 'X'. The doctors of hospital 'Z' would have been justified in their action had they given an opportunity to Mr. 'X' who himself being a doctor is quite capable of understanding the predicament and implications for Ms. 'Y' had she married him, to disclose the same to Ms. 'Y' and wait for her reaction. Otherwise, if this kind of an approach is adopted and is allowed to be practiced, then, keeping in mind the misinformed and hypocritic taboos which, the uneducated and undeveloped society at large has about the sources of HIV infection, people would be hounded out and killed on the streets without giving them a compassionate treatment. *This sort of a compassionate treatment is very much necessary so that, once they are able to derive emotional support and stability and are no longer afraid of the impending death, they are able to go back to the society and work for the rest of their lives in a socially productive, cooperative and creative manner.*

Then, from paragraphs 20 - 28, the SC has discussed the law of "Right to Privacy", where it has referred to various Indian and American decisions in this regard. In the process, the SC has referred to Article 8 of the *European Convention on Human Rights* which, defines the Right to Privacy as follows:

- "(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
- (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder, for the protection of health or for the protection of the rights and freedoms of others."[27]

Then the court has said that as one of the basic Human Rights, the right of privacy is not treated as absolute and is subject to such action as may be lawfully taken for the prevention of crime or disorder or protection of health or morals or protection of rights and freedoms of others.

All this is absolutely right, but, what is being humbly submitted is that these principles were not properly applied in Mr. 'X's' case- nether by the authorities of the respondent hospital 'Z' nor by the court in it's tacit approval of the former's behaviour.

27. See *Supra* n. 2 at pg. 306, Para 25.

Then, the court has discussed about the sources of this Right to Privacy. It says, "Right to privacy may, apart from contract, also arise out of a particular specific relationship which may be commercial, matrimonial, or even political. As already discussed above, doctor-patient relationship, though basically commercial, is professionally, a matter of confidence and, therefore, doctors are morally and ethically bound to maintain confidentiality. In such a situation, public disclosure of even true private facts may amount to an invasion of the right of privacy which may sometimes lead to the clash of one person's "right to be let alone" with another person's right to be informed."[28]

"Disclosure of even true private facts has the tendency to disturb a person's tranquility. It may generate many complexes in him and may even lead to psychological problems. He may, thereafter, have a disturbed life all through. In the face of potentialities, and as already held by this court in it's various decisions referred to above, the right to privacy is an essential component of the right to life envisaged by Article 21. The right, however, is not absolute and may be lawfully restricted for the prevention of crime, disorder, or protection of health or morals or protection of rights and freedom of others."[29]

Here it is submitted that, the *general* Right to privacy may be *lawfully* restricted but, in the light of the above-mentioned problems and insecurity complexes which, such a person would suffer and also in keeping with the violent reactions which any such patient, *irrespective of gender* might adopt to an unmindful and myopic society in which, the members of that very society, including the innocent ones, would further suffer, it is important that, in such sensitive and potentially explosive situations, additional care, tailor made to the peculiar situation is adopted. There is a difference between the general instances of the Right to privacy and what was being sought here. *Here, it would be an error in judgement to read the "Duty to maintain care and confidentiality" as the jural opposite of the general "Right to privacy".*

On the question of *Individual interest* vs. *Public-interest*, it would be pertinent to refer to an English decision given as way back in 1988, which Hon'ble Justice Michael Kirby, quoted in his introductory lecture at a workshop organise by the Lawyers Collective on the *"Role of Courts and Judges in the era of HIV/AIDS."*[30] In *'X'* vs. *'Y'* (1988) 2 All ER 648, the English Court of Appeal considered the public interest exception in

28. *Ibid.* at pg. 307, Para 27.
29. *Ibid.* Para 28.
30. Reported in the February 1999 issue of From the Lawyers Collective.

relation to the disclosure of information about a person's HIV status. An injunction was sought to prevent a newspaper from publishing the names of 2 doctors infected with HIV who were working in a particular hospital. The newspaper had obtained the information from confidential hospital records. The newspaper argued that there was an overriding public interest in disclosing the information, because the public was entitled to know that the doctors had HIV. However, the court held that the public interest in preserving the confidentiality of hospital records outweighed the public interest in the freedom of the press to publish the information, because people with HIV must not be deterred from seeking appropriate testing and treatment. This decision is important because the judges recognise that confidentiality in relation to a person's HIV status, could be important, not only to protect the interest of the infected person, but also for public health generally against the spread of the epidemic.

Doctors at Risk

In this regard it is also equally important to bring to light the risk to which doctors and other paramedical staff are exposed in their every day activities, and a kind of judgement like the present one, would seriously obliterate their selfless and sincere contribution to the society and treat them at par with people with promiscuous attitude and thus exposing them to the society's misplaced ridicule.[31]

Here the author is reminded of what was done to a senior resident doctor in Lucknow some years ago.[32] This happened in the King George's Medical College and Hospital (KGMC), Lucknow. This happened to be the sole hospital in the State of UP where people with HIV/AIDS were referred for treatment, without even a separate ward for treatment, leave alone a proper diagnostic infrastructure. While in this hospital, management of AIDS patients is slipshod and are discharged after treatment of secondary complications, the medicos were also becoming more vulnerable to the disease.

This former chief resident of KGMC contracted the dreaded virus while treating AIDS patients in the hospital. His wife also tested positive for HIV soon after. Ostracized by society and the hospital authorities, the couple had left the city and nobody knows for certain where they have gone. This doctor languished in the hospital for six months without proper

31. Here, the author is not including those doctors who are solely after money and have no ethics left in them.
32. *"Docs falling prey to AIDS. Lucknow hospital faces a peculiar situation"*, by Partha Maitra reported in the Hindustan Times dated 12th of November 1997.

treatment. His cluster of differentiation test (CD count) was not done there even months after he tested positive for HIV. He had to undergo the test from Ranbaxy, Mumbai at his own expenditure. The report sent alarm bells ringing, and as his health deteriorated, his friends and family members gave up hope. He had to travel all the way to Pune for treatment. Notwithstanding, the hospital authorities remained nonchalant at his plight.

This doctor had put in about 15 years of his life into the medical service. When the subsequent diagnosis had confirmed his status as HIV (+)ve, and the news spread in the Medical college which was attached to the hospital, the authorities asked him to vacate the premises which he was occupying. The reason for such a summary order was that *"medical students"* staying in the hostel would run away from the hostel if they came to know that this doctor was HIV (+)ve!

This is the height of such kinds of superstition and misplaced fear even among those in the medical profession. Is this the kind of treatment which we people (who claim to be *Homo sapiens*, the *'wise beings'* of the entire animal kingdom) are to mete it out to those who have dedicated their lives to the service of mankind? Is this the mark of a Civil Society? Then what is the difference between us, and the man-eating cannibals of the Sahara desert? Instead of such an approach, the medical authorities could have used this as an opportunity to set an example by coming together to take care of that doctor, by providing him with medical care; teach the students, the humane approach which, they were to take in dealing with such patients and their peers in future.

In another incident in the same hospital, a junior house officer received a prick from a syringe needle while handling a blood sample of an HIV positive patient with naked hands. No gloves were available in the ward then. The resident doctor was shocked and approached the hospital authorities for prophylactic treatment. The response was lukewarm. The doctor had to shell out huge amount of money from her pocket for post-exposure prophylaxis drug treatment. This amount was not reimbursed by the hospital. The position of nurses, paramedics including nurses is no better, and at the time of reporting, even a trainee nurse had also tested positive for HIV.

It is found that Catherisation; Intercostal-drainage (ICD) and dressing of open wounds of AIDS patients and resuscitation of newborn babies also make the doctors and nurses vulnerable to the disease. Significantly, disposable syringes are rarely used and even gloves are not provided to the doctors while handling blood samples of AIDS patients. "Glass syringes

are used for injection for over 20 to 30 patients at a stretch and then put into a boiler for disinfection", a resident doctor had told the corespondent on the condition of anonymity.

Then, in paragraph 29, the court has observed that, "Having regard to the fact that the appellant was found to be HIV (+)ve, it's disclosure would not be violative of either the rule of confidentiality or the appellant's right of privacy as Ms. 'Y', with whom the appellant was likely to be married was saved in time by such disclosure, or else, she too would have been infected with the dreadful disease if the marriage had taken place and consummated."[33]

Here again, it is submitted that the court has not gone by whatever has *actually* happened or it's *distinct* and *near* implication upon the patient, his fiancee, the society at large, but has gone into whatever has not happened. It has not ventured to examine the contention of the patient that the doctors of the respondent hospital in having *actually* done something which was not appropriate, are liable for having violated their "duty of care and confidentiality", but has based the judgement only on such things which have not at all occurred at the time when the petition was presented. It is a fact independent of and existing even before the court recognised it that Ms. 'Y' was protected, as the marriage was called off. The court had to decide on actual facts which had already taken place at the time of the presentation of the case and it is not supposed to base it's judgement on all numerous kinds of *probable* or *inconsequential* eventualities. It has based it's decision of the question, *'whether the doctors of hospital 'Z' are accountable or not'* on the fact that, *had the marriage taken place then*, the children too "would have been infected", etc. The court was not moved to decide whether Ms. 'Y' was saved in time or not.

Then in paragraphs 30 - 38, the court has dealt with the right based on confidentiality" in the context of marriage.[34]

The court has observed that "marriage is the sacred union, legally permissible, of two healthy bodies of opposite sexes. It has to be mental, psychological and physical union. When two souls thus unite, a new soul comes into existence. That is how, life goes on and on this planet."[35]

Then the court has observed that mental and *physical health* is of prime importance in a marriage, as one of the objects of the marriage is the procreation of equally healthy children.

33. See *Supra* n. 2 at pg. 307, Para 30.
34. *Ibid*, Para 31.
35. Emphasis supplied.

This, it is submitted that, is not an absolute rule in itself, as, there have been marriages where either of the parties have married Paraplegics[36] or even Quadriplegics[37] and have had a mutually complimentary and satisfying married life. There are cases where people have remained married even when one of the spouses have been afflicted with a mental or physical disability. Just because their numbers are small, it does not mean that they do not exist at all and so, are not to be counted for the purposes of defining the rule. Even in cases where both the spouses have been infected with the HIV, still they have stayed together, cared for each other. Even in cases where just one of the spouses was infected with HIV, still they have stayed together, cared for each other and provided the much-needed emotional support.[38]

A lot is possible where there is Compassion and Cooperation and everything is virtually impossible where there is Suspicion and Competition.

As regards the argument that having physical relationship with each other is also is an essential part of marriage, even if it is not accepted by many people including this author as an absolute necessity for a valid marriage, it is sufficient to note that even in cases where only one spouse is infected with the HIV, the couple has had such relationships by adopting methods of protected sexual behaviour. Today, a new trend is visible where, people infected with the HIV are marrying each other and thus finding emotional support and sustenance in each other when the rest of the society has condemned and forsaken them.

Also, as has been raised as a plea in the recent writ petition filed before the Bombay High Court in the matter of *AC & Ors.* vs. *Union of India* that, in view of this judgement of the SC that: "the right to get married in case of people with HIV/AIDS is a suspended one", will legal action be taken against such people who decide to marry each other and be penalised for having "violated" the "suspended right to marry"?[39]

36. See the September 1994 issue of India Today which featured an article about the Artificial Limb Centre, Pune working for the rehabilitation of such people, injured while serving in the armed forces.
37. See the Autobiography of the Superman star, Christopher Reeve, *"It's Still Me"*. He authored his experiences in recovering from a paralytic injury sustained during a film shooting after which he was paralysed from neck down forever. He was able to fight back and share his strength and faith with others only because of the unflinching support and care he received from his wife Dana Reeve and his three children.
38. See Supra n. 6, Para 3, in the case referred to, of the casual labourer who was summarily dismissed from his services on account of his being found to be HIV (+)ve, by his public sector corporation. His wife was not infected and has continued to care for him.
39. See the first issue of the newsletter of the "Lawyers Collective" on HIV/AIDS published in April 1999.

Another point is that one of the objects of marriage *is the procreation of equally healthy children*. In this regard also, it is submitted as a personal-submission that, even this objective is not an absolute rule in itself. As is evident around us, in many a marriages between *"healthy"* couple, their offspring might be suffering from some congenital, incurable or disabling genetic diseases like, Down's syndrome or being born with clubbed fingers or with rabbit-lips or as autistic, etc.

Hence, to say that it is only in case of people with HIV/AIDS that, they would not be in a position to procreate healthy children is not an absolute rule in itself. Even otherwise there are many couple who are not able to procreate children naturally and hence have adopted children. Hence, it would again not be absolute in itself to say that just because people with HIV/AIDS cannot procreate a natural child who, will live an ordinarily natural life or that even if they decide to adopt a child they would not be there for long to provide for it, they are not entitled to marry even.

As a matter of fact, in their cases, marriage either with a person who is also HIV (+)ve or with any other person, with that person's *informed and conscious consent* where, they agree to adopt methods of protected sexual behaviour, becomes very much necessary and important, for the society also. This is so as, there is a danger that in the other eventuality, people who are pushed to the wall can break loose and go berserk by infecting people either by having physical relationship without informing them of their HIV status (as people from the *"AIDS CLUB"* do in many western countries where, such people form groups and either freely solicit or trap people, without informing them of their status), or else, by forcibly raping or infecting others by injecting them with infected blood.

In fact, the *Global AIDS Strategy* prescribed by the WHO, inter alia provides for:

1. Supportive socioeconomic environment for AIDS prevention.
2. A greater focus on conveying effectively the compelling public health rationale for overcoming stigmatisation and discrimination.
3. Adequate and equitable provision of "health care" to the growing numbers of HIV infected people getting AIDS.
4. Immediate planning for reduction of socioeconomic impact which is going to arise due to the AIDS pandemic.
5. Reduction of women's social vulnerability to HIV infection by improving their health, nutrition, education, legal and economic status.

6. Treatment for STDs, because it's presence increases the vulnerability of HIV infection.

The Objective of this Global Strategy being:

1. To prevent infection with HIV.
2. To reduce the personal and social impact of HIV infection.
3. To mobilise and unify national and international efforts against AIDS.

And, the major components of this strategic planning are:

1. Programme management.
2. Surveillance and research.
3. Behaviour change through Information.
4. Target intervention.
5. Condom programme.
6. STD control programme.
7. Blood safety programme.

