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# ADOPTION OF INDIAN CHILDREN BY FOREIGNERS

Directions of Supreme Court in *Laxmi Kant Pandey v. Union of India* *

S.N. Singh, *Editor*

LAKSHMI KANT PANDEY, an advocate of the Supreme Court of India, had written a letter to the Supreme Court complaining of certain mal-practices indulged in by the social organisations and voluntary agencies engaged in the work of offering Indian children in adoption to foreign parents. The letter was based on a press report published in a foreign magazine *"The Mail"* which indicated that Indian children adopted by foreigners, who reached foreign countries, were used as beggars or for prostitution. The letter sought the relief of restraining the India-based private agencies "from carrying out further activity of routing children for adoption abroad" and directing the Government of India, the Indian Council of Child Welfare and the Indian Council of Social Welfare to carry out their obligations in the matter of adoption of the Indian children by foreign parents. The letter was treated as a writ petition by the court which passed a number of directions[1] in the case with a view to prevent mal-practices followed in adoptions of children of one country by another. The directions *interalia* included the establishment of a Central Adoption Resource Agency and the state level agencies for promotion of adoption, preparation of a list of foreign adoption sponsoring agencies to be recognised/licensed by the central government and circulation of the court's order to all the High courts and social and child welfare agencies located in different parts of the country, preparation of list of Indian sponsoring agencies, organisations and institutions recognised for inter-country adoption of orphan children of India, preparation and maintenance of records of adoptive parents and Indian orphans so adopted and send them to appropriate embassies and High Commissions for follow up action and answering the well being of the adopted children. These directions were to be implemented within a fixed time schedule. The High Courts were also requested to frame rules on the basis of the judgment.

The Supreme Court gave further directions[2] in the case regarding the recognition of representatives of foreign adoption agencies with liberty to operate in India. By another order,[3] the court directed all district collectors in India to ensure enlisting of abandoned/destitute children by the missing homes/hospitals within their respective jurisdictions with foster care homes or the social welfare departments of the concerned government, the publication of the list of recognised Indian placement agencies and their associate agencies in two local leading newspapers at least annually and the monthly reports by the juvenile courts in India to be submitted to their respective High Courts about the filing, disposal and pendency of the application for release order of the abandoned children.

According to the petitioner, the above directions issued by the court were

* Writ Petition (Cri.) No. 1171 of 1982.
1. *Laxmi Kant Pandey* v. *Union of India*, AIR 1984 SC 469=(1984) 2 SCR 795.
2. *Laxmi Kant Pandey* v. *Union of India*, AIR 1986 SC 272: (1985) Supp. 3 SCR 71.
3. *Laxmi Kant Pandey* v. *Union of India*, (1987) 1 SCC 66.

not complied with and, therefore, he approached the court for contempt proceedings. By its order,[4] the court called upon the central and state governments to comply with the directions issued by it in the case from time to time and make a return to the court's registry about their compliance within ten weeks of the order. Pursuant to this order, the central government and most of the state governments filed affidavits of compliance on different dates.[5] The court, presided over by Ranganath Misra J (as he then was), the present Chief Justice of India, passed the following order[6] to the remaining states and union territories which had not filed affidavits of compliance till then:—

"The remaining States and Union Territores served in terms of the Court's order are Arunachal Pradesh, State of West Bengal and the Union Territories of Andaman & Nicobar Islands and Lakshwadeep as also Dadra and Nagar Haveli. All these States & Union Territories have now entered appearance and have filed their affidavits. In view of the fact that there has been compliance with the notice of the Court the contempt proceedings are dropped.

A petition filed on behalf of the All India Lawyer's Union, Tamil Nadu, Madras, has brought to the notice of the Court the fact that at the time the main judgment was delivered the operative law was contained in the Children's Act and the Juvenile Court was authorised to deal with the children concered. With the enforcement of the Juvenile Justice Act, 1986, U/s 63 the provisions of the earlier law have been repealed as Chapter III of the Juvenile Justice Act, 1986, has contained provisions for neglected juveniles. Under this chapter the power to deal with relevant aspects vests in the Board constituted under that Act and, therefore, reference made in the main judgment to the Children's Act in regard to production of neglected juveniles and the procedure adopted to be followed in regard to such children including power to commit them to suitable custody now vest in the Board. The main judgment shall, therefore, be deemed to have been modified by operation of law and reference made to Juvenile Courts for such purposes shall be taken to be to the Board under Juvenile Justice Act, 1986. We would like to clarify the position that as a result of the change in the law the Juvenile Courts under the Children Act would no longer deal with these matters and the Board constituted under the Juvenile Justice Act, 1986 shall be appropriate authority for such purpose. This alteration shall be operative from 1st of September, 1990 so that adequate notice will be available of this change and for the purpose of informing the courts and the people dealing with this matter. We direct that this part of the order shalll be given adequate publicity in law journals and the Registrar general shall have it otherwise publicised. The matter shall now be called on 21.9.1990."

4. *Laxmi Kant Pandey* v. *Union of India*, 1989 (2) SCALE 691.
5. See *Laxmi Kant Pandey* v. *Union of India*, 1990 (1) SCALE 144 and 1990 Supp. (1) SCALE 133-36
6. *Laxmi Kant Pandey* v. *Union of India*, 1990 (2) SCALE 64. This order, passed on July 12, 1990 in Cri. Mis. Pet. Nos. 3357/1989, 789, 1712, 1713 & 2045/1990 in W.P. (Cri) No. 1171 of 1982, is being published in *Delhi Law Review* as directed by the Court.

## DEAN'S PAGE

I AM very happy to place this issue of Law Faculty Journal, Delhi Law Review, in the hands of the readers. It fills me with joy to recall that in 1972, I was the Founder Editor of Delhi Law Review, under the kind guidance of my senior colleague and the then Dean, Professor K.B. Rohatgi. Now during the last few years, the Delhi Law Review has not been appearing. On my assumption of office as Dean of the Faculty of Law on 20th of June 1989, one of the few things about which I took some urgent steps, has been the Delhi Law Review. The result of those steps is before you. However, I wish to assure the readers that Delhi Law Review has now been put on sound footing and, therefore, it is expected that it will never stop appearing in the future.

According to our perception, the role of law teachers is not only teaching of law but also to advance the frontiers of knowledge in the field of law so that law performs its true function of social engineering for solution of the socio-economic problems of the nation. I am sure that the Law Faculty of this University will keep this goal constantly in view, and Delhi Law Review will serve as the vehicle for carrying the thoughts of our teachers and students.

I deem it proper to place here on record the excellent services in teaching and research of one of our stalwarts, Professor P.K. Tripathi, who finally retired from the Law Department on May 24, 1989. Professor Tripathi is even now keeping himself busy in legal writing of a high order and we wish him very well in his scholarly persuits.

We are very happy to place on record our admiration of another stalwart, Professor Upendra Baxi, who is the first Law Teacher to occupy the high office of Vice-Chancellor of Delhi University. Inspite of his expected busy schedule as Vice-Chancellor, he has promised us his full association with the teaching and research of this Department, as before. We are grateful to him for this promise of continued association.

In the end, I must thank my friend and colleague, Dr. S.N. Singh, the learned Convenor of the Editorial Committee who worked relentlessly to make this venture a success.

PROFESSOR P.S. SANGAL
*Head of the Law Department and*
*Dean, Faculty of Law*

# EDITORIAL

## SUPER 301

IT IS surprising that India has been singled out for retaliation under Super 301 by the United States. So far at the international level, General Agreement on Tariffs and Trade (GATT) is the Organisation under which all matters connected with trade are decided. One country, namely U.S.A., trying to retaliate in the field of international trade under a provision of its own law, is something which is beyond the domain of international legality.

The U.S. wants that India should change its laws about insurance, banking, foreign investment, international trade, etc. and should throw open its borders for, among others, the entry of U.S. insurance and banking companies. This is certainly trying to infringe the sovereignty of this country. It is another thing that by mutual agreement, India may relent on any of these matters. But to try arm-twisting in this manner is nothing short of economic coercion at the international level.

One of the several changes that the U.S. wants India to make in its laws is a change in the Intellectual Property Laws of India, i.e. law of patents, trademarks, copyright and designs. The U.S. feels that because of weak protection of Intellectual Property Rights in this country, distortion is created in international trade; whereas the fact is that adequate protection is available to Intellectual Property Rights in this country.*

In view of these factors, there is absolutely no justification for the United States to single out India for the purpose of retaliation under its domestic law.**

PROFESSOR P.S. SANGAL***

* See the author's article entitled "Intellectual Property Laws of India and Foreign Accusations : An Evaluation", published at pp.16-45 of this very issue and also P.S. Sangal, "Protection of Trademarks in India—How Effective?" published in 80 *The Trademark Reporter* 159-70 (March-April, 1990) brought out by the United States Trademark Association, New York.