Coming back to the case, the SC in paragraph 32 further says that: "That is why, in every system of matrimonial law, it has been provided that if a person was found suffering form any (sic), including venereal disease, in a communicable form, it will be open to the other partner in the marriage to seek divorce". Thereafter it has referred to the following sections under various personal laws to point out it's point, namely:-

1. S. 13 (1) (v) of the Hindu Marriage Act, 1955.
2. S. 2 of the Dissolution of Muslim Marriages Act, 1939 which, as distinct form other legislations, specifically provides an entitlement to a woman married under Muslim law, if the husband is suffering from a virulent venereal disease, to obtain a decree for dissolution of her marriage.
3. S. 32, of the Parsi Marriage and Divorce Act, 1936, inter alia provides a ground of divorce for the plaintiff if the defendant has, since the marriage, infected the plaintiff with venereal diseases.
4. Under the Indian Divorce Act, 1869, the grounds for dissolution of a marriage have been set out in S. 10 which provided that a wife may petition for dissolution if her husband was guilty of incestuous adultery, bigamy with adultery or rape, sodomy or bestiality.

5. Under section 27 of the Special Marriage Act, 1954 the party to a marriage has been given the right to obtain divorce if the other party to whom he or she was married was suffering from venereal disease in communicable form.

After citing all these statutory provisions, the court observes: "The emphasis, therefore in practically all systems of marriage is on a healthy body with moral ethics. Once the law provides "venereal disease" as a ground for divorce to either husband or wife, such a person who was suffering from that disease, even prior to the marriage cannot be said to have any right to marry so long as he is not fully cured of the disease. If the disease, with which he was suffering, would constitute a valid ground for divorce, was concealed by him and he entered into marital ties with a woman who did not know that the person with whom she was being married was suffering from a virulent venereal disease, that person must be injuncted from entering into marital ties so as to prevent him from spoiling the health and, consequently, the life of an innocent woman."[40]

Whatever the court has said in the above-mentioned paragraph of the judgement, is true and is agreed to by this author as, nobody can be compelled, forced or fraudulently induced into such a marriage. But this author would like to submit two points for a just and due consideration by the reader:

Firstly, 'marriage' or any *'right to get married'* was not the point in issue in this case. As has been already pointed out, it was the question of accountability due to the violation of the principle of care and confidentiality by the doctors of the respondent hospital which, was addressed to the court. But the court seems to have taken up the issue of marriage in such circumstances, as the issue and then gave such a hasty judgement.

Secondly, the objective of all the above-mentioned statutory provisions from the various personal laws are also specific and restricted in nature, i.e. to provide a kind of 'safety valve' to get out of a marriage which took place without the specific knowledge of the petitioner that, the respondent at the time of marriage was suffering from a venereal disease in a communicable form. These come into picture only when the respondent had *deliberately suppressed* that fact from his fiance. Whereas here, these laws or for that matter, any particular personal law as applicable to his case does not come into the picture at all as he was not married to Ms. 'Y' nor was there any possibility of the marriage taking place without Ms. 'Y' coming to know of it since, without giving an opportunity to Mr. 'X',

40. See *Supra* n. 2 at pg. 308, Para 37.

the authorities of the respondent hospital had already revealed the information to Ms. 'Y' directly.

These laws have a limited purpose. As has been seen above, these laws cannot ensure the stoppage of the diseases from spreading. Thus laws themselves and alone do not provide any Blackstonian "Slot Machine" solution of a lasting nature.

Then the court has dealt with the present case from another angle. The court has taken into cognizance the presence of the following two sections in the IPC, namely: -

- "S. 269: Negligent act likely to spread infection of disease dangerous to life. - Whoever unlawfully or negligently does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease, dangerous to life, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.
- S. 270: Malignant act likely to spread infection of disease dangerous to life.- Whoever malignantly does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both."[41]

The court then says that: "Therefore, if a person suffering from the dreadful disease "AIDS", knowingly marries a woman and thereby transmits infection to that woman, he would be guilty of offences indicated in Sections 269 and 270 of the IPC."[42]

"The above statuory provisions thus impose a duty upon the appellant not to marry as the marriage would have the effect of spreading the infection of his own disease, which obviously is dangerous to life, to the woman whom he marries apart from being an offence."[43]

All this is agreed to, but, once again it is humbly submitted that an objective perusal of the facts show that, the appellant was not seeking the permission to get married and to thereafter, spread the disease. Furthermore, purely even for the sake of argument, it can be said as a fact that the appellant has not even committed the acts which are made punishable by these two penal sections.

41. *Ibid.* at pg. 309, Para 40.
42. *Id.* Para 41.
43. *Id.* Para 42.

Then the court proceeds to ask: "Can the appellant, in the face of the statutory provisions, contend that *the respondents*[44] in this situation, should have maintained strict secrecy? We are afraid the respondent's silence would have made them *particeps criminis*."[45]

The answer to this query in the light of the peculiar problems posed by the misconceptions, taboos and discrimination related to HIV/AIDS is an affirmative *'YES'*, in the sense that, the respondents must have informed the appellant first. Then, they must have awaited his reaction to the information, given him appropriate counseling and then see as to what his reactions still were. Inspite of all these safeguards had the appellant still been adamant about marrying Ms. 'Y' without her *informed and conscious consent* or taking her into confidence or without intending to adopt methods of protected sexual practices even when Ms. 'Y' might have agreed to marry him, then, the respondent's silence would have made them *particeps criminis*.

The court has devoted considerable part of it's decision upon issues like objects of marriage, ideals in the various systems of matrimonial law, the so called "appellant's contention" that every young man and women has a right tot marry, the complete failure of marriage in case either partner is impotent, Sections 269 and 270 of the IPC etc., which had no direct bearing on the issue really in question.

Moreover, Mr. 'X' had not claimed the enforcement of his right against Ms. 'Y' but had only sought accountability on the part of doctors in failing to live upto their duties. There is no question of bringing in his right to see whether the doctors were in error or not. Even if the need be so, then, he was not seeking the enforcement of his so-called right to get married or that of privacy vis-a-vis Ms. 'Y'. Hence, there is no point when the court endeavours to explaining the test of resolving the conflict between the two fundamental rights.

Then in paragraph 44, the court has observed that: "Ms. 'Y', with whom the marriage of the appellant was settled, was saved in time by the disclosure of the vital information that the appellant was HIV (+)ve. The disease which is communicable would have been positively communicated to her immediately on the consummation of marriage. As a human being, Ms. 'Y' must also enjoy, as she obviously is entitled to, all the Human Rights available to any other human being. This is apart from, and in addition to, the Fundamental Right available to her under Article 21,

44. Emphasis supplied.
45. See *Supra* n. 2 at pg. 309, Para 43.

which as we have seen, guarantees "right to life" to every citizen of this country. This right would positively include the right to be told that a person, with whom she was proposed to be married, was the victim of a deadly disease, which was sexually communicable. Since "right to life" includes right to lead a healthy life so as to enjoy all the faculties of the human body in their prime condition, the respondents, by their disclosure that the appellant was HIV (+)ve, cannot be said to have in any way, either violated the rule of confidentiality or the right of privacy. Moreover, where there is a clash of two Fundamental Rights, as in the instant case, namely, the appellants right to privacy as part of right to life and Ms. 'Y's right to lead a healthy life which is her Fundamental Right under Article 21, the right which would advance the public morality or public interest, would alone be enforced through the process of court, for the reason that moral considerations cannot be kept at bay and the Judges are not expected to sit as mute structures of clay in the hall known as the courtroom, but have to be sensitive, "in the sense that they must keep their fingers firmly upon the pulse of the accepted morality of the day "(Allen : Legal Duties)."[46]

Now, in this paragraph the court has dealt with three issues each of which, would now be discused separately:

Firstly, the question as to whose Fundamental Rights are superior, Ms. Y's or Mr. X's?

The court has observed that even Ms. 'Y' is equally entitled to the right codified under Article 21. In fact she is more entitled to it and thus be informed about the medical status of Mr. 'X' who is suffering from the deadly disease of HIV/AIDS.

All this is absolutely fine since, it is a natural fact that all of us are equally entitled to life and enjoy it as any other human being. There is no doubt about this issue. What matters is the procedure adopted by the authorities of the respondent hospital, it's social implications, etc. on the appellant and to those like the appellant.

As has been submitted before also, the authorities could have very well informed Ms. 'Y' and her family and counseled them also had the appellant after being informed and appropriately counseled, still refused to inform Ms. 'Y' about his status. Even otherwise, since the marriage was fixed for 12-12-95 there was no such immediate and inevitable risk for Ms. 'Y' that the authorities could not have waited to inform the appellant first, and then waited for his reaction before going to inform Ms. 'Y' as the last ditch effort to protect her. This is all the more so since, the reported blood tests were conducted on 1-6-1995 a good six months before the date fixed for marriage.

All along, the rights of Ms. 'Y' are being discussed and emphasised upon by the court. But nowhere except in the last but one paragraph has it bothered to see the rights of the appellant-victim to live as an ordinary human being with a level of basic dignity till he dies. On the question of death, today medical research and advancement has shown that such people can live for an average period of about 5-6 years in an active and healthy manner. He has already been left to die and in the light of a judgement of this sort, it is nothing but a tacit sanction and justification of the acts of the society if it seeks to hound such people out and either kill them or leave them to die in the streets. This sort of a judgement, more or less amounts to a pre-mature and extra-constitutional imposition of death penalty on a person who is already on the death row, thus, amounting to a *Double Jeopardy* of a distinct nature.

Secondly, the issue of Morality as a standard:

Time and again, the court's attitude in adapting morality as a standard or guideline in deciding legal disputes has been an inconsistent one and more after than not, a very cautious approach on the reasoning that the contents of morality are always in a state of flux and therefore, they cannot be relied upon when, a uniform and consistent guideline is required. The court quoting from "Allen : Legal Duties" has said that Judges.... "must keep their fingers firmly upon the pulse of the accepted morality of the day".

It is submitted that even this, is an easily fallible test as, today, abuse of Cocaine, Ecstasy, LSD, Wife-Swapping, etc. have become the accepted morality of the day in certain sections of the society. But it does not mean that the court is going to accept wife-swappaing as the morality of the day.

Morality cannot be determined by what the ordinary and misinformed people of the society wish to have for themselves for the purposes of protecting their selfish and self-centered interests. Speaking in the context of the present case, it is relevant to note what Gandhiji had said, *"Morality which depends upon the helplessness of a man or woman has not much to recommend it. Morality is rooted in the purity of our hearts."*[47]

Morality can be determined with a fair degree of accuracy and consistency if it is determined by any person, who has learnt and trained himself or herself to only love and forgive and nothing less than that. Any person, *including this author* who, entertains even the slightest of the impulses of competitiveness, selfishness, and other such self-centered

46. *Ibid.* Para 44.
47. Quotes of Gandhi, pg. 210.

attributes, cannot determine as to what is moral and as to what is immoral. Only a Gautama, the Buddha or a Jesus Christ or Kabir or Guru Nanak and people like them can determine as to what is moral or immoral since they have trained themselves to look beyond their own selves and thus be free of all insecurity complexes which afflict the rich and the poor, the "modern" and the "primitive" alike.[48]

Ofcourse, it may be argued by some just for the heck of argument that it is not possible for everyone on this earth to be like anyone of them. But still the point remains that so long as we have not been able to raise ourselves above and beyond our selfish insecurity complexes and train ourselves only to forgive and love, we are also equally unqualified to determine as to what is absolutely moral and what is not. And as to the question of how can we learn to love, this author would like to quote that:

"We come to Love not by finding the Perfect person but by Learning to see an Imperfect person Perfectly." - Sam Keen , To Love and Be Loved.[49]

Ofcourse, this learning process involves a lot of unlearning as well. In the process we have to unlearn the selfish prejudices and biases which we have deliberately or unknowingly inculcated within ourselves. This also includes the process of a conscious weakening and de-fortification of the strong walls of our ego which arises and gets fortified by the ignorant feeling of Superiority and the false belief that "Only I Know better than others". That last attribute can be cured to a great extent by a constant process of monitoring and trying to inculcate what Ralph Waldo Emerson said long ago, *"Every man I meet is superior to me in some way. In that, I learn of him".*

Thirdly, the Role of Judges (and that of all of us):

Here, this author would like to quote extensively for the benefit of students form the February 1999 issue of the journal, From the Lawyers

48. Here, for the benefit of students, this author would like to share what Prof. B.B. Pande taught him. That, *"Fear and Ignorance are the two great weaknesses of the human kind. The twin weaknesses afflict the rich and the poor, the "modern" and the "primitive" alike. In the regions where the Fears of material wants have been overcome, the emotional or spiritual wants continue to generate Fears, which can be much more fierce. Ignorance is a close ally of Fear. As a matter of fact they can be said to be the two sides of the same coin, because most of the Fears are born out of and sustained by Ignorance. Therefore, dispelling Ignorance becomes the most effective means of encountering Fear and attaining Knowledge is the surest way of dispelling Ignorance. But all learning does not give you knowledge. The test of real knowledge lies in it's ability to create Fearlessness.*
But there can be no real fearlessness unless one is able to think beyond oneself". - 5/2/1999.

49. Quotable Quotes, Reader's Digest, September 1998.

Collective which, had published the introductory lecture at a workshop of the Lawyers Collective on the role of judicial officers in the area of HIV/AIDS, delivered by Hon. Justice Michael Kirby.[50] He says,

"Judges, by definition, are leaders of their communities. They are invariably educated above the average. Their special positions in society impose upon them a responsibility of leadership. Nowhere more is that responsibility tested than when a completely new and unexpected problem presents itself to society. All the judge's instincts for legality, fairness and reasonableness must then be summed up, to help lead society towards an informed, intelligent and just solution to the problem... A judge of the final appellate court will have an enormously important role in applying the Constitution, in expounding basic human rights, in sometimes striking down legislation as unconstitutional, and in keeping the other branches of the government in check. A judicial officer at the other end of the spectrum, a magistrate, will see many more citizens than higher court judges do. This is where most people see the judiciary. It is a mistake to conceive of the role of the judiciary as limited to judges of the highest courts."

"... the judiciary's response... is not confined to interpreting, developing and applying HIV/AIDS law. The judiciary must do more than this, for the epidemic is fundamentally about human beings, fellow citizens. It is not about statistics. It is not about law as such. Jurists, as educated leaders of the community, must understand this."

"The first responsibility of the judiciary is consciousness about HIV/AIDS, and about the relevant legal principles which affect the performance of their professional tasks... the first rule in HIV/AIDS law and policy is to base all action and responses upon sound data. That data will require those involved in relevant decisions and the exercise of governmental power (including in the judiciary) to know what they are dealing with, and what they are talking about... They should not rely solely upon the general media, for it is often guilty of misinformation and extravagant reporting on this topic."

"The judicial function is typically performed in courts. The association of HIV/AIDS with drugs, sex and in particular, groups which have often

50. Hon. Justice Michael Kirby is a former member of the *World Health Organisation Global Commission on AIDS.* He has been one of the leading legal luminaries crusading in this field for a greater awareness and sensitivity to this global menace. He has been a judge of twenty-five years in Australia and has also served once in another common law country of Solomon Islands. He has also worked as the *Special Representative of the Secretary General for Human Rights in Cambodia between 1993 and 1996.*

been (and sometimes still are) the subject of stigma and even criminalisation (homosexuals, sex workers etc.) makes community responses to the epidemic highly sensitive and sometimes over-reactve. The judiciary are members of their communities. They cannot be entirely free from the attitudes, fears and prejudices of the societies they live in. But it behoves the judiciary to be better informed, and especially to so perform their functions as to reduce unnecessary burdens upon those who come before them who are living with HIV/AIDS....."

Speaking on the issue of confidentiality he says, "Because of the nature of the sensitive question that can arise in cases involving HIV/AIDS, it will often be the duty of the judge to afford a measure of confidentiality to the persons involved."

About the prevailing sense of discrimination he says that *technical hurdles must often be overcome if claimants under discriminatory legislation are to recover form redress.* "A factor in such cases is often the need for urgency in the judicial decision. Particularly at an advanced stage of AIDS, unless judges become pro-active, and take control of litigation involving people suffering form HIV/AIDS, the litigant may be improperly denied a right of remedy, and such loss may prove irreparable. "He then says that, "It is the duty of a judge, as the exemplar of due process, to insist upon fairness in the court, and to prevent discrimination from showing it's face."

He then quotes from an article of the Victorian Law Institute Journal, which, described the kind of problem that can arise in the context of a litigant's sexual orientation. The same problem he says, might arise in the context of HIV/AIDS. He quotes from *"The Hard Earned Pink Dollar"*, K. Derkley[51], "Often it is simply a matter of homosexuality being unnecessarily dragged into a case..... *Sexuality is rarely an issue in criminal matters and it should certainly not impinge on a person's equality in the eyes of law."*

He has mainly discussed cases pertaining to criminal law and family law. Talking about criminal law he says, "In common law countries, bail before trial is quite normal. In the United States, it has sometimes been argued that the defendant's HIV status is relevant to whether or not he or she should be released pending trial. This is because of the shortened life span of most people found HIV positive. The stereotyping view about dangers to the public should be expelled by the judge, who should confine his or her decision to the actual known conduct of the applicant. An appellate court in New York held that it was an abuse of discretion to

51. Law Institute of Victoria Journal, August 1995, 742, 743.

impose a condition of a negative HIV/AIDS test prior to release on bail, in so far as this was not mentioned in the statutes, and could involve an injustice to the particular applicant. [See People vs. McGreevy 514 NYS 2d 622 (1987) (NYCA)].[52]

"Some of the most difficult decisions arise in the area of family law. Cases have been decided whereby access to a child was denied to a father found to be HIV positive [In the marriage of B & C (1989) FLC 92,043 (Family Court of Australia)]. The basis of the decision, however, was not any real risk to the child, but that it was "not unreasonable" for the child's mother to have concerns without the risk of infection from fatherly social contact. This was an irrational fear, and the judge should not have given effect to it. A better approach was suggested in another case, where a wise judge held that *it was a more appropriate response to the risk of stigmatisation to bring the child up in a way that assists him or her in coping with it, and not to shield the child from reality altogether.*[53] [Jarmen vs. Lloyd (1982) 8 Fam LR 878 (Family Court of Asustralia)].

He concludes by saying that, "many of the features of HIV/AIDS are relevant to the professional duties of judges. Typically, laws stigmatise, and sometimes criminalise conduct which is relevant, e.g. the sexual activities outside marriage; prostitution; homosexual activities; and injecting drug use. It is therefore the duty of judicial officers to reflect upon the effectiveness of current laws, in so far as they are relevant to the epidemic. Where law has become the part of problem, judicial officers (being better informed and usually powerful) have a responsibility to add their voices to the discussion of law reform. In default of a cure for, or vaccine against, HIV/AIDS, the only weapon in society's armoury is behavior modification. Alas, it is the lesson which judges can tell society that strong criminal sanctions are only of limited use in securing and reinforcing behavior modification in such basic activities as sex and drug use."

Coming back to the last but one paragraph of the judgement[54], the SC made the following observations:

"AIDS" is the product of undisciplined sexual impulse. This impulse, being a notorious human failing if not disciplined, can afflict and overtake anyone howsoever high or, for that matter, how low he may be in the social strata."[55]

All that needs to be understood at this juncture, is the truthfulness and universal necessity of Hon. Justice Michael Kirby's first plea that we all

52. See the February 1999 issue of the Lawyers Collective for the rest of the cases.
53. Emphasis supplied.
54. See *Supra* n. 2 at pg. 310, para 45.
55. Emphasis supplied.

must base our decisions on a judicious and factually appropriate knowledge of what HIV/AIDS is all about and as to it's modes of transmission, etc. This author would not like to say anything more on this observation of the court.

Then the court proceeds further and says: "The patients suffering from the dreadful disease "AIDS" deserve full sympathy. They are entitled to all respect as human beings. Their society cannot and should not be avoided which otherwise, would have a bad psychological impact upon them. They have to have their avocation. Government jobs or service cannot be denied to them as has been laid down in some American decisions."

After, all what the court has observed, this above-mentioned observation does not amount to anything much, apart from a mere lip service for formality sake.

Then the court concludes by saying: *"But "Sex" with them or the possibility thereof has to be avoided as otherwise they would infect and communicate the dreadful disease to others. The Court cannot assist that person to achieve that object."*[56]

But then the question is: *Who was asking the Supreme Court to assist the appellant by giving him the unasked permission and then assist him in having sex, to, spread the infection complained of?*

After, all what has been submitted above this author would like to conclude with the following submissions, namely:

- No civil society worth it's name can afford to behave in this manner where, our actions and decisions are misguided by inadequate and inappropriate information.
- *The court could have and must have emphasised upon the need of spreading true awareness about the diseaser, the need and necessity of Appropriate-Counseling, Care in handling such cases, etc. In fact, this author submits that, like it was done in Vishakha's case, the court could have invoked it's powers under Article 142 of the Constitution and framed the appropriate policy guidelines and directions in this regard till, a full-fledged legislation would have come in this regard.*
- In fact, the court must have done that since we are also following the Common law pattern where, the judge being the person who can witness the changing scenario of the society right in front of himself, would be in the best possible position to understand the need for a change in attitude and law.[57]
- That, these sorts of things show a reversionary trend, back to the dark ages of ignorance and fear. It reminds one of the barbaric practices such as 'Kashi Karvat' one could witness just about 2-3 centuries before our time, in and around the areas of Kashi. Whenever any member of a family turned old to the extent of disability, or if anyone was afflicted with paralytic attack, etc. which necessitated continuous care and attention from the side of the family, they used to tie that person onto a Cot and take him or her to the Ghats of Kashi and leave them near the burning pyres. Helpless and left to die, they were preyed upon and eaten by dogs, vultures, jackals and other such preying animals, ALIVE.
- The question is, if we claim ourselves to be 'Educated', 'Modern' and the like, then, where have we reached from the ages of 'Kashi Karvat' and what have we evolved into, from the ages of 'Witch hunting' and 'Sati'?
- Such kinds of an attitude has resulted into the creation of AIDS-Sanitariums like the one being run by an NGO in the outskirts of Bangalore city which, has been forsaken by the society. But ironically, when another member from that very society is hounded out and driven off, he or she also finds solace and security in those very kinds of sanitariums. But above all, such an emergence of secluded and forsaken sanitariums remind one of the ages when Leprosy was at it's peak in the 19th Century. It required a Compassionate and Kind hearted Father Damien to go to the Island of Moloqui to serve and take care of what were scientifically known as *Homo Sapiens.*
- Here the author would also like to mention people like Dr. Suniti Solomon in Madras and scores and thousands like her who have dedicated their lives to combat this menace. This author is also hopeful that irrespective of the depth to which ignorant members of the human society might fall and above all fail to know their own predicament, still, there would be people like the ones

56. Emphasis supplied.

57. Ofcourse, this is subject to the submission that, even an excessive and over enthusiastic approach is this field could lead to allegations of encroachment on the domain of the legislature. What is needed is a cooperative and coordinate approach with all the branches of the government and the society at large.

mentioned above, to take care of even those falling in the latter category of ignorant people.

Finally, I would like to conclude with what Gandhiji said:

"If love was not the Law of life, life would not have persisted in the midst of death."[58]

"It is man's social nature which distinguishes him from the brute creation. If it is his privilege to be independent, it is equally his duty to be inter-dependent. Only an arrogant man will claim to be independent of everybody else and be self-contained."[59]

MAY ALL BEINGS BE HAPPY.

58. Gandhi Peace Diary, 1999.
59. *Ibid.*

JUDICIAL CONVOLUTION: FORM BRIBERY TO IMMUNITY VIA PRIVILEGE

T. Anamika and Santosh Kumar***

Few months before the Constitution of India is to celebrate 50 years of its adoption we will try to overview the judgement of a Constitution Bench of Supreme Court of India in *P.V. Narasimha Rao* v *State*[1] popularly known as J.M.M. Bribery Case. Bribe givers are to be prosecuted, but, bribe takers are protected by a web of constitutional immunity. The Supreme Court's judgement which enables such contradictory consequences seems misdirected in its aims, convolute in its arguments and disastrous in its results.

In the General Election for the Tenth Lok Sabha held in 1991 the Congress (I) party emerged as the single largest party and formed the Government with P.V. Narasimha Rao as the Prime Minister. A 'No Confidence Motion' was brought against the Government, which was put to vote on July 28, 1993. At that time the effective strength of the House (Lok Sabha) was 528 and Congress (I) party along with its allies had 251 members, 14 short of majority. The motion was defeated with 251 members voting in favour of the motion, while 265 against it. On Feb 28, 1996 one Shri Ravindra Kumar of Rashtriya Mukti Morcha filed a complaint with the Central Bureau of Investigation (C.B.I) alleging a criminal conspiracy hatched by few political managers to prove a majority of the Government on the floor of the House on July 28, 1993 by bribing Members of Parliament of different political parties, individuals and groups of an amount of above 3 crores of rupees.

After completing the investigation C.B.I. submitted three charge sheets u/section 120-B, I.P.C.[2] and sections 7,[3] 12,[4] 13(2)[6] r/w section 13(1) (d) (iii)[5] of the Prevention of Corruption Act, 1988, cognizance of

* LL.B., Final year, presently Advocate, Supreme Court of India.
** LL.B., Final year, presently Advocate, Tis Hazari Court, Delhi.

1. 1998 (4) S.C.C. 626.
2. **120-B Punishment of Criminal conspiracy.** (1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence.

which was taken by the Special Judge, Delhi. C.B.I.'s case was that Suraj Mandal, Shibu Soren, Simon Marandi, Shailender Mahto (Jharkhand

(2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment of either description for a term not exceeding six moths or with fine or with both.

3. **"7. Public servant taking gratification other than legal remuneration in repeat of an official act.** - Whoever, being, or expecting to be a public servant, accepts or obtains or agrees to accept or attempts to obtain from any person, for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act or for showing or for bearing to show, in the exercise of his official functions, favour or disfavor to any person or for rendering or attempting to render any service or disservice to any person, with the Central Government or any State Government or Parliament or the Legislature of any State or with any local authority, corporation or Government company referred to in clause (c) of Section 2, or with any public servant, whether named or otherwise, shall be punishable with imprisonment which shall be not less than six moths but which may extend to five years and shall also be liable to fine.

Explanations :- (a) : "Expecting to be a public servant." If a person not expecting to be in office obtains a gratification by deceiving others into a belief that he is about to be in office, and that he will then service them, he may be guilty of cheating, but he is not guilty of the offence defined in this section,

(b) "Gratification." The word "gratification" is not restricted to pecunniary gratifications or to gratifications estimable in money.

(c) "Legal remunerations." The words "legal remuneration" are not restricted to remuneration which a public servant can lawfully demand, but include all remuneration which he is permitted by the Government or the organisation, which he serves, to accept.

(d) "A motive or reward for doing." A person who receives a gratification as a motive or reward for doing what he does not intend or is not in a position to do, or has not done, come within this expression.

(e) Where a public servant induces a person erroneously to believe that his influence with the Government has obtained a title for that person and thus induces that person to give the public servant, money or any other gratification as a reward for this service, the public servant has committed an offence under this section."

4. **12. Punishment for abetment of offences defined in section 7 or 11.** — Whoever abets any offence punishable under section 7 or 11 whether or not that offence is committed in consequence of that abetment shall be punishable with imprisonment for a term which shall be not less than six months but which may extend to five years and shall also be liable to fine.

5. **"13. Criminal misconduct by a public servant** — (1) A public servant is said to commit the offence of criminal misconduct:

(a)	X	X	X	X
(b)	X	X	X	X
(c)	X	X	X	X

(d) If he:—

(i) by corrupt or illegal means, obtains for himself or for any other person any valuable thing or pecuniary advantage; or

(ii) by abusing his position as servant, obtains for himself or for any other person any valuable thing or pecuniary advantage; or

(iii) while holding office as a public servant, obtains from any person any valuable or pecuniary advantage without any public interest;

6. (2) Any public servant who commits criminal misconduct shall be publishable with imprisonment for a term which shall be not less than one year but which may extend to seven years and shall also be liable to fine.