** See also P.S. Sangal, "Indian Exports to the United States and Section 301 of the U.S. Trade Act of 1974," XLIV *India Quarterly* 270 (July-December, 1988), a Journal of Indian Council of World Affairs, New Delhi.

*** LL. M., Ph.D., Head of the Department & Dean, Faculty of Law, University of Delhi, Delhi.

# ON THE PROBLEMATIC DISTINCTION BETWEEN "LEGISLATION" AND "ADJUDICATION": A FORGOTTEN ASPECT OF DOMINANCE*

UPENDRA BAXI**

## I

THE LAW—as an ideology and as an ensemble of institutions - has featured preeminently in the mainstream theorizing concerning the nature, and changing forms, of the state, both in the liberal and marxian traditions of analysis. Indeed, a characteristic feature distinguishing the state from any other social ordering has been expressed in terms of the legal monopoly of force by the state; the notion of "law" is thus central to thinking about the state. It has been a prime cultural and civilizational, function of the law to reiterate and reincarnate the boundaries between the permissible and proscribed uses of force. The critical role of legal norms in the complex organization of the internal powers of state is also recognized in theorizing, and in actual practice, of the capitalist and in actually existing socialist societies.

Indeed, a major question concerning the nature of state and law (which has fertilized most recent theorizing on capital and state) was acutely formulated by E.B. Pashukanis when he asked:

> Why does the dominance of a class not continue that to be that which it is—that is to say, subordination in fact of one part of the population by another part ? Why does it take on the form of official state domination? Or, which is the same thing, why is the mechanism of state constraint created as a private mechanism of the dominant class—taking the form of the impersonal mechanism of public authority isolated from society?[1]

His own answer to this question that the legal form of *Rechtsstaat* is required by the nature of the bourgeois social relations, entailing a close analysis of the homology between the commodity form and the legal form,[2] has in turn generated many varied elaborations of linkages between the state as an "ideal collective" capitalist and the nature and forms of law in capitalist societies.[3]

But in most of this state theorizing (which at times becomes state and law theorizing) the "law" appears as an undifferentiated category, encompassing legislation, administration, adjudication and enforcement. The distinctive charac-

* This is a revised version of a paper presented by the author at the International Political Science Congress, Paris, July 15-20, 1985.

** Professor of Law, Vice-Chancellor, University of Delhi.

1. E.B. Pasukhanis, *Law and Marxism: A General Theory* 139 (1968).
2. Isaac D. Ballbus, "Commodity Form and Legal Form : An Essay on the " Relative Autonomy of the Law", 11 *Law & Society Rev.* 571 (1977).
3. For a recent analysis of writings on commodity circulation, law and state, see B. Jessop, *The Capitalist State* 84-101 (1982); J. Holloway & S. Picciotto *et al.* (eds.), *State and Capital: A Marxist Debate* (1978); U. Baxi, *Marx, Law and Justice- Indian Perspectives* (1990, in press).

teristics of these domains of law, so familiar to the lawpersons, tend to be totally ignored. The form and function of the state is perhaps understood but at the cost of encapsulating the forms of law. Thus, for example, Poulantzas attributes to the legal and ideological structures the "effect of isolation." Agents of production are distributed "in social classes as juridico-ideological subjects" who actually *experience* "specific fragmentation and atomization".[4] Individuation through the system of juridical norms thus helps to conceal from the agents "in a particular way that the fact that their relations are class relations"[5] and the state also appears to perform the function of representing the "unity of isolated relations."[6] the reference to normative legal order causing this effect of isolation, of course, cannot only signify legislation; the effect of isolation must be seen as a joint product of legislation, administration, adjudication and enforcement. The interesting and intriguing way in which these different domains of the law collaborate or compete to continuously produce and reproduce this pertinent effect does not constitute a part of the problematic for Poulantzas.

Similarly, we constantly come across the notion of the centralized unity of state power in state theorizing. However, its existence and development may be sought to be explained, the assumption of such unity seems to be an ineluctable feature of marxian theoretical approaches to state power. And the locus of the centralized unity of state power often enough turns out to be the executive. The seeds of this tendency were, of course, sown in the much misleadingly misquoted aphorism in the *Communist Manifesto*: "The executive of the modern state is but a committee for managing the common affairs of the whole bourgeoisie."[7]

From this standpoint, the doctrine of separation of powers, which features preeminently in the liberal discourse on the nature and forms of state as a critical variable, marking the differentiation of state power, appears "above all, a *political* problem of relation of forces, not a *juridical* problem concerning the legality and its spheres." As Louis Althusser has reminded us, Montesquieu himself meant by the notion of separation of powers "no more than the calculated division of *puvoir* between determinate *pussiances*."[8] And when one asks of the doctrine of separation of powers the question: "*To whose advantage does this division work?*," one begins to decipher the class domination legitimated by this doctrine,[9] which otherwise powerfully projects the ideology of a multi-centred, pluralist state, mediating conflicting social interests.

The very notion of separation of powers is said to presuppose a unity of state power, of which it represents delegation or division among various domains.

4. N. Poulantzas, *Political Power and Social Classes* 130 (Verso ed., 1975).
5. *Id.* at 130, 132.
6. *Id.* at 132-33.
7. K. Marx and F. Engels, "The Common Manifesto of the Communist Party" in 1 *Selected Works of Karl Marx and Fredreick Engels* 110-11 (1969). Note the emphasis not merely on the "executive" but also on the "*common* affairs of the *whole* bourgeoisie".
8. L. Althusser, *Montesquieu, Rousseau, Marx: Politics and History* 91 (Verso Ed., 1982).
9. *Id.* at 91-92.



Poulantzas, for example, maintains that the separation of powers is more appropriately viewed as division of functions; such separation or division constitutes merely "the index of the internal relations of *subordination* by delegation of power, of the various state 'powers' to this dominant 'power' which constitutes the principle of unity of state power."[10] Typically, the "nodal point where the unitary institutionalized state power is concentrated within the complex state organization"[11] is often enough identified with the executive, and in rare instances with the legislature. There is not a single theoretical analysis which identifies this nodal point in adjudication. The quest for understanding the state has invariably focussed on the composition and decomposition of the executive power, which liberal jurists comprehend to be the power to initiate and implement policies affecting the community and which most state theorists characterize simply as the totality of state powers. It is, therefore, not surprizing at all that adjudication does not feature at all in the landscape of state theorizing.

Perhaps one may seek partially to explain this in the light of the fact in most societies of Western Europe, adjudication has a subordinate role compared with legislation and administration. Indeed, Montesquieu went so far as to describe judicial power as being "in some measure, next to nothing" and judges as merely a "sight and a sound", providing some sort of animation to the codes.[11] Of course, adjudication is not to be demoted to such a nondescript status in theory or practice of state; judicial creativity - in the sense of adjusting the text of the law to the context of capitalist development - has been a striking feature of both the civil law and common law traditions.[12] But the civil law systems are not conspicuously endowed with judicial review powers, that is powers in constitutional courts to invalidate legislations. No doubt, West Germany's Federal Constitutional Court *(Bundesverfassungsgericht)* and Italy's *Cort Constituzionale* furnish in recent experience significant exceptions. But, overall, there is not much scope for judicial activism—that is, such exercise of judicial power as may generate a recodification of power relations among the dominant institutions of governance [13]—in the organization of adjudication as an internal aspect of power structure of the state.

The attribution of a secondary status to adjudication is, however, not only confined to the civil law tradition. In the common law orbit too, the jurisprudential ideologies have inclined predominantly to the view that adjudication merely consists in the application of the law enunciated by the legislature and that judges declare the law but do not make it. In England where codification did not reach, and which evolved almost all its basic principles and doctrines due to judicial creativity, (the common law was nothing but the law made by the judges unaided by the legislatures to meet the needs of expanding capitalism)[14] the Great Blackstonian Lie

10. Poulantzas, *supra* note 4 at 303.
11. Quoted in L. Althusser, *supra* note 8 at 90.
12. See G. Erosi, *Comparative Civil (Private) Law : Law Types, Law Groups, The Roads of Legal Development* (1979).
13. For this conception of judicial activism, see U. Baxi, *Courage, Craft and Contention: The Indian Supreme Court in mid-Eighties* 2-20 (1985).
14. David M.Trubek, "Max Weber on Law and the Rise of Capitalism", *Wisconsin L.Rev.* 720 (1972).

still persists that judges do not make law; what is more, judges and everybody else are asked to believe this unquestioningly. In a sense, this assertion assists the ideology of parliamentary sovereignty, which in real terms means the supremacy of the executive. In the United States where a written Constitution provides for judicial review of executive and legislative action and where the American Supreme Court has at times been significantly activist (in the sense given above), persistent questioning concerning the legitimacy and democraticity of judicial review has become the standard feature of political and jurisprudential discourse.[15] In other words, judges are constantly asked to observe judicial restraint and maintain institutional comity with other organs of the state and are reminded of their true role of expositors of the Constitution and the law.