Mukti Morcha) and Ram Lakhan Singh Yadav, Ram Sharan Yadav, Roshan Lal, Anadicharan Das, Abhay Pratap Singh Haji Gulam Mohammed (Janata Dal) and Ajit Singh (Janta Dal Ajit Singh) agreed to and did receive bribes to the giving of which P.V. Narasimha Rao, Satish Sharma, Buta Singh, V. Rajeshwar Rao, N.M. Revanna, Ram Linga Reddy, M. Veerappa Moily, D.K. Adikeshavulu, M. Jhimmogowda, Bhajan Lal were parties. Charges were framed against the alleged bribe takers and givers. Shailender Mahto of the J.M.M. later turned approver and was pardoned.

Before the Special Judge an objection was raised on behalf of the accused persons that jurisdiction of the Court to try the case was barred u/Art. 105(2) of the Constitution. The Special Judge rejected the said contention on the view that in the present case voting pattern of the accused persons was not under adjudication and they were sought to be tried for their illegal acts committed outside Parliament. The objection that a Member of Parliament is not a public servant for the purposes of the Prevention of Corruption Act, 1988, was also rejected in the light of the decision of the Delhi High Court in, *L.K. Advani* v *Central Bureau of Investigation*,[7] where it was held that Members of Parliament were public servants under the Act. Another objection as to previous sanction u/sec. 19 of the Act was rejected by the Special Judge on the ground that no previous sanction for prosecution of an accused u/sec. 19 was necessary if he had ceased to hold public office which was allegedly misused by him and in the present case at the time of filing of the charge sheets and on the date of taking of cognizance by the Court, the Tenth Lok Sabha (1991-96) had come to an end.

Revision petitions filed by the appellants against the said order of the special judge were dismissed by the Delhi High Court. Consequently the appellants came to Supreme Court in appeal. The appeals were heard by a bench of three judges which referred it to the Constitution Bench on the ground that a substantial question of law as to the interpretation of Art. 105 of the constitution was raised in these petitions.

Two questions arose for consideration before the Supreme Court:

(i) Whether Art. 105 of Constitution conferred any immunity on a Member of Parliament from being prosecuted in a Criminal Court for an offence involving offer or acceptance of bribe?

(ii) Whether a Member of Parliament is excluded from the ambit of the Prevention of Corruption Act, 1988 for the reason that —

7. (1997) 66 DLT 618 (Del).

(a) he is not a person who could be regarded as a "public servant" as defined u/section 2 (c) of the Prevention of Corruption Act, 1988 and

(b) he is not a person comprehended in clauses (a), (b) and (c) of Sec. 19(1) for there is no authority competent to grant sanction for the prosecution under the Prevention of Corruption Act, 1988?

Before we proceed further, it may not be out of place to discuss in brief the position in some foreign jurisdictions such as Untied Kingdom, Asustralia, Canada and the U.S.A.

UNITED KINGDOM

The Bill of Rights, 1689 in Article 9 provides "that the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament". On May 2, 1695, the House of Commons passed a resolution whereby it resolved that "the offer of money, or other advantage, to any Member of Parliament for the promotion of any matter whatsoever, depending or to be transacted in Parliament is a high crime and misdemeanour and tends to the subversion of the English Constitution". In the spirit of this resolution, the offering to a Member of either House of a bribe to influence him in his conduct as a Member or of any fee or reward in connection with the promotion of an opposition to any bill, resolution, matter or thing submitted or intended to be submitted to the House or any committee thereof, has been treated as a breach of privilege.[8] In *Ex Parte Wasan* (1869)[9] Cockburn CJ made the following observations:

> "It is clear that statements made by Member of either House of Parliament in their Places in the House, though they might be untrue to their knowledge, could not be made the foundation of civil or criminal proceedings, however, injurious they might be to the interest of a third person, And a conspiracy to make such statement would not make these persons guilty of it amenable to the criminal law".[10]
>
> Lush J said "I am clearly of the opinion that we ought not to allow it to be doubted for a moment that the motives or intentions of Members of either House cannot be inquired into

8. May's Parliamentary Practice, 21st Edn. P 128.
9. (1869) 4 QB 573.
10. *Id.* at 576.

> by criminal proceedings with respect to any thing they may do or say in the House".[11]

The Royal Commission on Standards of Conduct in Public Life (Chaired by Lord Salmon, July 1976) had pointed out that "neither the statutory nor the common law applies to the bribery or attempted bribery of a Member of Parliament in respect of his Parliamentary activities", but "corrupt transactions involving a Member of Parliament in respect of matters that had nothing to do with his Parliamentary activities would be caught by the ordinary criminal law."[12]

According to Salmon commission, the Committee of Privileges and the Select Committee on Member's Interest do not provide an investigative machinery comparable to that of a police investigation and that having regard to the complexity of most investigations into serious corruption special expertise is necessary for this type of inquiry.[13] The Salmon Commission had recommended that "Parliament should consider bringing corruption, bribery and attempted bribery of a Member of Parliament acting in his Parliamentary capacity within the ambit of the criminal law."[14]

It further said that

> "equality before the law is one of the pillars of freedom. To say that immunity from criminal proceedings against anyone who tries to bribe a Member of Parliament and any Member of Parliament who accepts the bribe, stems from that Bill of Rights is possibly a serious mistake. This is a charter for freedom of speech in the House not a charter of corruption. The crime of corruption is complete when the bribe is offered or given or solicited or taken."[15]

In 1992 in *R.V Currie & Ors* Buckley J. held : "that a Member of Parliament against whom there is a prima facie case of corruption should be immune from prosecution in the Courts of Law is to my mind an unacceptable proposition at the present time. I do not believe it to be the Law."[16]

11. *Id.* at 577.
12. ROYAL COMMISSION REPORT 1976 at Page 98.
13. *Id.* at pp 98-99, para 310.
14. *Id.* at p. 99, para 311.
15. Statements made by Lord Salmon during the course of the debate in House of Lords, quoted from 1998 (4) S.C.C. 653 without citation.
16. Quoted from 1998 (4) S.C.C. 653-54 without citation.

In 1994, the Attorney General advised the Committee of Privileges of the House of Commons that in his opinion, though bribery of a member was not a statutory offence, it might be an offence at the common law.[17] The committee on standards in Public life, chaired by Lord Nolan (Nolan Committee) in its first report, submitted in May 1995 has said:—

> ".... It is quite likely that Members of Parliament who accepted bribes in connection with their Parliamentary duties would be committing common law offences which could be tried by the courts. Doubt exists as to whether the court or Parliament have jurisdiction in such cases."[18]

It also expressed through recommendation

> "that the Government should now take steps to clarify the law relating to the bribery of or the receipt of a bribe by a Member of Parliament. This could usefully be combined with the consolidation of the statue law on bribery which Salmon also recommended, which the government accepted, but which has not been done. This might be a task which the Law Commission could take forward."[19]

Halsbury's Law of England, in dealing with Members of Parliament under the subject of "Criminal Law, Evidence and Procedure" sets out the law succintly:

> "37. Members of Parliament: Except in relation to anything said in debate, a member of the House of Lords or of the House of Commons is subject to the ordinary course to criminal justice: the privileges of Parliament do not apply to criminal matters".[20]

Australia

In 1875, the Supreme Court of New South Wales held that an attempt to bribe a Member of the Legislative Assembly in order to influence his vote was a criminal offence, a misdemeanour at Common Law.[21] This decision was approved by the High Court of Australia in *R.* v *Boston & Others*.[22]

Section 73A of the Crimes Act, 1914 in Australia makes it an offence for members of the Australian Parliament to accept or be offered a bribe.

17. May's Parliamentary Practice 22nd Edn p. 114.
18. The Committee on Standards in Public Life (Nolan Committee) Ist report 1995 at para 103.
19. *Id.* at para 104.
20. 4th Edn Vol. 11 Para 37.
21. R.V. White : 13 SCR (NSW) 332.
22. (1923) 33 CLR 386.

Under the said provision a member of either House of Parliament who asks for or receives or obtains or offers or agrees to ask for or receive or obtain any property or benefit of any kind for himself or any other person, on an understanding that, the exercise by him of his duty or authority as such a member will, in any manner, be influenced or affected, is guilty of an offence.

Canada

In the case of *R.*v *Bunting*,[23] the defendants had moved for quashing of an indictment for conspiracy to bring about a change in the Government of the Province of Ontario by bribing members of the legislature to vote against the government. The contention of the defendants that exclusive jurisdiction to deal with this case rests with the Legislative Assembly was rejected.

Section 108 of Criminal Code in Canada renders it an offence for a bribe to be offered to or accepted by a provincial or federal member, while in Federal Canada and several provinces the reward etc, for promoting a matter within Parliament constitutes a breach of privilege.

Other Commonwealth countries: After examining the anti-corruption measures in the various Commonwealth Countries, Gerrard Carnery has concluded:

> "Most countries treat corruption and bribery by Members of Parliament as a criminal offence rather than as a breach of privilege."[24]

United States

Article 1 (6) of the Untied States Constitution contains the "speech or debate clause" which provides that "for any speech or debate in either House, they (Members of the Congress) shall not be questioned in any other Place."

> " The speech and debate clause does not give any protection in respect of conduct that is in no sense related to due functioning of legislative powers".[25]

In Burton v. *U.S.*,[26] the United States Supreme Court upheld the conviction of Senator Burton who had been bribed in order to get a mail

23. (1884-5) 7 Ontario Reports, 524.
24. [See: Gerrard Carney: Conflict of Intrest: A commonwealth study of Members of Parliament, P. 1237].
25. [See: *United States* v *Johanson*. 15L Ed 2d 681 at p. 684.
26. 202 US 344: 50 L Ed 1057.

fraud indictment quashed under the rationale that Burton's attempt to influence the Post Office Department was unprotected non-legislative conduct.

In *US* v *Brewester* (1972)[27] a former US Senator, named Brewester was charged with accepting bribes for being influenced in his performance of official acts in respect of his action, vote and decision on postage rate legislation. Burger C.J., speaking on behalf of six judges, held that the speech or dabate clause protects the members of congress from inquiry into legislative acts or into the motivation for their actual performance of legislative acts and it does not protect them from other activaties they undertake that are political, rather than legislative, in nature and that taking a bribe for the purpose of having one's official conduct influence is not part of any legislative process or function and the speech or debate clause did not prevent indictment and prosecution of Brewester for accepting bribes.

It was held that the purpose of the speech or debate clause is to protect the individual legislator, not simply for his own sake, but to preserve the independence and thereby the integrity of the legislative process and that financial abuse by way of bribes, would grossly under-mine legislative integrity and defeat the right of the public to honest representation. The learned CJ has observed :

> "Taking a bribe is, obviously, no part of the legislative process or function, it is not a legislative act. It is not, by any conceivable interpreation, an act performed as a part of or even incidental to the role of a legislatior".[28]

Brennan and White JJ (Joined by Douglas J) dissented. Bernnan J held that the Senator's immunity went beyond the vote itself and precludes all extra-congressional scrutiny as to how and why he cast, or would have cast his vote a certain way.

White J. stated : "Bribery is most often carried out by prearrangement; if that part of the transaction may be plucked from its content and made the basis of criminal changes, the speech or debate clause loses its force".[29]

The judgement in *Brewster* was followed in *US* v *Henry Helstoski* (1979)[30] Brennan J dissenting, expressed the view that the indictment in question should have been dismissed altogether since, a corrupt agreement to perform legislative acts, even if provable without reference to the acts

27. 33 L Ed. 2d 507.
28. *Id* at 526.
29. Quoted from 1998 (4) S.C.C. at 7288; see *Supra* n 27 at 508.
30. 61 L Ed 2d 12.

to perform legislative acts, even if provable without reference to the acts themselves, may not be the subject for a general conspiracy prosecution.[31]

INDIA

The relevant provision which provides for power, privileges and immunities of Parliament and its members and its committees is contained in Article 105 of the Constitution.

Clause (1) secures freedom of speech in Parliament to its members subject to the provisions of the Constitution which regulate the procedure of Parliament, viz. Articles 118 and 121.[32] The freedom of speech that is available to Members of Parliament under Article 19 (1) (a) is subject to Article 19 (2) though not the freedom of speech under Article 105 (1).

Clause (2) confers immunity in relation to proceedings in courts. It can be divided into two parts:

(i) Immunity form liability under any proceedings in any court is conferred on a Member of Parliament in respect of anything said or any vote given by him in Parliament or any committee thereof.

(ii) Immunity is conferred on a person in respect of publication by or under the authority of either House of Parliament of any report, paper, votes or proceedings.

Clause (3) can be divided into two parts:

(i) It empowers Parliament to define, by law the powers, privileges and immunities of each House of Parliament and of the members and the committees of each House.

(ii) Until they are so defined by law the said powers, privileges and immunities shall be those of the House of Commons in the United Kingdom and of its members and committees at the commencement of the Constitutions.

Clause (4) makes the privileges and immunities secured under clauses (1), (2) and (3) applicable to persons who by virtue of the Constitution have the right to speak in and otherwise to take part in the proceedings of a House of Parliament or any Committee thereof as they apply in relation to Members of parliament.

31. *Supra* n 30 at 13.
32. For details see, *Pandit NSM Sharma* v *Shri Krishna Sinha and others*, 1959 Supp (1) SCR 806 at 856 and Legislative Privileges case 1965 (1) SCR 413.

present case. The majority (Mr. Justice S.P. Bharucha, Mr. Justice G.M. Ray and Mr. Justice S.R. Babu) speaking through Bharucha J, drawing support from the U.S. Supreme Court in *Johnson*[33] and from the dissenting judgement of Brennan J. *in Brewster*,[34] agreed to the contention of Sri. P.P. Rao (appearing on behalf of the appellants) that to secure the freedom of speech in Parliament to the members, the immunity granted under clause (2) must be construed in a wide sense as the expression "anything" was construed as a word of widest import in *Tej Kiran Jain and others* v *N. Sanjiva Reddy and others*[35] and that the expression "in respect of" must also be given a wide meaning so as to comprehend an act having a nexus or connection with the speech made or a vote given by a member in Parliament or any Committee thereof and would include, within its ambit, acceptance of bribe by a member in order to make a speech or to cast his vote in Parliament or any committee thereof in a particular manner.

The Court held

> ".... Our conclusion is that the alleged bribe takers other than Ajit Singh have the protection of Art. 105(2) and are not answerable in a Court of law for the alleged conspiracy and agreement. The charges against them must fail. Ajit Singh not having cast a vote on the no-confidence motion derives no immunity from Article 105(2). The charge against bribe givers of conspiracy and agreement with Ajit Singh to do an unlawful act would, therefore, proceed.'[36]

However, Justice S.C. Aggarwal, delivering a dissenting opinion for himself and for A.S. Anand observed that

> "... an interpretation of the provisions of Art. 105 (2) which would enable a Member of Parliament to claim immunity from prosecution in a criminal court for an offence of bribery in connection with anything said by him or a vote given by him in Parliament or any Committee thereof and thereby place such Members above the law would not only be repugnant to healthy functioning of Parliamentary democracy but would also be subversive of the Rule of Law which is also an essential part of the basic structure of the constitution."[37]

> In this context, it may be appropriate to note that : It is settled

33. *Supra* n - 25.
34. *Supra* n - 27.
35. 1971 (1) SCR 612 at 615 E.
36. *Supra* n. 1 at p. 732.
37. *Id.* at 673.

> In this context, it may be appropriate to note that : It is settled law that in interpreting the constitutional provisions the court should adopt a construction which strengthens the foundational features and the basic structure of the Constitution".[38]

They held that on the basis of provision contained in clauses (2) and (3) of Article 105, the appellants cannot claim immunity from prosecution on the charges that have been levelled against them.[39]

Members of Parliament as a 'Public Servant'

Prior to the enactment of the Prevention of Corruption Act, 1988 the law relating to prevention of corruption was governed by Prevention of Corruption Act, 1947. In section 2 of the 1947 Act, it was provided that for the purposes of the said Act "Public Servant" means a public servant as defined in section 21 IPC.

In *R.S. Nayak* v *A.R. Antulay*,[40] the court held that a Member of the Legislative Assembly was not comprehended in the definition of "Public Servant" in section 21 IPC and that change introduced in section 21 IPC and that amendments introduced in section 21 IPC by Amendment Act of 1964 did not bring about any change. While dealing with clause (12) (a) of section 21 IPC, as amended by Amendment Act 1964, the Court observed that a person would be a public servant under clause (12) (a) if,

(i) he is in the service or pay of the Government, or

(ii) he is remunerated by fees or commission for the performance of any public duty by the Government.

Section 2 (c) (viii) is relevant for our purpose which postulates that the person must :

(i) hold an office and

(ii) by virtue of that office.

(iii) he must be authorised or required to perform

(iv) a public duty.

"Office" means "a position to which certain duties are attached, especially a place of trust, authority or service under constituted authority". In *Mc Millan* v *Guest*[41] Lord Atkin adopted that following view of Rowlatt J. in *Great Western Ry Co.* v *Bater*:[42]

38. *Sub Committee on Judicial Accountability* v *Union of India*: 1991 (4) SCC 697 at 719.
39. *Supra* n. 1 at 702.
40. 1984 (2) SCC 183 at 221, 224-225.
41. 1942 AC 561 at 564.
42. (1920) 3. K.B. 266 at 274.

> "An office or employment which was subsisting, permanent, substantive position, which had an existence independent of the person who filled it, which went on and was filled in successive holders".

In *R.* v *White*[43] the S.C. of the New South Wales has held that a member of the State Legislature holds an office. That view was affirmed by H.C. of Australia in *R.* v *Boston.*[44] Isaacs and Rich JJ said:

> " A Member of Parliament is, in the highest sense, a servant of the State, his duties are those apertaining to the position he fills, a position of no transient or temporary existence a position forming a recognised place in the constitutional machinery of government. Clearly a Member of Parliament is a 'Public Officer" in a very real sense, for he has duties to perform which would constitute in law an office".

In *Habibullah Khan* v *State of Orissa*[45], Orissa H.C. held that a member of the Legislative Assembly holds an office and performs a public duty. Taking into consideration the provisions of Articles 168, 170, 172 and 173 of the Constitution relating to Legislative Assembly of the State, the learned Judges have held that the Member of Legislative Assembly is created by the Constitution and that there is a distinction between the office and holder of the office.

The statement of Oath or Affirmation taken by Members of Parliament contains the words "faithfully discharge the duty upon which I am about to enter" which show that a Member of Parliament is required to discharge certain duties after he is sworn in. The duties discharged by him are such in which the State, the public and the community at large have an interest and the said duties are public duties.

A Member of Parliament holds an office and by virtue of such office he is required or authorised to perform duties and such duties are in the nature of public duties. A Member of Parliament, would, fall within the ambit of sub-clause (viii) of clause (c) of section 2 of the Prevention of Corruption Act 1988.

Requirement of Sanction for Prosecution

Section 19 of the Prevention of Corruption Act 1988 prescribes that no court shall take cognizance of an offence punishable under sections 7, 10,

43. 13 SCR (NSW) 332.
44. (1923) 33 CLR 386.
45. 1993 Cr. L.J. 3604 at 3608.

11, 13, and 15 alleged to have been committed by a public servant except with the previous sanction of the authority specified in clauses (a), (b) or (c) of sub-section (1) of section19.[46]

Section 19 contemplates that for every public servant there must be an authority competent to remove him from his office and that, effort must be to identify that authority. But if no authority can be identified in the case of a public servant, it cannot lead to the conclusion that he is not a public servant within the meaning of the said Act. In *K Veeraswami* v *UOI and Others*,[47] the Supreme Court considered the applicability of the Prevention of Corruption Act, 1947, to a Judge of a High Court or Supreme Court. The Court concluded that a Judge of a High Court or Supreme Court was a public servant within the meaning of section 2 of the Act. A prosecution against him could be lodged after obtaining the sanction of the competent authority under section 6[48] of the Act. For this purpose, the President of India was the authority to give previous sanction. This aspect has also been considered by the Court in *S.A. Venkataraman* v *The State.*[49] In that case the appellant, who was a public servant, had been dismissed after departmental enquiry and thereafter he was charged with having committed the offence of Criminal misconduct under section 5 (2)[50] of the 1947 Act and he was convicted. No sanction under section 6 was produced before the trial court. It was observed:

> " When the provisions of sec. 6 of the Act are examined it is manifest that two conditions must be fulfilled before its provisions become applicable. One is that the offences mentioned therein must be committed by a public servant and the other is that the person is employed in connection with the affairs of a Union or a State and is not removable from his office save by or with the sanction of the Central Govt. or the State Govt. or is a public servant who is removable from his office by any other

46. Section 19 (1) (a) — In the case of a person who is employed in connection with the affairs of the Union and is not removable from his office save by or with the sanction of the Central Government.
(b) In the case of a person who is employed in connection with the affairs of the State and is not removable from his office save by or with the sanction of the State Government.
(c) In the case of any person, of the authority competent to remove him from his office.
47. 1991 (1) S.C.C. 655 at 655 and 662.
48. This requires previous sanction for prosecution and the competent authority for sanction has been given in clauses (a), (b) and (c) of sub-section (2) of section 6 which is similer to s. 19 (1) (a), (b) and (c) respectively of the Prevention of Corruption Act 1988.
49. 1958 S.C.R. 1037.
50. Section 5 (2) provides for punishment for criminal misconduct.

> competent authority. If either of these conditions is lacking, the essential requirements of the section are wanting and the provisions of the said section do not stand in the way of a court taking cognizance without previous sanction."[51]

In *Kihoto Hollophan* v *Zachillhu and Other* [52] the Supreme Court said:

> "The Speaker/Chairman hold a pivotal position in the scheme of Parliamentary Democracy and are guardians of the rights and privileges of the House".

In order that Members of Parliament may not be subjected to criminal prosecution on the basis of frivolous or malicious allegations at the hands of interested persons, the prosecuting agency, before filing a charge sheet in respect of an offence punishable under sections 7, 10, 11, 13 and 15 of the 1988 Act against a member of Parliament in a criminal court, shall obtain the permission of the Chairman of Rajya Sabha/Speaker of Lok Sabha, as the case may be.

Article 101 of the Indian Constitution states that the seat of a Member of Parliament, becomes vacant immediately upon his becoming disqualified subject to the disqualifications mentioned in Article 102. The removal of a Member of Parliament is occasioned by operation of law and is self operative. Reference to the President under Article 103 is required only if a question arises as to whether a Member of Parliament has earned such disqualification, that is to say, if it is disputed. His order would not remove the Member of Parliament from his seat or office but would declare that he stood disqualified. So it cannot be said that President is the authority competent to remove a Member of Parliament from his office.

The Member of Parliament and the State Legislatures are public servants liable to be prosecuted for offences under the said Act.

After the unanimity in deciding that members of Parliament are public servants within the frame work of the Prevention of Corruption Act, 1998, the bench differed in its search for a sanctioning authority. S.P. Bharucha and S.R. Babu JJ. held that Members of Parliament cannot be prosectued for offence under sections 7, 10, 11 and 13 thereof because of want of an authority competent to grant sanction thereto. However, innovating a stop gap arrangement, S.P. Agarwal, A.S. Anand and G. N. Ray JJ. held that since there is no authority competent to grant sanction for the prosecution

51. *Supra* n 49 at 1045.
52. 1992 *Supp* (2) SCC 651 at 663.

of a Member of Parliament under section 19 (1) the of Prevention of Corruption Act 1998, the court can take cognizance of the offences mentioned therein in the absence of sanction. They held that before filing a charge sheet in respect of an offence publishable under sections 7, 10, 11, 12 and 15 of 1988 Act against a Member of Parliament in a criminal court, the prosecution agency shall obtain the permission of the Chairman of the Rajya Sabha/ Speaker of the Lok Sabha, as the case may be.

The Supreme Court deserves all commendations for settling the much contested proposition that MPs are public servants. Doubt was cast on this in *Antuely case*[53]— a confusion which was not entirely resolved even by the prevention of Corruption Act 1988.

But the majority decision in response to the first question that whether Article 105 of Constitution confer any immunity on a Member of Parliament form being prosecuted in a Criminal Court for offence involving offer or acceptance of bribe is baffling. Bribing MPs to purchase their votes-albeit to save a tottering government is constitutionally subversive. It is also a crime. Can it be that the Constitution makers intended such errant MPs to claim immunity from prosecution for their crime and obtain illicit rewards for effecting constitutional subversion? Such a reading of Constitution would result in an erosion of basic constitutional values which the Supreme Court has time and again declared sacred and inviolate.

It is humbly submitted that their lordships failed to notice a House of Commons resolution of 1695 calling a promotional payment to an MP, a high crime and misdemeanour. For the past more than 100 years legislatures in Austrialia, Canada and most of the Common Wealth countries have treated corruption and bribery by members of legislature as a criminal offence. The *appeal* to American case law is unfortunate and misleading. Immunity under Art 105 (2) has been over stretched to a point where it can be considered objectionable. The immunity should not be available to give protection against liability for an act that precedes the making of the speech or giving of vote by member of Parliament even though it may have some connection with the speech made or vote given by the member if such an act gives rise to a liability which arises independently and does not depend on the making of the speech or the giving of vote in Parliament by the member. Such a liability cannot be regarded as liability in respect of anything said or vote given by the members in Parliament.

53. *Supra* n 40.

The offence of criminal conspiracy is defined in Section 120 A IPC.[54] It is clear from the text of this provision that to complete the offence of criminal conspiracy two or more persons should enter into an agreement to commit the offence of bribery and it is immaterial whether or not in pursuance of that agreement the act that was agreed to be done in lieu of payment of money was done, mere change of hands of money is sufficient to amount to crime. At this point accepting the claim of privilege is totally misplaced and it seems that the Hon'ble Judges were in a hurry to expand the walls of Parliament so as to be regarded as "Vasudhaiv Kutumbakam" (Entire world is one family) here, entire India being part of Parliamentary proceeding.

Consider a situation where a member of legislature starts from his residence to the Parliament and on the way crushes a human being under the wheels of his car. Will he be given immunity from being prosecuted under section 304-A IPC (Casuing Death by negligence)?

The decision of this case was totally unexpected from such a activist judiciary which commands respect not only from the plain hearted peace loving 1000 million Indians but also from the jurists across the world. It would have been much better had the judges taken into consideration the words of Lord Denning which are :

> "My root belief is that the proper role of a judge is to do justice between the parties before him. If there is any rule of law which impairs the doing of justice, then it is the province of the judge to do all he legitimately can to avoid that rule — to even to change it — so as to do justice in the instant case before him"[55]

Public expectations from the Supreme Court, given its activist role of late, were high as usual when the much talked about Bribery case came up for hearing. The alleged bribe takers had committed a very serious offence. They had battered a most solemn trust reposed in them by those they

54. **"120-A Defininition of criminal conspiracy"** — When two or more persons agree to do, or cause to be done,
(1) an illegal act, or
(2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy:
Provided that no agreement except an agreements to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.
Explanation:— It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object."

55. From 'THE FONDLY STORY', 1981 Edn.

represented. By reason of the lucre that they received, they enabled a government to survive.

All the powers, rights and functions belonging to the governors and the governed are derived and controlled by fundamental law of the land i.e. the Constitution of India. While governance of the country belongs to the political department, the preservation of constitutional dictates and the rule of law is the duty of the courts. These twin responsibilities are very onerous but they are also indispensable for the welfare of the people and the country. Therefore, the various complexities which may arise in the exercise of Parliamentary privileges require a balanced handling so that constitutional limits are neither strained nor broken.

Unfortunately, the role of the legislative bodies is marked by arrogance of authority and power which some times reached the stage of arbitrariness which cannot be justified by any stretch of imagination. Our experience in the field of privileges and immunities of legislature often leaves a sour taste in the mouth. However sound a system maya be, it cannot deliver the goods unless sincere efforts are made to make it a working phenomenon.

The whole of the law and custom of Parliament has its origin from this one maxim that "whatever matter that arises concerning either House of Parliament ought to be examined, discussed and adjudged in that House to which it relates and not elsewhere"[56] (Blackstone). A full and free debate is of the essence of Parliamentary Democracy. To ensure this, Art. 105 was framed, to give protection to anything said or any vote cast so that a member has freedom to say what he thinks is right in Parliament, undettered by the fear of being proceeded against.

As early as in 1951, an ad hoc committee of Parliament[57] was appointed to investigate the conduct and activities of a member, H.G. Mudgal in connection with some of his dealings with a business association which included canvassing support and making propaganda in Parliament on certain problems on behalf of that association in return for alleged financial and other business advantages. The Committee held that conduct was derogatory to the dignity of the House and inconsistent with the standards which Parliament was entitled to expect of its members.