In other words, there seems to be a persistent tendency, whether in the liberal or marxian variants of political thought, to regard "adjudication" as distinct from "legislation" and subordinate to it. In the current theorizing on the state, the real bas es for comprehending this tendency are not readily available. In what follows the difficulties in cogent articulation of this tendency in jurisprudential discourse is explored. Typically in that discourse, the question of the role and limit of judicial power is articulated, more or less, through the questions: Do judges "make" law ? And if they actually do, *ought* they do so ?"

## II

There are many good reasons why some people might say that judges ought not to make law. The phrase "make law" has to be clearly understood at the outset. Hans Kelsen has seminally reminded us that all judges, trial as well as appellate, create specific individual norms by their decisions. Specific individual norms directed to persons (e. g. X is hereby denied bail; marriage between X and Y is hereby annulled; P is the implied term of a contract, etc.) do not and cannot pre-exist a judicial decision. Such norms come into being only when a judge decides in accordance with the higher norm, which is concretized by that decision. In other words, the process of concretization of general and abstract norms always results in creation of new, individuated and specific norms. In this sense, the distinction between norm creation and norm application is not an absolute but a relative distinction.[16]

If this is conceded, much of the futile controversy concerning whether judges ought to make law or not is silenced. And by the same token it is focussed on the more meaningful question: How should judges make law? In other words, judges have choices to make in the matter of concretization. How ought they to exercise their choice to questions concerning how one ought to appraise judicial decisions and their justifications. The normative justifications we prescribe for judges to reach their decisions also then become the standards by which we ought to evaluate their performance. A prescriptive theory of judicial discretion is thus

15. See e.g. literature cited in J. Stone, *Social Dimensions of Law and Justice* 656-96 (1966); Ely, *Democracy and Distrust* (1980).
16. H. Kelsen, *General Theory of Law and State* (1961).



also a prescriptive theory of evaluation of judicial role.

One general answer is that in making choices judges ought to follow the will of the legislature as embodied in the statute. They ought to do so because in a democracy the will of the elected representatives of the people who are accountable to the people should be respected by judges who do not (ordinarily) possess this representative character and are not politically accountable as are the legislators. Many of the rules of statutory interpretation are based on this premise. The familiar idea that judges declare or discover law through interpretation is also anchored on the secondary and auxiliary status assigned to judicial choice making. Since judges primarily declare pre-existing law, it is also accepted that their decisions are retroactive in character.

But this idea that judges are to enunciate the will of the legislators very often breaks down in practice. Judges do enunciate new rules, principles, standards, doctrines and even ideals and in doing so either fill gaps in law or transcend whatever might be the will of the legislator. Very often, such decisions in hard cases generate new bodies of law. But even so, as Ronald Dworkin has felicitously put it, when " ... the expectation runs, they will act not only as deputy to legislators but as deputy legislators." That is to say, they will still act as subordinates to legislature and proceed to make law "in response to evidence and arguments of same character as would move the superior institution if it were acting on its own." [17]

Or, we may vary the metaphor and say that judges have certain delegated legislative powers, just as the executive has. Judges, we might say, ought always to be aware that they derive their powers of making law, either implicitly of explicitly, from the legislature or the constituent body. For example, article 141 of the Constitution proclaims: "The law declared by the Supreme Court of India shall be binding on all courts within the territory of India." If we construe the word "declared" in Kelsenite terms, it would implicitly extend to norm creation as well. But legal system can embody the idea of delegated legislative power quite explicitly as is done by article 1 of the Swiss Civil Code "which requires the judge to decide, where the law is silent, as if he himself were legislator...." [18]

Or, further still, one may envisage the judicial role essentially as a bureaucratic role. In this view, governmental institutions appear as "politically active" and "transmitting" agencies. The paradigm instance of the former type is the legislature, and of the latter, are administration and judiciary. These latter receive "instructions" from the politically active agencies which they further transmit to people. Of course, there are marked differences between administration and adjudication: the "judiciary, while different from other bureaucracy, is nevertheless a bureaucracy."[19] Prescriptively put, the sole expectation here is that when carrying out legislative instructions requires filling of gaps, judges ought to go about

17. R. Dworkin, *Taking Rights Seriously* (1977).
18. J. Stone, *Legal Systems and Lawyers' Reasonings* 113 (1964).
19. R. Dhavan, *Judicial Decision-making* (1979, mimeo., University of Delhi Law Faculty Lectures).

their tasks as intelligent bureaucrats seeking to emulate what their superior would have done were she (the superior) to be confronted with the same new, unexpected or unparallelled situation.

Implicit in these formulations is the basic theme both of separation of powers and division of functions. The separation of powers idea entails the proposition that making of laws is the pre-emient and primary domain of the legislature; their implementation (and to some extent their initiation) the primary function of the administration or the executive and their interpretation and application in dispute *inter partes* the pre-eminent and primary domain of the adjudicators. But, of course, as Julius Stone has aptly reminded us, the doctrine of separation of powers "is no longer generally seen as a legal straitjacket for each branch of government, or an absolute pre-condition of liberty. It is mainly translated into a precept concerning the distribution of functions to be respected by the self-restraint of each kind of organ rather than enforced upon it."[20] The translation of the separation of powers doctrine into a division of functions carries with it an idea that judges ought not, even if they can (and can get away with it), perform a truly legislative role and that they ought to find answers to hardest of hard cases from within the authoritative legal materials rather than legislate afresh or anew. The doctrine of judicial self-restraint prescribes that judges ought not to behave as if they were full-fledged legislators; they really ought to behave as bureaucrats or at best as "deputy legislators."

This kind of approach enables us to formulate the following propositions concerning how judges ought to perceive and perform their tasks:

(i) judges ought to be aware of the fact that in applying general norms to specific situations they are always creating specific, concrete, individuated norms of law which were previously not existant;

(ii) judges ought to faithfully apply the will or carry out the instructions of legislatures;

(iii) in doing so, they ought to respect the legislator's will since that will is ultimately expressive of the will of the people at large expressed through periodic elections conducted under the law;

(iv) judges ought to realize that in clear cases, "an antecedent legal rule uniquely determines a particular result;"[21]

(v) judges ought also to recognize that in hard or determinate cases, problems of discretion arise whenever the applicable precepts provide not one but several choices;

(vi) judges ought, even in hard cases, to have certain matters to other organs of governnment most suited to decide them efficiently, even if they may at times feel that they could decide them more efficiently

20. J. Stone, *supra* note 15 at 687 (emphasis added).

21. H.L.A. Hart, "Problems of the Philosophy of Law" in 6 *Encyclopedia of Philosophy* at 264 (1967).



and even wisely; in other words, they must follow the canon of self-restraint.

## III

So far, so good. But how does one articulate difference between legislation and adjudication? Or, in other words, what does the doctrine of division of functions tell us concerning how judges ought not to exercise their discretion? The canon of self-restraint itself presupposes that certain functions more appropriately belong to legislatures and not to courts. But the meaning of this proposition is scarcely self-evident.

Two notable efforts have been made to answer this question. Lon L. Fuller (through his thesis of adjudication as a form of social order) and Ronald Dworkin (through his distinction between policy questions and questions of principle) have tried to answer the question: How judges ought not to exercise their discretion? While we personally cannot persuade ourselves to believe that there is or ought to be a universal theory of judicial role,[22] it is still worth looking briefly at these two pioneering attempts.

Lamented Fuller sees adjudication as a distinctive form of social order. It is so because it marks "the influence of reasoned argument in human affairs." In the pure form, adjudication is a process initiated by parties, backed by reasoned advocacy on both sides, and culminating in a judicial opinion based on reasoned elaboration. Reasoned elaboration involves judicial reasoning not so much in the sense of empirical or deductive reasoning. Rather, its role is, in essence, to "trace out and articulate the implications of shared purpose." The importance of reasoned elaboration lies also in the fact that it is based on participation of parties affected, and the decision is shaped not just by pre-existent law and usages but by arguments. In this sense, adjudication is based primarily upon the dignity of discourse.

This means that adjudiction, on this pure model, is best suited to matters which yield "either-or" answers. But when questions involved raise a "multiplicity of variable and interlocking factors, decision on each one of which presupposes a decision on all the others" the matter is not fit for adjudication but apt for legislation. Fuller termed such matters (following Polyani) "polycentric." Polycentric matters, he suggested, fall more adequately within the realm of legislation. Such matters involve negotiation and trade-offs between a variety of social interests and are best left to politically representative institutions rather than to judges. A typical instance is of polycentricity privided by the situation calling for decision to commence a nuclear power plant.

Of course, Fuller is not saying that courts are necessarily incompetent to adjudge each and every kind of polycentric dispute. He concedes that adjudication can effectively extend to such disputes, but he insists that it ought not to. One reason for this is that adjudication when it so extends will have to be parasitic, that is, it will derive its strength, to the extent it succeeds, from other forms of social order. This

22. For reasons elaborated in U. Baxi, *supra* note 13.

ought not to happen.[23]

This attempt is interesting but not successful. This is so because the distinction between bipolar and multipolar (either-or and polycentric) is not really viable. The pure type of adjudication is only a model, an ideal type. Issues do come before the courts which are polycentric in nature. Of course, judges who evade the question by invoking the doctrine of political questions might genuinely be persuaded that these are legislative or executive matters best left there. The political questions doctrine is one manifestation of the canon of judicial self-restraint. But important questions can be raised (and have been raised concerning desegregation and busing and apportionment cases for example, in the United States) whether judges can, with justification, invoke this doctrine at the cost of sacrificing rights, ideals and values of constitutional and legal systems. Indeed, whatever course judges may adopt in relation to polycentric questions, "the 'form of social order' kind of analysis cannot dispense us from the much wider and more difficult questions of evaluative choice, whether we call them questions of 'policy', 'justice', 'social philosophy' or 'ideology'." (And indeed, "even if we close our eyes and refuse to see these questions at all)".[24]

Ronald Dworkin has over the past fifteen years argued brilliantly but, in our opinion, unsuccessfully that the nature of justification of decision ought to vary fundamentally in adjudication as different from legislation. The core of his argument is that while both legislative and judicial decisions are broadly political in nature, the legislature ought to justify its decisions in terms of policy, while the court ought to do so in terms of principles. The court ought to "justify a political decision by showing that the decision respects or secures some individual or group rights." On the other hand, arguments from policy "justify a political decision by showing that the decision advances or protects some collective goal of the community as a whole."[25] Dworkin maintains that legislation is better suited to handle arguments of policy and courts are better suited to handle arguments of principle. Indeed, he maintains that courts ought to proceed only with arguments of principle.

Dworkin maintains that judges do not have discretion to choose even in hard cases because there are always to be found in the authoritative legal materials standards and principles which the judge ought to follow. He maintains that judges are always constrained to follow the law; for "all practical purposes", he says, "there will always be a right answer in the seamless web of law."[26]

Decisions based on principle protect individual or group rights; decisions based on policy advance community goals. If a judge is conscientious, she would

23. See Lon L. Fuller, *The Forms and Limits of Adjudication* (1959, mimeo., lecture delivered to the Association of American Law Schools at Jurisprudence Round Table Seminar; Lon L. Fuller, "Collective Bargaining and the Arbitrator", *Wisconsin L. Rev.* 3 (1963).
24. J. Stone, *supra* note 15 at 655.
25. R. Dworkin, *supra* note 17 at 82-85.
26. R. Dworkin, "No Right Answer?" in P.M.S.Hacker and J. Raz (eds.) *Law, Morality and Society : Essays in Honour of H.L.A. Hart* 58 at 84 (1977).



always be able to ground her decision even in a hard case on some principle protecting group or individual rights. She ought only to justify her decision this way and not by reliance on goals. Goals are non-individuated whereas rights are individuated. Goals "encourage trade-offs, benefits and burdens within a community to produce some overall benefit for the community as a whole." Rights, while they can be weighted against other rights, have by definition certain "threshold weight" against ordinary routine goals and can only be defeated or overcome by the goal of special urgency. Decisions on principle furthermore demand an articulate consistency; in other words, judges as political officials must make such decisions on enforcement of rights "as they can justify within a political theory that also justifies the other decisions they propose to make." Intuitionistic decisions are thus precluded in enforcement of rights. This demand of articulate consistency does not apply in the same measure to decisions on policy because policies are thought to be "aggregative in their influence and it need not be a part of responsible strategy for reaching the collective goal that individuals be treated alike." In other words, principles entail "distributional consistency from one case to next;" principles forbid the idea of "unequal distribution of benefits."

The "rights thesis" of Dworkin is fascinatingly complex but what has been said so far makes clear that it forbids judges from making decisions and justifying them on policy. They ought always to ground their decisions on principles and their reasoned elaboration must satisfy the demands of articulate consistency. If rights are to be taken seriously, judges ought not to mess around with goals and weigh rights with goals, excepting where goals of special urgency are involved.

Judges have still choices to make. A principle justifying rights may still have to yield place to goal of special urgency and principles and rights may conflict with other principles and rights. In both situations, judges have to choose. Dworkin says at this point that judges ought to have "a coherent political theory" recognizing a "wide variety of different types of rights, arranged in some ways that assigns rough relative weight to each."[27] But can we have a coherent political theory which will perform this task without at the same time moving back and forth from principle to policy and *vice versa*.

R. Sartorius in an attempt to tide over these difficulties and in grappling with the problem of competing principles has ultimately been able only to offer us the following solution: "In any case... the obligation of the judge is to reach that decision which coheres best with the total body of authoritative standards which he is bound to apply."[28] He elaborates this point thus:

> The correct decision in a given case is that which achieves "the best resolution" of existing standards in terms of systemic coherence as formally determined, not in terms of optimal desirability as determined either by some supreme substanive principle or by the judge's

27. R. Dworkin, "Is Law a System of Rules?" in R. Summers (ed.), *Essays in Legal Philosophy* 35 (1968).
28. R. Sartorius, "Social Philosophy and Judicial Legislation", 8 *Am. Philosophical Qly.* 151 (1971).

> own personal scheme of values...It is the distinctive feature of the institutionalized role of the judiciary, in contrast to the legislature, that it may not directly base decisions on substantive considerations of the value of competing social policies. [29]

However, well intentioned, this kind of prescription for judicial role is indeed vacuous. What does the demand for coherence really mean? Does it mean following precedents? If so, we must all accept that the demand for coherence really amounts to formal as well as substantive matters. How do we measure and determine systemic coherence? How should judges articulate such coherence ?

## IV

We find at the end of the road that a prescriptive judicial role theory which denies to judges a less law creating role is indeed difficult, if not impossible, to maintain without much internal strain and confusion. As Lord Lloyd put it, the "democratic ideal that adjudication should be as "unoriginal as possible", that judges should not be 'deputy legislators' seems as much violated by Dworkin's theory as by the theories of those whom he attacks."[30]

Unless a choerent theory satisfactorily preempting creative role for judges is available, it seems that we ought frankly to accept that judges, as political decision makers, do legislate. Judges do decide to create new norms of law and act prescriptively rather than descriptively, when they so decide. Professor H.L.A. Hart is right when he asserts:

> The truth may be that, when courts settle previously unenvisaged questions concerning the most fundamental constitutional rules, they get their authority to decide them accepted after the questions have arisen and the decision has been given. Here all that succeeds is success. [31]

Indeed, although the observation specifically confined to "most fundamental constitutional rules," it admits of much wider application. Professor Hart further maintains, and quite rightly, that the question here involved concerns the power and authority of courts and judges rather than one of morality., "Nothing succeeds like success" is a maxim which does not stipulate that success need be a morally justified and justifiable one. There is thus no necessary connection between law and morals even at this point. At best, such a relation would be a contingent one. It is "folly to believe", says Hart, "that where the meaning of the law is in doubt, morality always has a clear answer to offer."[32]

## V

More recently, Dworkin has argued, that we bid farewell to the "ancient question whether judges find or invent law."[33] Rather, "jurisprudence and

29 . *Id.* at 156-59.
30. D. Llyod, *Introduction to Jurisprudence* 848-49 (4th ed., 1979).
31. H.L.A. Hart, *The Concept of Law* (1961).
32. *Id.* at 200
33. R. Dworkin, *The Law's Empire* 225 (1986).



adjudication" stand united by the principle of law as integrity which insists that adjudication "is different from legislation, not in some single, univocal way, but as the complicated consequence of the dominance of that principle."[34] Law as integrity is a complex and rich conception, deserving a fully-fledged analysis: we here ambush it momentarily in our search for a coherent discourse on adjudication. *The Law's Empire* seems to offer us a fresh start in this direction by illuminating the "complicated consequence of the dominance" of integrity in adjudication which marks it off from legislation.