The Privileges and Immunities that are provided in the Constitution are not simply for the personal or private benefit of the members, but are meant

56. Adopted by Stephen J in *Bradlaugh* v *Gosset* ; (1884) 12 QBD 271.

57. See M.N. Kaul and S.L. Shakdher; PRACTICE AND PROCEDURE OF PARLIAMENT 4th Edn pp 284-285.

to protect the integrity of legislative process by ensuring the independence of individual legislators. Our Constitution does not contain an exhaustive code of the powers, privileges and immunities of Parliament, as only a few privileges are expressly provided, while the rest are to be ascertained by reference to those enjoyed by the House of Commons in England at the time of the commencement of the Constitution. However, Parliament is empowered to redefine the law relating to privileges by enacting an appropriate measure.

The argument of codification of privileges and immunities of legislatures in the country finds favour with the press and the people who regard it as an effective method of curbing legislative lawlessness. From the very beginning, members of legislatures in India were intolerant of judicial interference with Parliamentary Privileges and that is the reason why they preferred to be governed by the transitory provision in the second part of clause (3) of Art 105 and thereby deferring the enactment of necessary legislation codifying these privileges.

There is a need for codification as it will remove the uncertainity in this branch of law and will provide limits on the powers and privileges of legislatures. This is not the whole truth. Proper working of democratic institutions largely depends upon the observance of democratic norms governing a particular area of public life. It is not possible to lay down the grounds of contempt exhaustively as new and varied situations arise from time to time. Courts besides interpreting the Constitution will have to carry the added burden of interpreting the codified law. Codification may be a beautiful doll of a fashionable political society but it is not the real answer and may be avoided being bereft of factual benefits and more so in the context of political conditions prevailing in the present day democratic India. The only effective remedy is to ensure the observance of the rules of the game.

Power without responsibility or limits is the another name for arbitrarianess which has no place in an orderly society. It, in fact, negates all efforts of human race to prevent power running riot so that this earth may become a hospitable place to live in. Existing constitutional jurisprudence has failed to instil a sense of propriety and responsibility in our legislators.

Political sagacity and inspiring leadership by responsible and able leaders is needed to meet the challenge of naked power which the nation faces today. Observance of democritic spirit is necessary to prevent the catastroph of our democratic institution being swallowed by the sea of oblivion and to prevent the society from following a path which inevitably leads to suicide and self destruction.

While all other countries have strived towards eliminating the corruption of legislators (including U.K.), the Supreme Court's majority judgement seems to move the other way in its quest for curing a cancer which seeks to auction democracy. There is every possibility of this judgement adding to the political instability faced by the country for the last one decade and patronising horse trading. Its permanent effect, in terms of protecting leaders of doubtful integrity and morale is a cause for alarm. The judgement should be reversed before democracy is imperilled.

BOOK REVIEWS

The Dialectics & Dynamics of Human Rights in India (Yesterday, today, and tomorrow). By V. R. Krishna Iyer. Eastern Law House, Calcutta New Delhi; 1999 page [32]+ 394; Rs 55/- ISBN 81-7177-100-9.

Human Rights, environment, WTO, Intellectual property rights (IPRS) and social clauses have become instruments of peace, trade and growth. These issues will remain dominant in the global politico-social and economic scenerio, at-least up to 2nd or 3rd decade of the twenty first century. It is not surprising that human rights on the one hand are essential to keep dignity of mankind, while on the other they have become instruments of intervention in the affairs of sovereign nations and use of arms is being justified to fight alleged suppression, and even without UN sanction; as in Kosovo and Rwanda recently. India's permanent representative in UN, strongly opposed this theory in his speech in UNGA on oct. 7. 1999, that under the pretext of defending human rights, separation of ethenic groups in being supported rather than supporting multicultural and pluralistic societies. Use of external force to redress human issues would set the world on a dangerous slope, in principle there would be no limit to it. What some might regard as humanitarian action, others would consider it as war crimes. National scene too is discouraging in India and in most developing countries terrorism by individuals, groups and State is increasing and every individual is responsible for violation of the rights of women, children and the oppressed sections of the society.

The book under review consist of lectures delivered by V. R. Krishna Iyer, a former judge of the Supreme Court of India at Calcutta University Tagore Law Lecture series. The author himself confesses that the long gap between delivering lectures and publishing the book had affected freshness of the views expressed, despite inclusion of two supplements and preface. For the obvious reasons, the book misses to do full justice in analysing provisions of India's Human Rights Act, 1993 or working of National and State Commissions. Many State Human Rights Commissions are exceeding their limits. For example, the Chairman of State Human Rights Commission has recently ordered the government to build steps down into a valley called Patalkot. In another case it has ordered the collectors to inspect district hospital every month. As for as collectors are concerned, they are not subordinate to the Commission and orders to them are without jurisdiction.[1] Despite these set backs Justice Krishna Iyer directs a sharp focus on India's human rights odyssey from a jurisprudential perspective and presents a learned discourse on the emergence, dimension and development of human rights and the realities confronting

these rights. A detailed study is made of the concept and origin of human rights and their relationship with religious culture and the foundation and structure of the UN, the charter and its ancillary bodies, colonial domination of the people's rights, the basics of judicial independence and the non-negotaible value of liberty.

Chapter one makes us realise that concept of human rights is not something alien to India or the world. Rig Veda, humanist jurisprudence of Ashoka and Akbar, glorious justinian's rule and reverence for human rights by Imam Ali are examples, which are replete in world history. Thoughts of Mahatma Gandhi, Marx, Bertrand Russel, Einstein, H.G. Wells and others highlight the need to promote a terror - free human rights-friendly society. Human Right's Law has no locomotion of its own unless the necessary infrastructure for receiving events and accusations, providing for prompt adjudication with due process requirements, easy access and legal aid, agencies to prosecute, enforcement of verddicts and delivery of relief are vigilantly attended.[2] It is lamentable that although Human Rights Declaration was made in 1948 yet legislations of various countries are far behind the UN jurisprudence and the covenants.[3]

Justice Krishan Iyer, though socialist at heart, agrees that there are flaws in both systems - capitalist privations and socialist regimentations-both make fundamental freedoms anaemic and frail. We cannot enjoy civil and political rights unless we enjoy economic, social and cultural rights. A unitive understanding through human rights holism is necessary.

Relationships between the rulers and citizens is the key to understand human rights. Institutional protection for the victims of State violence is often inadequate, civilian morale slumps when the State itself takes sides, and the courts look unperturbed at the harsh laws like the TADA, the MISA and the emergency laws, and the basic freedoms become judicial casualty. What the world needs is a universal Human Rights Regime, a code and courts with regional centres and jurisdiction world wide.

Chapter two deals with the concepts of human rights, which are of many dimensions-temporal, moral, cultural and spiritual. The sublime blend of these components constitutes the chemistry of human rights.

Chapter three gives details of development, political, philosophical and legal and the instruments promulgated by or under the auspices of UN or otherwise. The American Constitution, 1787, along with its, first ten amendments, French Declaration of Right of Man and of the citizen, 1789 with its fundamental demand for liberty, equality and fraternity, and the reformist ideas of the nineteenth century led to changes in the condition of women and children, prisoners and mentally ill people; slavery was barred

in many parts of the world. On the decline side of the human rights came Colonisation of Africa by Europe, India becoming part of the British Empire, and humiliation of China by Europe and Japan. Imperial rivalries, protectionist trade policies, arms race and economic crisis spread tension and diminish human security. World War I and II, failure of League of Nations and Hiroshima brought 20th century's worst crimes on humanity. Indian constitutional makers were influenced by these events. Human rights formed the core and were reflected in the Preamble, Fundamental Rights and Directive Principles of our fundamental instrument of governance.

Chapter four traces the origin of human rights in the concept of natural rights. Law and religion remained largely undifferentiated in the early period. Law and legislation had its origin in the divine will. Thoughts of Plato, Manu, Aristotal Kautilya, Cicero, progress of Greek and Roman law, philosophies of Grotius, Hobbes, Rousseau, Marx, Gandhi, Locke and Montesquieu's doctrine of separation of powers and others formed the philosophical foundations of human rights. It advances the theory that ideas of "natural law" and the idea of the natural rights of man, are interdependent. Abolition of slavery, emancipation of women, emergence of law of nature school in the US and advancement of democracy may be considered as milestones towards the law of liberty to the challenge of despotism.

Chapter five examines influence of religion and culture, sustaining the human rights. Hindu Dharma Sastras and the *Artha Sastra* of Kautilya and other treatises regulate the duties of kings,[4] subjects[5] and judiciary.[6] Buddha transformed the world of thought and his disciple King Ashoka created a compassionate empire. Christianity gave the world the right to dignity, self expression and other freedoms. Islam and its founding Prophet Hazrat Muhammed's reverrence for human rights is noteworthy. It is a dilemma that today the fundamentalists sector is a vritual disease among the obscurantists of almost all religions.

Chapter six and seven takes us through the saga of UN and other bodies, examine Charter and Covenants and in their backdrop discuss the likely future of human rights. There have been many proposals to make the UN a stronger instrument of human rights. In 1993 at the Vienna Conference, there was a demand for the establishment of high level UN commission for the Human Rights. Late in 1993 at the UNGA decided to create such a post with useful supervisory powers and coordinatory function. And Ombdusman for the UN system was also suggested in a recent study.[7]

It is essential to be vigilant and protest every time when anyone's

human rights are breached or butchered. What are the instrumentalities and operational possibilities to actualise the constellation of human rights? There is linkage between the international law of armed conflicts and international human rights law. We have a fairly comprehensive set of Geneva Conventions, applicable in case of armed conflicts or in times of war. The General Assembly has passed a resolution entitled "Respect for Human Rights in Armed conflicts"[8] The resolution, brought the International Committee of Red Cross (ICRC) into a close nexus with human rights law. Human rights have attained a jural base, an ideology and a full fledged expression, yet they are under threat from many quarters-nuclear menaces, chemical poisons and psychic demoralisation. We are at the cross roads of history.

Chapter eight deals with the effect on human rights of mankind on account of colonization and neo-colonization of human race. Advent of Columbus, Vasco-da-Gama, Captain Cook, and number of navigators, traders and military administrators; and technological innovations, use of armament and gun powder by Spanish, Portuguese, Dutch, French and British resulted in the extermination of American natives, humiliation and plundering wealth of Indians, slavery of Africans and the aboriginals of Australia being made aliens in their own country and betrayel of Latin Americans by bloodhounds.

Justice Iyer laments Indian surrender at the WTO as a bad omen. The Fund - Bank conditionalities, pressure to sign CTBT and use of force by US, make it clear that human rights as a universal rule of life is but double-speak and double deception. There is an urgent need for the third world to rise unitedly.[9]

Chapter nine focusses its attention on human rights realities in India, prospects of an Asian Charter and other experiments. Universal Declaration of Human Rights was made in 1948 and two more covenants were added to it in 1966. India incorporated in its constitution social, cultural and economic rights, thought the latter is not Judicially enforceable. Vigilant court system and implementing instrumentalities were provided. There is a move to declare Asian charter.[10] However, many obstacles are in the way : Non-acess to information, armed conflicts, corrupt intermediaries, conflict between western science and technology and eastern ethos, jettisoning native skills and snatching of triable community resources.

Chapter ten examines the "Right to Development" as a fundamental human right. Cocoyoc Declaration 1974 convened by UNEP and UNCTAD presents a balanced, enlightened human statement on patterns of resource use, environment and goals of development . Development does not really

mean to close wealth gap, but to ensure equality of life. It also takes care of limits on maximum, set by carrying capacity of biosphere and man's limited ability to absorb goods without damage to his physical or mental health.[11] Similarly UNESCO's plan for 1977-82 contained the idea of endogenous development, planned and carried out by each nation in line with its own choices and in accordance with the authentic values, aspirations and motives of its own people. Nairobi summit 1986, adopted the African charter on Human and people's Rights. It recognised group and community rights and duties - family, society and state, generation rights - the right to peace, solidarity, health, environment and development; and right to development in harmony with environment.[12] Organization of African Unity (UAU) and Assembly of Heads of state ensure promotion and protection of human and peoples rights. The African Commission examines complaints received which can be filed either by state or private persons - whether natural or legal.[13]

United Nation General Assembly passed a resolution entitled "Right to Development". US and Moscow did not agree on the point whether or not priority is to be accorded to civil and political rights. United Stated preferred priority to the former while Moscow and other developing countries preferred the latter one. This led to the sole dissent of U.S. Therefore, the soul of the resolution never became effective.[14]

Chapter eleven and twelve emphasise the value and need for independent judiciary to defend human rights, with special reference to India. Bangalore Principles (Conference of the Judges of Commonwealth, 1998) bears the testimony of independent judiciary, and further affirms the importance of importing, by interpretation, the values embodied in the UN instruments on human rights into domestic law, as far as possible. These principles have been re-affirmed in the Harare Declaration (1989), Banjul Affirmation (1990) as well as in Abuja confirmation (1991).[15]

Right to life, health, shelter and environment embrace within themselves, a wide arena of rights. Rights to life includes right to live with dignity at least with bare necessities of life such as adequate nutrition, clothing, shelter, facilities for reading writing and expressing oneself in diverse forms.[16] Rights to live enshrined in Article 21 derives its life breath from Arts. 39 (*e*),(*f*) and 41 and 42 of Directive Principles of State Policy. It includes protection of health and strength of workers men and women children; protecting them against abuse and also providing educational facilities and other opportunities for their healthy development, freedom, dignity, just and human conditions of work including maternity relief. [17] The right to shelter is part of the right to life.[18] It was recognised that

depriving a person of his right to livelihood is to deprive him of his life.[19] The Jurisprudence of human rights and the Constitution take a holistic view and insist on ecological justice and environment pollution.[20] The need to have a 'Right to Information' as a human right has been emphasised.