In this conception, judges are no longer deputies to legislators. Rather, the courts emerge as "the capitals of law's empire" and "judges are its princes."[35] Integrity which elevates adjudication thus consists of two political principles:

> [A] legislative principle, which asks lawmakers to try to make the total set of laws morally coherent, and an adjudicative principle, which instructs that the law be seen as coherent in that way, so far as possible.[36]

The principle of integrity is "attractive" for several reasons well stated by Dworkin.[37] He also concedes that neither the legislative nor the adjudicative principle of integrity is sovereign, for example, pursuit of justice may require sacrifies of integrity. [38] But, in real life, a "working political theory must be more relaxed"[39] as far the legislative principle of integrity is concerned; here, pursuit of "general strategies that promote the overall good as defined roughly and statistically..."[40] will have to do. Strategic decisions of this sort are matters of *policy*, not of *principle*; they

> [M]ust be tested by asking whether they advance the overall goal, not whether they give each citizen what he is entitled to as individual.[41]

In contrast, the adjudicative principle of integrity emphasises matters of principle, the *principle* being that rights will be taken seriously, recognizing

> [D]istinct individual rights as trumps over these decisions of policy, right that the government *is* required to respect case by case, decision by decision.[42]

In a sense, we find rehearsed the same distinction as a mark of distinguishing legislation from adjudication which attract the same difficulties articulated in the preceding section of this paper.[43] What makes *The Law's Empire* distinctive is Dworkin's analysis of how the adjudicative principle of integrity ought to work in

34. *Id.* at 410.
35. *Id.* at 407.
36. *Id.* at 177.
37. *Id.* at 188-90.
38. *Id.* at 217-18.
39. *Id.* at 222.
40. *Ibid.*
41. *Id.* at 223.
42. *Ibid.*
43. The notion that rights do have a "trumping" feature has been rigorously ascaled by Allan Buchanan, "What's Special About Rights ? " 2 *Social Philosophy & Policy* 61 (1984).

matters of principle. In this prescriptive framework, judges constitute an interpretive community; they "interpret contemporary legal practice as an unfolding political narrative."[44] Each judge must think of herself as "an author in the chain of common law." Each judge must think of the past judge's decision as "a part of the long story." She must now interpret and "then continue" according to her "best judgement of how to make the developing story as good as it can be."[45] A chain novel is a novel-in-progress, demanding both continuity and innovation in narration; and when several authors contribute a chapter each. Complex interpretive acts and standards of consistency (fit), totality and taste come into play. Like chain-novelists (for aesthetic reasons), judges too (for reasons of political and moral theory) have to embark an increasingly complex interpretation from "competitive rather than contradictory principles, that is, from principles that can live together in an overall moral or political theory though they sometimes pull in different directions.[46] The collective work of judges, respecting integrity, aspires to the construction of "a community of principle"[47] such that:

- The imperatives of integrity always challenge today's law with the possibilities of tomorrow's, that every decision in a hard case is a vote for one of law's dreams. [48]

Dworkin's endeavour to furnish, at the level of deep structure, affinities between legal and literary theory is exceetingly controversial. [49] But for the present purposes, we have to ask whether this mode of interpretation sufficiently distinguishes 'adjudication' from 'legislation'. Legislation can also be construed as narration in time of a society's search for a "community of principle." Constitutions and statutes recognize principles just as adjudication; in fact, the former furnish both a preinterpretive and postinterpretative context for adjudication. [50] And there is no inherent reason why legislators should not be considered with Dworkin (with all the infirmities of such an analogy) [51] as collective authors of a chain novel. Further, as Dworkin himself concedes, that even when "all the discrete rules and other standards enacted by our legislatures" cannot be brought "under any single coherent scheme of principle" commitment to integrity demands that:

> We must report this fact as a *defect*, not as the *desirable* result of a fair division of political power between different bodies of opinion....[52]

Intetgrity still exerts its normative, ideal force on legislation, even though Dworkin has (as seen earlier) counselled a "more relaxed" political theory for judging political practices. Indeed, *The Law's Empire* ends with a clarion call that

44. R. Dworkin, *supra* note 33 at 225.
45. *Id.* at 238-39.
46. *Id.* at 241 ( emphasis added).
47. *Id.* at 243.
48. *Id.* at 410.
49. S. Fish, "Working on the Chain Gang: Interpretation in the Law and in Literary Criticism", R. Dworkin, "My Reply to Stanley Fish ..... Please Don't Talk about Objectivity Any More" and W. Benn, "Is There a Politics of Interpretation ?" in W.J.T. Mithell (ed.),*The Politics of Interpretation* at 271, 287 and 335 respectively (1982).
50. R. Dworkin, *supra* note 33 at 65-68.
51. See supra note 49.
52. R. Dworkin, *supra* note 33 at 217 (emphasis added).



the law's constructive attitude aim "to lay principle over practice to show the best route to a better future, keeping the right faith with the past."[53] The 'law' here signifies both legislative and adjudicative law. All in all, the magnificant achievement of *The Law's Empire* falls short of the articulation of a coherent distinction between 'legislation' and 'adjudication.'

## VI

The internal incoherence of bourgeoisie legal thought concerning the role of the judge and of adjudication in general is partly a result of the heritage of state theorizing which treats law undifferentially in relation to the state and puts all legal domains and powers under the shadow of the executive. In part, the confusion represents essentially the denial of even a relative autonomy of courts as a domain of the law, which is itself often thought of as having a relative autonomy of its own. The law has been identified as autonomous in terms of methodology, occupational culture, institutionally; it has features which render it at times even substantively autonomous. [54] The implicit denial of such autonomy to adjudication [55] must perform the ideological task of preventing adjudication from emerging as an arena for expression of class struggle, of articulation and accentuation of social contradictions through the legal order. That adjudication be a very powerful arena for such articulation has been dramatically, manifested in the recent experience of the Indian Supreme Court which through the social action litigation (miscalled public interest litigation) has begun its transformation from the Supreme Court of India *to* a Supreme Court *for* Indians. [56] In matters such as racial desegration and legislative reapportionment and affirmative action, the American Supreme Court has also become an arena manifesting the relations of class struggle. [57] These examples point to an urgent need for a reexploration of the ideological functions of the doctrine of separation of powers and the inchoate distinction between "legislation" and "adjudication".

53. *Id.* at 413.
54. R.M. Unger, *Law in Modern Society* 53 (1976); D. Trubek, "Complexity and Contradiction in Legal Order: Balbus and the Challenge of Critical Social Thought About the Law", 11 *Law & Society Rev.* 529 (1971).
55. Even when considered as public officials, judges do not seem to strike as important public officials for the purposes of state theorizing. For the recent fascinating study of the relative autonomy of capitalist state, see E. Nordlinger, *The Relative Autonomy of the State* (1979)
56. U. Baxi, "Taking Suffering Seriously: Social Action Litigation Before the Supreme Court of India", 8 & 9 *Del. L. Rev.* 91 (1979 & 1980) and its revised version, with the same title, in U. Baxi (ed.), *Law and Poverty: Critical Essays* 387 (1988).
57. D . Horowitz, *Courts and Social* Policy (1979).

# INTELLECTUAL PROPERTY LAWS OF INDIA AND FOREIGN ACCUSATIONS : AN EVALUATION*

P.S. SANGAL**

AT THE global trade negotiations currently under way, a lot of accusations have been made against the developing countries including India which suggest that adequate and effective protection and enforcement of intellectual property rights has not been available in the developing countries and this results in trade distortions and impairment of concessions previously negotiated. They point towards the supposedly inadequate international obligations as the principal causes of distortion in trade. They also advert to the growing phenomenon of counterfeiting and piracy which are highly injurious to the trading system as a whole. The proposals call for an effective international dispute settlement machinery because at present the conventions relating to intellectual property rights do not have effective dispute settlement provisions.

The proposals submitted by the U.S.A., European Economic Community and Japan in relation to trade-related aspects of intellectual property rights can broadly be divided into three categories: (1) Ineffective and inadequate system for the protection of intellectual property rights; (2) Discrimination against the foreigners and (3) Inadequate intellectual property protection with regard to changing circumstances and new technologies. In the first category, we can cover patent protection for food-stuffs, chemicals and pharmaceuticals; intellectual property rights duration; compulsory licensing and enforcement procedures. In the second category will fall several allegations of discrimination against the foreigners and the foreign goods. In the third category, we can cover new technology and changing circumstances with which the existing intellectual property regime is not in a position to cope.

In this paper, the proposals would be commented upon from the viewpoint of Indian intellectual property laws. Does Indian system provide adequate and effective protection to the intellectual property rights; is it discriminatory against foreigners and is it in a position to cope up with the changing circumstances and high technology? In India, the different types of intellectual property rights are governed and protected by the Copyright Act, 1957, the Designs Act, 1911, the Patents Act, 1970 and the Trade and Merchandise Marks Act, 1958. These Acts provide the legal remedies which can be invoked by an aggrieved person in the event of an infringement of his intellectual property rights. They provide for civil remedies. In addition, the Trade and Merchandise Marks Act and the Copyright Act provide for criminal remedies. These two sets of remedies are distinct and independent and can

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be invoked simultaneously. In the event of an intellectual property right being infringed, various Acts dealing with intellectual property provide that an aggrieved party may file a civil suit in a court of law. The reliefs in the nature of injunction, damages and accounts, delivery of infringing goods or materials, etc. can be asked for. Amongst these, the grant of an injunction is the most effective and important relief available in the Indian legal framework for the protection and effective enforcement of the intellectual property rights available to the holder of the intellectual property rights (IPRs).