Directive Principles aim at making the Indian masses free in the positive sense, free from passivity and coercion and object physical conditions that had prevented them from fulfilling their best values.[21] Life in its expanded form includes all that giving meaning to life including traditions, culture and heritage.[22] ASEAN countries were of the view that historical, cultural and religious backgrounds determine national and regional peculiarities and therefore contents of human rights.[23] But it was reiterated by the West that torture, rape, racism, anti-semitism, ethenic cleansings, politically motivated disappearances or arbitrary detention are not tolerated in any faith or culture that respects humanity; nor can they be justified by demands of economic development or political expediency.[24]

Chapter thirteen deals with human rights to life, liberty and security of persons, human rights of prisoners sentencing jurisprudence and issue of capital punishment. The author draws attention towards gap between rhetoric and reality. Preventive detention without trial, the MISA the TADA and have been declared as constitutional.[25] Fundamental rights do not flee the person as he enters the prison. However until *Sunil Batra's* case, prison precincts were thought to be out of bounds for courts.[27] Judge made law has civilised our prisons, banished bar fetters and handcuffs, eliminated solitary confinement.[26] Many other progressive changes including legal aid and easier bail in criminal cases have been ordered by the Apex Court. But many instances of long under trial custody still appear in abundance. Pushing the prisoner into a solitary cell, denial of the necessary amenities, transfer to a distant place where visits or links with friend or relatives may be snapped assigning him to a desperate or tough gang are still Practiced. Such actions will be arbitrary under Article 14 (Equal protection) if it is dependent on unguided discretion, unreasonable under Art. 21 (protection of life and personal liberty) if it violates natural justice.[28] In the era of human rights consciousness, the habeas corpus writs under Art. 32 & 226 have functional plurality and the constitutional regard for human decency and dignity.[29]

The penal system and the sentencing process are versatile instruments for reforming the prisoner and for defence of the society. Correctional processes, probation or conditional suspension of the sentence, training schools and Rescue Homes for women must be considered by the judges.

Safeguards do guarantee the minimal rights of those facing death penalty and these have been subject to EXOSOC resolution.[30] Persons below the age of 18 years at the time of commission of crime, pregnant women or new mothers or insane persons should not be sentenced to death. In India, death sentence is not violative of Art. 21; but then it ought to be imposed in 'rarest of the rare' cases.[31] Great Britain has abolished the death sentence. Justice Iyer believes that time is ripe for ADM, Jabalpur [32], to be overruled and constitutional humanism restored.

The National Human Rights Commission, although powerless, has done an excellent job far beyond its limited statutory capabilities. The position is the same regarding the National and State Commissions for Women. If more punitive powers and proper infrastructures are given to them to life, not merely to bark, they would be a boon to victims of violations, which are on the increase.

Chapter fourteen takes us through global journey of human rights. UN was born at San Francisco in 1945, to be followed by Manhatten, where Human Rights were declared on 10th June 1948. Granting of independence to colonial countries followed in the sixties and permanent sovereignty over Chapter for natural resources was recognised. Tehran Proclamation, 1968 created standards and obligations in human right fields to which states should conform. Hague is the headquarter for International Court of Justice. Geneva Convention deals with wounded and sick in the war, maritime warfare, human regulations of the conditions of the prisoners, torture, mutilations, cruel treatment, graded treatment based on race, colour, nationality religion, belief, sex, birth or social status and capital punishment. Rio conference, 1992 on environment provided Agenda 21 for sustainable development in the twenty first century. Vienna Conference on Human Rights, 1993 dealt with the concrete proposals for increasing resources for the human rights programmes, the creation of the Centre for Human Rights and the establishment of a UN High Commissioner for Human Rights. Cairo's International Conference on Population and Development, 1994 included in its agenda subjects like gender justice, population and development.

Coppenhagen World Summit for social Development, 1995 accorded the highest priority in national, regional and international programmes policies and actions to the promotion of social justice, progress and the betterment of human conditions. Beijing Women Conference Declaration focussed on womenhood and gender justice.

Finally the author focuses on the policies of Gattology, IMF and World Bank conditionalities, creation of WTO, agreements on TRIPS, TRIMS

and Trade in services (TRIS) removal of farm subsidies, reduction of non-tariff barriers to trade and minimising restrictions on foreign investment which will result in the dominance by West over the third World. Human Rights are in the process of becoming a tool in the hands of G-7 countries to augment their hunger for profits. The author questions the constitutional validity of GATT treaty and Art. 253 as against basic structure of the constitution.[33] As Preamble declares India as socialist, republic, while impact of GATT Agreement is good bye to social philosophies.

To conclude, the declarations are often repetitions. What about the platform of action, periodic social audit, pressure to perform and people's sanction on breach. The author recommends model of European Court of Human Rights and the European Convention which are similar to US Convention. It gives specific legal content to human rights, combining with it the establishment of machinery for supervision and enforcement.

The Human Rights prospect for the 21st century is a thing of fancy and fiction and a dream for the mankind, as large strides made to strengthen inalienable rights of people are crippled by terrible reverses in suffering of billions of people. Let us ponder over it.

The book under review makes a good reading. It gives an adequate insight into the legal as well as politico-cultural aspects of the major issues emerged from the north-south divide. It offers a convincing evaluation of the probable consequences of the adoption of trinity of liberalization, privatization and globalization. Human Rights Law remains a battle of International politicking, legal rules, covenants and enforcement in its illusive ways. Alas ! the humanity is to win this battle.

*V.K. Gupta**

References

1. Buch M.N, Too Many Commissions? Hindustan Times, 13, 19, 10, 1999.
2. Iyer V.R.K, The Dialectics and Dynamics of Human Rights in India, (Eastern Law House, 1999) p. 11.
3. *Id*, p.4.
4. Gupta V.K, Kautilyan Jurisprudence, (New Delhi, 1987) pp. 14-17, 21, 175-76.
5. *Id.*
6. *Id*, p.9.
7. Erskine Children's, Renewing the United Nations—Development Dialogue, (1994) p.1.

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

8. United Nations General Assembly (UNGA) Resolution 2444 (xxiii), 19th Dec. 1968.
9. *Supra* n.1 p. 196.
10. UNGA Resolution 41/128, 4th Dec, 1986.
11. Paul Harrison, THE THIRD WORLD TOMORROW, pp 40-41.
12. AFRICAN CHARTER ON HUMAN AND PEOPLE'S RIGHTS 1986, UN Publication, Art-24.
13. *Ibid*, Introduction, p.1.
14. *Supra* n.1 p.230.
15. *Id*. p. 272.
16. *Francis Coralie Mullin* v. *Administrator*, Union Territory of Delhi (1981)2 SCR 516: AIR 1981 SC 746.
17. *Bandua Mukti Morcha* v. *UOI* (1984) 2 SCR 67 : AIR 1984 SC 802 (at pp. 811-812 of AIR).
18. *Olga Tellis* v. *Bombay Municipal Corporation*, AIR 1986 SC 180 : (1985) 3 SCC 545; See also *State of H.P.* v. *Umed Ram*, AIR 1986 SC 847, para 11.
19. *Id.*
20. Rural Litigation and Entitlement *Kendra* v. *State of UP*, AIR 1987 SC 359.
21. Granville Austin: INDIAN CONSTITUTION: THE CORNER STONE OF A NATION (1996 Ed.), pp. 50-51.
22. *Ramsharan* v. *UOI*, AIR 1989 Sc 549, para13.
23. Darryl D' Monte, 1993; quoted by the author at p. 269.
24. Gupta Vijay K (ed) PERSPECTIVES ON HUMAN RIGHTS INTRODUCTION pp. 7-8. quoted by the author at p.270.
25. *A.K. Gopalan's* case AIR 1950 SC 27; ADM, *Jabalpur* v. *Shivakanta Shukla*, AIR 1976 SC 1207; (1976) 2 SCC 52.
26. Sunil Batra's case I AIR 1978 SC 1675; *Sunil Batra's* case II AIR 1980 SC 1579.
27. *Charles Sobraj* v. *Supt. Central Jail* AIR 78 SC 1514; See UN Congress on the standard Minimum Ruler for treatment of prisoners 1955; UN Congress in Geneva 1975; UNGA Res 45/11, 14 Dec 1990.
28. *Sunil Batra's* case II AIR 1980 SC 1579.
29. *Id.*
30. ECOSOC Resolution 1984/50, 25th May 1984.
31. *Bachan Singh* v. *State of Punjab*, AIR 1980 SC 898; also dissenting judgement of J. Bhagwati : AIR 1982 SC 1325; Amritsar case AIR 1983 SC 629.
32. *Supra* note I. p.343.
33. *Id* pp. 363-36.

Marriage and Divorce, by A.N.Saha 5th edition, 1996, Eastern law house private Limited, Calcutta, Pp 85+1065, Price Rs. 600/-

Importance of marriage in any civilised society is undisputed. Attempts to distract from the issue of stability fail as the options available to marriage are almost none and of little utility in terms of providing social and financial security to children and to the continuation of the family line in the patriarchal society. This does not mean that marriage as an institution has always been far from controversies or free from problems. Accusation of existence of an avoidable domination of one sex over other, amongst perennial allegations of the institution itself being a spider's web for the unhappy party trying desperately to wriggle out of it makes it a wonder that it continues to enjoy not only acceptance but is considered as inherently necessary in any society.

The remarkable diversity presented in the area of matrimonial laws by India is perhaps unique in the world. No other country can show the coexistence of such a variety of diverse laws governing the spousal relations of people belonging to one nation. These laws vary depending on the religion of a person; sect in that religion' domicile; tribe; sex of an individual; and sometimes even with the form of marriage she might have undergone through. As many as five major religions are prevalent in India[1] with their distinct matrimonial law and over and above them two statutory legislations provide alternate forms of marriages to all Indians and foreigners marrying in India.[2] In addition to these, numerous members of Scheduled Tribes continue to be governed by their distinct un codified personal laws enjoying constitutional protection of their identities.[3] Hindus in Goa, Daman and Diu still have their distinct personal laws; while Christians inhabitants of the same place are subject to the Portugese Civil Code, 1867.[4] The renocants of Pondicherry are governed by French Civil Code, 1804;[5] and Hindus of Pondicherry by the un codified customary Hindu law. Further, a study of matrimonial laws in not an isolated study of their provisions governing marriages and divorce alone, but encompasses a wider aspect of spousal relationship from a variety of angles. Starting from how to get into and get out of a marriage; to how to preserve peace in the family; financial security of a dependent spouse or children; adoption; custody and guardianship issues, distribution of assets in break up of marriage and the latest to add to it are the enactment's dealing with problems of harassment during marriage; domestic violence; dowry and dowry deaths. To undertake a study of laws of marriage and divorce in this scenario is indeed an admirable task, and the one, which is well accomplished in this case by the author.

The book[6] is divided into 28 chapters and twenty-three appendices. Each chapter is preceded by a well formulated though very extensive synopsis.[7] The first chapter deals with evolution of family and marriages in India. The discussion starts with the forms of marriages prevalent during the early period; thirteen types of sons recognized; to the later development in brief and finally ends with the desirability of having a Uniform Civil Code. Chapter -II deals with the application of distinct matrimonial legislation's to people in India on grounds of religion the exception in favour of scheduled tribes; domicile; inter-religious and intra-religious marriages; domicile of the parties in case of inter-religious marriages and void marriages. During the detailed discussion the author mentions that the Hindu Marriage Act, 1955 applies to all Hindus but fails to note the exception given to Hindus of Goa, Daman, Diu and Pondicherry, who are not covered by the tribal exception but are nevertheless exempted from the application of the HMA due to two Acts passed by Government of India, in -1962 soon after the liberation of Goa and Pondicherry. The wide areas and the extensive coverage to each and every topic covered by the author in the book would inevitably lead one to conclude the information about the Goa and Pondicherry laws also and their absence therefore comes as a surprise.

Conditions relating to the validity of Hindu Marriages and the consequences of the violation of the same is the subject of Chap III and IV, Chap. V deals with the solemnisation and registration of marriages. The discussion revolves around the provisions of the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954. The rest of the enactments appear only as a summary. While dealing with mental capacity and marriage, the exhaustive discussion covers not only different aspects of mental incapacity but also which dimension of mental incapacity would be a ground for which matrimonial remedy, with a detailed and an impressive chart. Chap. VI to X deal with the matrimonial remedies of restitution of Conjugal rights; judicial Separation and divorce. A passing reference has been made to the Constitutional validity of Sec. 9 of the Hindu Marriage Act, 1955.[8] The discussion on RCR, which covers both English and the Indian cases, leads one to wonder how the English cases with a distinct law and a totally different social outlook can at all influence the RCR cases in India which remains one of the chief reasons for a woman's subjugation. The author mentions[9] while discussing the definition of cruelty that the definition accepted under the English law cannot be applied in the Indian situation. He quotes the Supreme Court ruling[10] that the meaning and concept of cruelty is different in both situations. In Indian context, it means such conduct of the respondent, which makes it harmful or injurious for the

petitioner to live with the respondent. The reality however for the different concepts is, that the western society which is considerably more sensitive to a woman's feelings and her problems are prepared to treat a lot of stereotyped accepted conducts as amounting to cruelty, while similar conduct in the Indian Scenario would be either dismissed as ordinary wear or tear of married life or the woman bringing the action would be preached by our honorable judiciary, the lessons in tolerance being the essential virtue of a Hindu wife or would be admonished for wasting the precious time of judiciary on frivolous grounds. In absence of a definition of cruelty there is no reason why guidance should not be taken from some of the advanced countries and indeed, despite his statement that cruelty under English law may not amount to cruelty under Hindu law, the author has quoted extensively the English cases[11] to explain the concept of cruelty.

While dealing with desertion under Chap. IX, The author observes,[12]

"Keeping in view the traditional position of the wife the question of desertion by wife cannot possibly be weighed in the same scale as that by the husband except when the parties are very affluent and ultra modem belonging to an elite society"

The two factors tilting the balance, according to the author would be affluence and modernity, and would normally act adversely against a woman. These presumptions are yet one more instance of stereotyping of behaviors and prejudices against an educated modern and elite woman. These factors are constantly looked down upon when it comes to family structure, which is unfortunate, as it perpetuates and strengthens subordination of women and also undervalues her education. A presumption that an educated woman or an elite modern woman can leave her husband with ease and without reasonable cause in comparison to a traditional, not so modem or elite Indian wife may be far fetched and such a generalisation therefore is wholly inappropriate. Human relations and sufferings caused by the breakups in matrimonial relations cannot be tested in the light of modernity and elite ness of the family. Further, the fact that a wife's job at a different place other than the husband's continues to be a factor to be taken into consideration as a possible desertion against the latter is again very unfortunate. In the year 1999, while entering the 20th century, Indians still believe strongly in pushing an Indian woman to a life of complete financial dependency and subservience. With increased emphasis on a girl child's education by the state and the need to be self sufficient, employment by the wife is an inevitable conclusion. To make her earning capabilities dependent solely on the whims and wishes of the husband and to the supposed needs of the family members, without considering her own

need of identity and self-sufficiency is a gross injustice specially in light of absence of any financial security to a wife under the Indian laws. The earnings by the husband continue to belong to him despite the fact that the wife might have been forced to resign from a well-paid job to look after his home and his family needs. She receives absolutely no compensation if she after resigning from an avocation outside her home is thrown out of the house of the husband by him for no fault of hers. The amount of maintenance that she may receive after a long battle of years, virtually as a charity from the husband and not her right, may not be sufficient to feed her let alone assuring her of a dignified comfort of a decent life. The man-centered economy leaves no choice for a woman but to stand on her own feet. In this scenario, if the judiciary also take her employment as a major consideration to be taken into account as a possible desertion, it is very unfortunate. It should be avoided at all costs and the sooner it is done the better it is.

Chap. X deals with adultery. Starting with the meaning and scope of adultery the author discusses the constitutional validity of the divorce provisions relating to adultery under the Indian Divorce Act. While dealing with the Constitutionality of the Divorce provisions the author mentions[13],

> "As to challenge based on Art. 15, the Constitution is concerned, it may be respectfully pointed out that no doubt discrimination on the ground of sex fouls Art. 15(1), Constitution. But Art. 15(3) provides "Nothing in this article shall prevent the State from making special provisions for women and children." The words "special" under Italics deserves consideration. The word special is unqualified. Therefore, the special provision may be beneficial as also prejudicial to the interest of women."

The observation and interpretation that the author puts to Art. 15(3) not only appears to be very surprising but also inconsistent with the interpretation and views expressed by the author throughout the book. Can any provision of the Constitution by interpreted in any manner, which is inconsistent with the basic principles of the Constitution? Gender Equality is a fundamental principle incorporated in the Constitution. Application of these principles in the public sphere have been consistently upheld by the Courts, Though the applicability of these directives of Equality has been doubted in the private sphere, yet at the same time, Constitution can never be interpreted to permit, enforce and justify gender inequality.

Chap IX to XII deal with the grounds available under the Hindu Marriage Act, for annulment of marriages, starting with the premarital

pregnancy of the bride by a person other than the husband to impotency; and finally fraud and coercion. Without giving the status of marriage and the relevance of this ground the author deals straight away with the grounds independently. It may lead the readers to wonder whether this is a ground for divorce or otherwise. While dealing with the presumptions relation to the paternity of the children the author seems to have transcended the border of legal knowledge and has crossed over the medical science. With the through appraisal of the blood groups DNA analysis, and determination of paternity with the help of these findings, the whole chapter makes a fascinating study.[14] The remaining grounds for dissolution of marriage available primarily under the Hindu Marriage Act are summarised in Chap. XIV.

Chap- XV and XVI deal with the provisions and problems relating to the custody of children under various enactments and all major personal laws and legitimization of children. The problems of legitimacy of children who are born of void and voidable, marriages, and their legal status has been dealt with in detail by an exhaustive discussion of the number of cases on this issue. Chapter XVII and XVIII deal with the provisions of appeals from the decree of the court under all personal laws and also 'the family court and bars to the matrimonial relief, Condonation; connivance and taking advantage of one's wrong are some of the issue discussed in detail here. Chap, XI to XXI deal with the provisions of maintenance; its execution., matrimonial property and the concept of matimonial home under the Indian laws. The discussion revolves around the factual position under the Indian law and the English statues but does not suggest the need to have an analogous concept of marital property in India. Next two chapters deal with the jurisdiction and procedure, while Chap. XXIV deals with Dowry prohibition. Tracing the origin of Dowry in brief the author mentions[15] the system prevailing in the olden times among some communities in India, where girls of marriageable ages were sold for a sum of money to wealthy men who were in the advanced ages or were suffering from deformities. Tracing the concept from the olden time to the present definition of Dowry under the Dowry Prohibition Act, 1961, the author also discusses the concept and position of Dowry under the Muslim law and the position of Dowry under the Laws in Bangladesh. Chap. XXV deals with the Special Marriage Act and the consequences of performance and registration of marriages under the Act. Muslim law relating to marriage and matrimonial remedies forms the subject of the next chapter. The author does not seem to approve polygamy and is conscious of the need to have a change affected in the Muslim Personal Laws. He says,[16]

> "Two Kerela cases discussing the impropriety in India, Muslim male's being permitted to indulge in polygamy stated, "A keen perception of the new frontiers of Indian Law hinted in Art. 44 Constitution of India is now necessary on the part of the parliament and the judicature" in The national committee on the status of women (1971-74) reported,[17]
>
> "while the desirability of reforming the Muslim law is generally acknowledged as polygamy has been prohibited in most of the countries, the Government of India has taken no steps on this direction on the ground that public opinion in this country does not favor its change; ignoring the interests of the Muslim Women is denial of equality and social justice and therefore there can be no compromise on the basic policy of monogamy being the rule for all communities in India. As held in Bombay case, however polygamy for males and monogamy for females do not discriminate against women on the ground of sex only and is not violative of Art. 15(1), Constitution of India.[18]

The author also seems to be of the opinion that the bias under the traditional Muslim law is a violation of the fundamental rights. Though even on the face of it the provisions seem to offend part-III of the constitution, the supreme court, the author notes with regret[19] has held,[20] that Part II of the constitution does not touch upon the personal law of the parties. The author also notes[21] that discrimination on the ground of religion is also noticeable in a few posts - Constitutional enactments. The discussion on gender discrimination is fairly exhaustive and also takes into account the aspect form the neighboring countries of Pakistan and Bangla Desh. Chap XXVII deals with the problems of conflict of laws and the recognition of foreign decrees in India. Marriage under distinct personal laws, inter-religious marriages under that traditional laws; problems of conversion and its effect on the personal laws; foreign marriages at home and abroad are some of the important issues discussed in this chapter.

Chap. XXVII deals with Adoption and cross-country adoption. Rather than dealing in detail about adoption under the Hindu Adoptions and Maintenance Act, 1956, the author has dealt with adoption under Hindu law; under the Guardian and Wards Act and cross-country adoption. The detail in which the author has gone into while discussing the guidelines to be adopted in cross country adoption are indeed remarkable and very informative. The book also provides the functions and procedures to be followed by the Central Adoption Resource agency; role of the state Government, and the Union Territory Administration. It is very detailed on

cross-country adoptions and makes a fascinating study of this less explored aspect of law. Major and minor enactments dealing with matrimonial laws have been summarised in appendices 1-20 while appendixes 21-22 deal with the rules. Appendix 23 gives model form of petitions.

The book is very exhaustive and very detailed on some of the aspects. It makes an engrossing study and at some place the author has gone out of the matrimonial law and have given useful information relating to areas not traditionally considered part of matrimonial jurisprudence but are nevertheless directly related. The author deserves to be complimented on a very well written; very exhaustive treatise on Matrimonial laws. It would prove very useful to both the practitioners and the academia.

*Poonam Pradhna Saxena**

REFERENCES

1. People belonging to four major religions live in India viz., Hindus; Muslims. Christians and the Parsis. There is also a small population of Jews in India. According to the Government of India censxe, in the year of 1995, there were around 4,000 followers of the Jewish religion.
2. The Special Marriage Act, 1954, and the Foreign Marriage Act, 1969.
3. Art. 366 of the Constitution of the India provides for the non-applicability of the Hindu Marriage Act, 1955 to the Hindus who are members of the scheduled tribes. Section 1(2) of the HN4A also enacts the same provision.
4. Family laws relating to the non-Christian inhabitants of Goa; Daman and Diu passed in 1882; 1891, and 1903 respectively.
5. According to the treaty of accession it was provided, that the personal laws in force in these new territories would continue to be in operation on the same terms and conditions as they were applicable before their accession to India.
6. Pondicherry become a part of India in 1962, and the people of Pondicherry were given an option to be governed either by the provisions of the French Civil Code, 1804, or by the Indian laws. Those who opted for the application of French Civil Code, 1804 were called "Renocants" They continue to be governed by the provisions of this Act even in the present year 1999.
7. Sometimes the synopsis exceeds even a full-page p. 106-7, to chapter 7 on matrimonial relief.
8. In just four lines the Constitutionality of the provision has been summed up. At p. 84.
9. At p. 152
10. *N.G. Dastane* v. *S. Dastane* AIR 1975 SC 1534; *Susheela* v. *Gopal Krishna Prabhu Mohandas Prabhu* 1975 Ker LT 72
11. At. p. 155. *Forbes* v. *Forbes*, (1955) 2 All ER 311; p. 160 HALSBURY'S LAWS OF ENGLAND, 3rd Ed. Vol. 12 para 517 p. 271; *Reeves* v. *Reeves* 32LJ J&M 178: Barkar v. Barker (1941) 1 All ER 247; *Robins* v. *Robins*, (1960)3 All ER 66.
12. At p. 200.
13. At p. 232-36.

* Associate Professor, Faculty of Law, University of Delhi

14. At. P. 217.
15. At. P. 557
16. At p. 575-576.
17. *Shahulameedu* v. *Subaida Beevi* 1970 Ker L T 4; *Habeebullah* v. *Shakee* 1984 Cr. L.J. 1062)
17a. COMMITTEE ON THE STATUS OF WOMEN IN INDIA. At p. 41.
18. *State of Bombay* v. *Narsu Appa Mali*, AIR 1952 Bom 84.
19. At p. 593.
20. *Krishna Singh* v. *Mathura Ahir* AIR 1980 SC 707.
21. At 594.

The Indian Succession, Thirteenth edition by M.N. Das, Eastern Law House, pp 531, Rs. 375.

The book under review is a commentary on the Indian Succession Act 1925, which came into force on 30th September 1925 consolidating the law applicable to intestate and testamentary succession. As many as twelve Acts were consolidated in the Indian Succession Act, 1925, the more important among them are (1) The Succession (Property Protection) Act 1841; (2) The Indian Succession Act 1865; (3) The Parsi Intestate Succession Act 1865; (4) The Hindu Wills Act 1870; (5) The Probate and Administration Act 1881; (6) The Probate and Administration Act 1889; (7) The Succession Certificate Act 1889; (8) The Probate and Administration Act 1890; (9) The Probate and Administration Act 1903.

The Indian Succession Act 1925 has been divided into eleven parts and some of the parts have been subdivided into chapters. Part I relates to preliminary matters. Part II lays down the law relating to domicile. This part, however does not apply if the deceased was a Hindu, Buddhist, Sikh, Jain or mohammedan. Part III deals with the effect of marriage on the rights of succession and Part IV explains the implications of consanguinity. Part V enacts provisions relating to intestate succession. This part does not apply to any intestate occurring before January 1, 1866 or to the property of any Hindu, Buddhist, Sikh, Jain or Mohammadan. Part VI relating to testamentary succession is the most important portion of the Act. It comprises 23 Chapters. Chapters I to V prescribe as to how wills and codicils are made, and how wills are to be attested, altered or revoked. Chapter VI contains rules of construction of wills. Chapters VII, IX, X and XI deal with different types of bequests. Vesting of legacies is the subject matter of Chapter VIII. Chapter XII deals with the effect of bequests with direction as to their application or enjoyment. Effects of bequests of things described in general terms of bequests of the interest or produce of a fund and of bequests of annuities are treated in Chapters XVIII to XX. The provisions of Chapter XXII elucidate the equitable doctrine of election. Chapter XXIII deals with gifts in contemplation of death.

Part VII deals with the protection of the property of the deceased. Any person claiming right by succession to the property of the deceased may apply to the District Judge for relief against wrongful possession. Such application is to be made only when exceptional grounds exist and prompt actions are necessary to guard against misappropriation, waste or neglect. Only a person claiming right by succession can apply.

Part VIII deals with representative title to the property of the deceased. It consists of sections 211 to 216 providing that the executor or administrator is the legal representative of the deceased for all purposes, and that all the property of the deceased vests in him as such. Section 214 makes proof of representative title a condition precedent to the recovery of debts due to the deceased. Part IX relates to probate, letters of administration and administration of the assets of the deceased. Part X regulates the grant of succession certificate.

The Act however, is not all comprehensive. Many of its provision do not apply to the intestate or testamentary succession to the property of a Hindu, Buddhist, Jain, Sikh, or Mohammedan. For example, Part V dealing with intestate succession does not apply to the property of any Hindu, Buddhist, Jain, Sikh or Mohammedan. Similarly Part II regulating domicile does not apply where the deceased was a Hindu, Buddhist, Jain, Sikh or Mohammedan.

Part VI dealing with testamentary succession is also of limited application. The provisions of this part do not apply to testamentary succession to the property of any Mohammedan. Though most of the provisions of this part apply to testamentary succession to the property of any Hindu, Buddhist, Jain or Sikh, some of the provisions do not.

In this thirteenth edition of the book all relevant and intricate questions on the different topics have been elaborately discussed. Commentary on each section is arranged under separate headings and sub-headings for the easy reference for the readers. The style and method of placing facts and law by the original author B.B. Mitra has been maintained in this edition also. Obsolete cases have been discarded. Up to date case law (October 1997) of Supreme Court and of different High Courts and important English decisions have been incorporated.

In this edition the discussion on Will and the granting of probate has been made quite comprehensive including how a will become void if it is caused by fraud, coercion, importunity, undue influence; revocation of grant, the use, the abuse and the limitations of the powers of the Executors and Administrators.

The Indian Succession Act, 1925 is a jumbling of heterogeneous provisions, some of which are applicable to one community, some to the other, some again totally exclude the Mohammedans, and others are applicable to Hindu within certain specified limits. The result is that one is at a loss to understand what provisions of the Act or how much of it will apply to a particular case. Thus considering the length of the Act, the

diversity of the provisions contained in it, this lucid and brilliantly presented book clearly deserves a place in all law libraries in the country. This revised edition of the book is extremely useful to the Bench, Bar and the students of law. An exhaustive subject index enhances the usefulness of the book to the busy practitioners.

*Dr. (Mrs) Usha Tandon**

* Reader, Campus Law Centre, Faculty of Law, University of Delhi.