## I CHARGE OF INADEQUATE AND INEFFECTIVE SYSTEM FOR THE PROTECTION OF INTELLECTUAL PROPERTY

### (a) Intellectual Property Rights Duration

*(i) Patents*

The proposals submitted by U.S.A., E.E.C. and Japan assert that at present in many of the countries the period for the protection of patent rights is not sufficiently long and the inventor or the holder of right cannot work the patent in such a short time. So it must be 20 years from the date the patent protection is sought or 17 years from the date the patent is granted.

In India, the normal term of all patents granted under the Patents Act, 1970 is 14 years except that a patent for the process of manufacturing substances used or capable of being used as food, medicine or drug is five years from the date of sealing of the patent or seven years from the date of grant of the patent, whichever period is shorter.[1] Thus the Act provides a fairly long period of protection in all fields of inventions except food and drugs which are essential to the health and life of the nation and thus viewed differently in view of their strategic need. This patent duration is comparable to that available in most of the developed countries of the world and in view of fast changing technologies, there is hardly any justification for a longer duration.

*(ii) Copyright*

The term of the copyright protection in literary, dramatic, musical and artistic works (other than a photograph) published within the lifetime of the author is fifty years from the beginning of the calendar year next following the year in which the author dies.[2] In the cases of anonymous and pseudonymous works, the protection is available for fifty years from the beginning of the calendar year next following the year in which the work is first published.[3] Thus, the duration prescribed under the Indian law is exactly the same as suggested by the U.S.A.

*(iii) Trade mark*

Regarding the duration of trade mark, under the Trade and Merchandise

1. The Patents Act 1970, sec. 53.
2. The Copyright Act, 1957, sec. 22.
3. *Id.*, sec. 23.

Marks Act, 1958, the trade mark is registered for a period of seven years but may be renewed from time to time.[4] The U.S. suggests a minimum period of five years only.

**(b) Compulsory Licences and Licences of Right**

*(i) Patents*

The proposals assert that the governments should generally not grant compulsory licences in case of patents and shall not grant a compulsory licence where there is legitimate reason for non-working of the invention and no compulsory licence should be exclusive. The proposals also accuse that in certain countries compulsory licences are granted systematically without having regard to whether the invention is worked or not.

In India, the Patents Act, 1970 provides for granting of compulsory licences[5] for the working of patented inventions and also for revocation[6] of patents on the ground of their non-working in the country. According to the Patents Act, a compulsory licence to work a patented invention may be granted by the Controller of Patents to an interested person, or a patent may be endorsed with "licences of right" on the ground (1) that reasonable requirements of the public with respect to the patented invention have not been met, or (2) that the patented invention is not available to the public at a reasonable price.[7] It is clear from these provisions that compulsory licensing of patented invention is permitted to prevent public harm and to promote public interest. Justice and fair play demand that in the scheme of priorities, public interest should be placed above private interests of a few. Further, it should not be forgotten that these provisions have been enacted perhaps more for their psychological deterrent effect than for actual enforcement, except in extreme cases. Many countries which claim to be upholders of intellectual property rights have similar provisions in their laws.

*(ii) Copyright*

The Copyright Act, 1957, provides for compulsory licensing in both the published[8] and unpublished[9] work on the ground that the work is not available to the public and on reasonable terms. India being a member both of the Berne Convention as well as the Universal Copyright Convention, these provisions are in conformity with India's obligations under those Conventions.

*(iii) Trade mark*

The Trade and Merchandise Marks Act, 1958 does not contain any provision regarding compulsory licensing of the trade mark.

4. The Trade and Merchandise Marks Act, 1958, sec. 25.
5. The Patents Act, 1970, sec. 84.
6. *Id.*, sec. 89.
7. *Id.*, sec. 86.
8. The Copyright Act, 1957, sec. 31.
9. *Id.*, sec. 31-A.



**(c) Charge of Granting Compulsory Licences as a Matter of Course**

It has been alleged that some countries grant compulsory licences in the ordinary course without any special justification. In India, there are various provisions in the Patents Act, 1970, which require governmental authorities to make certain findings before granting the compulsory licence including findings on whether or not sufficient time had elapsed since the sealing of the patent to enable the working of the invention or whether a government regulation, rule or order had intervened which prevented working or whether the patentee had taken adequate or reasonable steps to start working.[9a]

Thus, the Patents Act recognizes legitimate and realistic reasons as a justification for not granting a compulsory licence. This indicates that a compulsory licence cannot be granted easily or as a matter of course.[10]

**(d) Process Patent versus Product Patent in Food, Drugs, etc.**

The suggestions/submissions oppose the idea of giving process patent and insist that in case of food, drugs, etc., product patent should be given and not process patent as done by several developing countries. In India, under section 5 of the Patents Act, 1970, only process patent is available in case of food, drugs, etc. Very cogent reasons were found for this choice in India by *Ayyangar Committee Report* which forms the basis of the Patents Act, 1970. This Report says that the grant of a patent to a chemical *per se* had a deadening effect on research since it precluded attempts to arrive at the same products by other alternative processes whereas if patentability was restricted to novel processes, it stimulated research in regard to other alternative methods for producing the same product.[11] After detailed considerations, the Committee came to the conclusion that the interest of the counntry would be best served by confining patentability to the processes by which the products were obtained and to deny patents to the products *per se* in the area of chemicals, etc. The reasoning given above appears to be flawless and has found favour in a large number of countries including many developed countries.

**(e) Exceptions from Patent Protection: Patentability**

The submissions/suggestions, particularly from Japan, point out that the problem of "unpatentable subjects" or exceptions from patent protection are specially serious, as there are many countries which do not grant any patent at all or do not grant patents for a large number of inventions. In India, the patents are granted to all the inventions of novelty. As stated above, in India, the case of food, chemicals, drugs, etc., process patents instead of product patents are being granted. In atomic energy, however, neither product nor process patent is granted. The

9a. The Patents Act, 1970, sec. 91.
10. See P.S.Sangal, "Paris Convention and the Indian Patent System: Legal Perspectives" in P.S.Sangal and Kishore Singh (eds.), *Indian Patent System and Paris Convention: Legal Perspectives* 45 (1987).
11. See *Report on the Revision of the Patent Law* 23 (Chairman: Justice N. Rajagopala Ayyangar, Government of India, September, 1959).

Patents Act, 1970 provides that "no patent shall be granted in respect of an invention relating to atomic energy falling within sub-section (1) of section 20 of the Atomic Energy Act, 1962."[12] The Act also provides that even after the acceptance of a complete specification if the central government is of the view that the invention is related to the atomic energy, it can direct the controller to revoke the patent.[13]

In the year 1985-86, a total of nine cases were referred to the Department of Atomic Energy. In 6 cases, the patents were not granted in view of the provisions of section 4.[14] In the case of defence, the Act provides that if the controller is of the view that the application filed for a patent is relevant for defence purposes, he may give directions to prohibit the publication of any information relating to such invention.[15] The main object of such prohibitions is to protect the defence of India. This is an absolutely legitimate justification for restricting patentability.

### (f) Strict Action in Case of Counterfeiting

In the submissions/suggestions, it has been stated that strict action is not generally taken to prevent counterfeiting of goods. The position in India is that criminal punishment is provided for counterfeiting. The Supreme Court took a strict view of counterfeiting in *Sumat Prasad Jain v. Sheojanan Prasad and State of Bihar.*[16]

### (g) Foreign Trademark and Appellations of Origin Protected in India

*(i) Foreign trade mark*

There have been cases in India where a foreign trade mark was protected only on the basis of prior user in India through imports. In *Consolidated Foods Corporation v. Brandon & Co.*[17] upholding the American company's objection to the registration of the trade mark 'Monarch' by the Indian company, the Bombay High Court ordered cancellation of the registration of the trade mark 'Monarch' in favour of Brandon & Co. by the Registrar of Trade Marks solely on the ground that the American trade mark 'Monarch' was in use in this country through imports even though it was not registered in India by the American company.

*(ii) Appellations of origin*

Though there is no specific provision for protecting appellations of origin, yet in actual practice this is done. This was done in *Ellora Industries, Delhi v. Banarasi Dass Goela,*[18] in which Delhi High Court heavily relied on well-known cases on the point such as *J. Bollinger v. Costa Brava Wine Co. Ltd.*[19]

12. The Patents Act, 1970, sec. 4.
13. *Id.*, sec. 65.
14. See *Patents Fourteenth Annual Report of the Controller General of Patents, Designs & Trade Marks 17 (1985-86).*
15. The Patents Act, sec. 35 (1).
16. AIR 1972 SC 2488. See *infra* under Effective Enforcement.
17. AIR 1965 Bom. 35.
18. AIR 1980 Del. 254.
19. 1961 RPC 116. This case is popularly known as *Spanish Champagne* case and has been discussed in detail, *infra* under Effective Enforcement.



## II CHARGE OF DISCRIMINATION AGAINST FOREIGNERS

The European Economic Community and Japan have levelled charges of discrimination against foreigners. The E.E.C. spoke of "Discrimination against Imported Products" and "Preferential Treatment of Activity on National Territory". Japan speaks of "Deficiencies in protection of prominent foreign trade marks", "Inadequate system of opposition to registration", "Excessive/discriminative protection of intellectual property rights" and "Restrictions on Foreigners" "Patent Rights aiming at protection of home made technologies".

### (a) The Position in India

India is not yet a member of the Paris Convention but the country is not practising any discrimination. The Patents Act, 1970 provides that any country may by agreement acquire the status of a convention country which means that on the basis of reciprocity, it can acquire for its citizens similar privileges as are granted to India's own citizens.[20] On this basis, at present India has notified United Kingdom, Australia, Canada, New Zealand, Sri Lanka and State of Eire as the convention countries. Ruling out discrimination completely on the basis of reciprocity is only fair and also in accordance with the Paris Convention though, as stated above, India is not yet a member of that Convention. This position of law is based on fairness and equity. However, in actual practice, it appears from a large number of cases[21] that even the compliance with the requirement of reciprocity is not looked into and equal justice, and in some cases even preferential treatment, is given to the foreign companies/individuals.

### (b) Accuser itself Accused

It is really strange that a country like Japan which is itself violating the established norms (even prescribed by the Paris Convention of which it is a member) is accusing others for the violation of those very norms. Japan is of the view that the restrictions on import of foreign goods and discriminatory treatment to foreign nationals and inadequate patent systems are hampering the trading interest of that country. The statistical evidence available confirms that foreigners are not given the same protection for their inventions in Japan as the Japanese obtain in Japan and in other foreign countries.[22] Japan is a country which is a member of the Paris Convention that provides for national treatment,[23] i.e. same treatment to foreigners as it provides to its own nationals. Thus, Japan is itself violating the Paris

20. See the Patents Act, 1970, chapter XXII, secs. 133-139 "International Arrangements."
21. *Philip Mooris Belgium S.A. v. Golden Tobacco Co. Ltd.*, AIR 1986 Del. 145; *M/s Banga Watch Co., Chandigarh v. M/s. N.V Phillips, Holland*, AIR 1983 P & H 418; *Glaxo Operations U.K. Ltd., Middlesex (England) v. Samrat Pharmaceuticals, Kanpur*, AIR 1984 Del. 265; *Consolidated Foods Corporation v. Brandon & Co.*, AIR 1965 Bom. 35; *Penguin Books Ltd., England v. M/s. India Book Distributors*, AIR 1985 Del. 29; *John Richard Brady v. Chemical Process Equipments P. Ltd.*, AIR 1987 Del. 372.
22. See Arthur Wineberg, "The Japanese Patent System: A Non-Tariff Barrier to Foreign Businesses?", *Journal of World Trade* 11 (1987).
23. See the Paris Convention, article 2.

Convention of which it is a member. United States companies complain that they do not experience the same success in getting patents in Japan which they receive for their inventions in America. Tales of foreigners' frustrations in protecting their inventions in Japan are part of the oral tradition of doing business in Japan.[24]

The following excerpt from Arthur Wineberg's article throws adequate light on the way the Japanese patent system is actually operating:

> The pressure in Japan is on the licensing of patent "applications". The Japanese regularly share inventions and cross-licence their patents. Cross-licensing would clearly discourage opposition at the Patent Office. For foreign companies, though, cross-licensing Japanese competitors in the Japanese market often means ceding it to them. Unless a foreign company has a decided advantage of some kind, it will not be able to compete successfully in Japan against Japanese companies. So, a unique feature or product derived from the patent right of exclusivity may be the only means for a foreign company to compete successfully. However, if the price of obtaining a patent is giving away the right to exclusivity, the reward may no longer be worth the price.
>
> While the environment in which foreigners apply for patent protection in Japan is not favourable, the institutional barriers and conduct of the Japanese industry can be overcome. Patent protection is available in Japan, but it is not cheap, and it cannot be obtained easily.[25]

The above excerpt shows that Japan is itself at fault in regard to the very same matters about which it is blaming others.

## III COPING UP WITH NEW TECHNOLOGIES

In the submissions/suggestions, a doubt is expressed about the capability of countries in giving adequate protection to emerging new technology like computer software, biotechnology, semi-conductor chips and tackling the problem of video piracy. The position in India in regard to these matters is as follows.

### (a) Computer Software

The importance of computers in the field of science, technology, commerce and other places of activities is increasing very fast. It would, therefore, be very necessary to assure legal protection which would encourage investment and trade in computer software and provide its wider acceptability. In India, the protection of computer software is provided by the Copyright Act, 1957. The Act was amended in September, 1984, to expressly extend protection to computer programmes (software). This has been accomplished by re-defining the term

24. See Arthur Wineberg, *supra* note 22.
25. *Id.* at 22.



"literary work" to include computer programme. The amended definition of 'literary work'[26] is as follows:

> "Literary work" includes tables, compilations and computer programmes; that is to say, programmes recorded on any disc, tape, perforated media or other information storage device, which, if fed into or located in a computer or computer based equipment is capable of reproducing any information.

By providing copyright protection for computer software under the Copyright Act, 1957, a lead is given to recognize that copyright as against patent is the appropriate protection device for computer software.

### (b) Biotechnology

Biotechnology may be defined as the technology that uses living organisms (or part of organisms) to make or modify products to improve plants or to develop micro-organism for specific uses.[27] In the field of biotechnology, patent protection is available for the application of micro-organism and strains leading to the production of substances like enzymes, yeast, antibiotics, alcohols and for other similar industrial application. But the strains of micro-organism as such are not patentable. Though biotechnology has come into prominence recently, it is one of the oldest technologies. From the beginning of the civilization, man has deliberately selected organisms that improve agriculture, animal husbandary, baking and brewing. However, the human possibilities of intervening in the process of nature in exploiting it for a long time remained very limited.

Patent laws require an invention to be new to comprise of an inventive step and industrially applicable. In addition, inventions must be repeatable since the disclosure must enable others to repeat the described technical solution. As regards the condition of novelty, an invention is not new if it has been disclosed to the public either in writing or orally, by use or otherwise, before the filing date or priority date. A question, therefore, may arise as to whether the naturally occuring substances, micro-organisms or other biological materials may be treated as new when found in nature. As in the other technological fields, the patentability requirement of inventive step also constitutes one of the most complex questions in the biotechnology. The consideration of industrial application has been a major obstacle to patenting in the area of biotechnology.

Sufficient disclosure of the invention in the patent application is a standard patentability requirement. In the biotechnological fields, the condition of sufficient disclosure poses specific problems since living entities are difficult to describe in writing. To make up for the insufficiency of description of an invention relating to biotechnological field to which the public does not have any access, the patent

26. The Copyright Act, 1957, sec 2(o).
27. See N.R. Subbaraman, "Patent Protection for Inventions Relating to High Tech. Areas: Indian Scenario", p. 5 (Paper presented at the Seminar on Intellectual Property and High Technology organised by WIPO, UNDP and Government of India in March, 1987).

procedure requires not only the filing of written description but also the deposit of the sample micro-organism with authorised depository authority. As the deposit is considered a part of the description, it could be concluded that the sample of the micro-organism must be deposited with the depository institution at the latest on the date on which the patent application is filed or, if a priority is claimed, on the priority date. The deposit supplements the description of the micro-organism so that a person in the art is able to identify the type of micro-organism involved.[28]

The definition of patentable inventions under the Patents Act, 1970 as applied to a process, method, art or manner of manufacture is regarded as an artificial process or operation of an industrial nature wherein certain starting materials have been subjected to the process or operation to convert the material in such a manner as to produce a new and useful article or a substance. In addition, the method of agriculture or horticulture and any process for the medicinal, surgical, curative, prophylactic or other treatment of human beings or any process for similar treatment of animals or plants to render them free of disease or to increase their economic value or that of their products are not patentable inventions under the Act.[29] Accordingly, the living entities of natural or artificial origin like animals, plants or micro-organisms and biological materials like viruses, cultures, processes for their creation/production are not patentable under the Patents Act, 1970. However, inventions relating to the processes for the production of substances like enzymes, yeast, antibiotics, alcohols, etc. by bioconversion utilising micro-organisms, etc., are patentable under the Act as the resultant products are tangible and non-living entities.[30]

### (c) Tackling the Problem of Video Piracy

The Copyright Act, 1957 was comprehensively amended by the Copyright (Amendment) Act, 1984, which aimed mainly at discouraging and preventing the widespread piracy prevailing in video-films and records. The salient points of the amendment given below show the seriousness with which the Parliament viewed the menace of video-piracy:

(1) Video-films are henceforth deemed to be work produced by a process analogous to cinematography (sec. 2(f), Explanation);

(2) The definition of duplicating equipment was introduced (sec.2 and 2(a);

(3) Duplicating equipment has been included in the term 'plate' (sec. 2(t));

(4) Import of infringing copy of cinematographic film or record for private and domestic use of the importer, formerly allowed, is now considered infringement. But import of two infringing copies of other works, formerly allowed, is retained (sec.51(b)(iv) and proviso);

28. *Id.* at 6.
29. The Patent Act, 1970, sec. 3(h) and (i).
30. See N.R. Subbaraman, *supra* note 27 at 7.



(5) Certain particulars to be displayed on any published record or published video film (sec.52A);

(6) The punishment for committing the offence of infringement of copyright has been substantially enhanced. The term of imprisonment under the amended provision varies from six months to three years and the amount of fine has been enhanced from fifty thousand rupees to two lakh rupees. When the offence is repeated by the same person, the punishment for the subsequent commissions are further enhanced (secs. 63 and 63A);

(7) Police officers are given powers to seize without warrant copies of a work and instruments used for making infringing copies of the work, wherever found, if the officer is satisfied that an infringement of copyright has been committed or is likely to be committed (sec. 64);

(8) Publication of a record or a video-film which does not display the particulars required under section 52A is made an offence punishable with imprisonment and fine (sec. 68A);

(9) Punishment for making or possessing instruments for the purpose of infringement of copyright is enhanced (sec. 65); and

(10) Infringement of copyright has been made an economic offence under the Economic Offences (Inapplicability of Limitation) Act, 1974[31] so that an infringer of copyright cannot get the benefit of the law of limitation by passage of time.

### (d) Semi-conductor Chips

The U.S. has argued that in the field of high technology like semi-conductor chips, protection is not available even in the developed countries and most developing and newly industrialized countries are only considering laws relating to the semi-conductor chips and mask works. The position in India is possibly different from many other developing countries because the provisions of the Patents Act, 1970 provide protection to the invention relating to semi-conductors. Under the Act, the semi-conductors are patentable only in regard to the methods or process of their manufacturing.[32] No patent can be granted for the semi-conductors themselves.

## IV CHARGE OF EXISTENCE OF NON-PARTIES TO THE COPYRIGHT CONVENTIONS AND THE PHONOGRAMS PROTECTION CONVENTION

About the Copyright Conventions, Japan states in its submissions that as there are still a number of non-member countries, expediting their participation "is the first issue to be dealt with". About Phonograms Protection Convention, which obliges the parties to protect phonogram producers of foreign nationality against

31. See P. Narayanan, *Copyright Law* 11 (1986).
32. See the Patents Act, 1970, sec. 5(b).

production, importation and distribution of unauthorised copies of phonograms, the Japanese state that "It is an effective means for prevention of pirate editions and participation in this Convention is, therefore, to be promoted". As stated above, India is a member of both the Copyright Conventions, viz. the Berne Convention as well as the Universal Copyright Convention. About the Convention for the Protection of Producers of Phonograms against Unauthorised Duplication of their phonograms, established in 1971, the position is that majority of the 39 members as on January 1, 1986 were developing countries and India is a member. [33]

## V ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS IN INDIA

In the event of an intellectual property right being infringed, various statutes dealing with intellectual property mentioned above provide that an aggrieved party may file a civil suit in a court of law. The reliefs in the nature of injunction, damages[34] delivery of infringing goods and materials for destruction can be claimed. The courts in India have power to protect the holders of intellectual property rights in obtaining and preserving the evidence of infringement of such rights by passing appropriate interim orders like injunctions during the pendency of trial in the court. Moreover, the courts have also been equipped with the power to appoint any person as a commissioner[35] to carry out local investigation for the purposes of examining any matter in dispute, to examine accounts, to make an inventory of stocks, raw materials or other property lying at any place, to seal any premises and to take possession of the goods for keeping them in safe custody with the object of preserving the same.[36]

In India, the most important and effective remedy available to the holder of the intellectual property is to seek an injunction from a court of competent jurisdiction. Whenever there is a breach of an intellectual property right or such breach is threatened, apart from penal remedies available to the owner of an intellectual property, civil proceedings can be instituted and an order of injunction sought against the person committing the breach. The grant of an injunction is a right expressly provided under the provisions of the Copyright Act,[37] the Trade and Merchandise Marks Act[38], the Patents Act[39] and the Designs Act.[40] The procedure and the principles to be followed for the grant of an injunction are laid down in the Code of Civil Procedure, 1908 and the Specific Relief Act, 1963. An injunction may

33. See WIPO, "Protection of Neighbouring Rights (Rights of Performers, Producers of Phonograms and Broadcasting Organisations): International Conventions in the Field of Neighbouring Rights", 28 *JILI* 450 (1986).
34. The Specific Relief Act, 1963, sec. 40. See also *Shyam Lal Paharia* v. *Ganga Prasad Gupta*, AIR 1971 All. 192; *Y.S. Prakasa Rao* v. *Chief Secy., Govt. of A.P.*, AIR 1984 NOC 7 (AP). For detailed discussion of these cases, see infra under Effective Enforcement.
35. The Code of Civil Procedure 1908, sec 75 read with order XXVI, rr. 1-22.
36. *Shyam Lal Paharia* v. *Ganga Prasad Gupta*, supra note 34.
37. The Copyright Act, 1957, sec. 55(1).
38. The Trade and Merchandise Marks Act 1958, sec. 106(1).
39. The Patents Act, 1970, secs. 108 and 106 (1) (b).
40. The Designs Act, 1911, sec. 53(2)(b).



be temporary (interlocutory), perpetual (permanent) or mandatory. A temporary injunction may be sought either at the time when a case is instituted or during the pendency of trial. A remedy by way of temporary injunction is required when there is imminent danger to the rights of the intellectual property owner. An order of injunction is protective and preventive and primarily issued with an object to stay further injury and keep the things as they were at the time when the order is issued.[41] Perpetual injunction, on the other hand, is granted to the plaintiff to prevent permanently the breach of an obligation existing in his favour. The relief of perpetual injunction[42] is granted only on the conclusion of the trial.[43] In order to prevent the breach of an obligation where it is necessary to compel the performance of certain acts, the court may, at its discretion, grant a mandatory injunction to prevent the breach complained of and also to compel performance of the requisite acts.[44]

The Indian courts grant *ex parte* injunctions also. The grant of *ex parte* injunction in the field of intellectual property rights is one of the most effective and speedy remedies available to the holder of the right. At times, it is necessary to catch an infringer of a property right by surprise.[45] In England, such *ex parte* orders are known as *anton piller orders*. In fact, Indian courts often grant relief which is greater in magnitude than the *anton piller orders*.[46] The Copyright Act, 1970[47] and the Trade and Merchandise Marks Act, 1958[48] also provide for effective penal criminal sanctions against the infringement of those rights. There is, however, no such

41. The Code of Civil Procedure, 1908, order XXXIX, rr. 1-10. See *Philip Mooris Belgium S.A.* v. *Golden Tobacco Co. Ltd. supra* note 21; *Glaxo Operations U.K. Ltd. Middlesex (England)* v. *Samrat Pharmaceuticals, Kanpur*, supra note 21; *Shri Swaran Singh Trading as Appliances Emporium* v. *Usha Industries (India), New Delhi*, AIR 1986 Del. 343; *B.K. Engineering Co. Delhi.* v. *U.B.H.I. Enterprises (Regd.)*, AIR 1985 Del. 210; *Pennuin Books Ltd., England* v. *M/s. India Book Distributors*, AIR 1985 Del. 29; *M/s Rightway* v. *Rightways Foot Wear*, AIR 1986 J & K 71; *Consolidated Foods Corporation* v. *Brandon & Co., supra* note 21; *M/s Manoj Plastic India* v. *M/s Bhola Plastic Industries, AIR 1984 Del. 441; M/s Vrajlal Manilal and Co.* v. *M/s N.S. Bidi Co.*, AIR 1987 Del. 312; *M/s Hindustan Radiators Co.* v. *M/s Hindustan Radiators Ltd.*, AIR 1987 Del. 353; *M/s Virendra Dresses, Delhi* v. *M/s Varinder Garments, Delhi*, AIR 1982 Del. 482; *K. Krishna Chettiar* v. *Ambal & Co.*, AIR 1970 S.C. 146; *John Richard Brady* v. *Chemical Process Equipments*, AIR 1987 Del. 372; *Pillalamarri Lakshmikantham* v. *Ramkrishna Pictures, Vijayawada*, AIR 1981 AP 224.
42. The Specific Relief Act, 1963, sec. 38.
43. See *M/s. Banga Watch Co., Chandigarh* v. *M/s N.V. Phillips, Holland, supra* note 21; *Globe Super Parts* v. *Blue Super Flame Industries*, AIR 1983 Del. 245; *M/s Kalaniketan, Karol Bagh, New Delhi* v. *Kalaniketan South Extension Market No. 1, New Delhi*, AIR 1983 Del. 161; *Sarabhai International Ltd.* v. *Sara Exports International*, AIR 1988 Del. 134; *Dr. Ganga Prashad Gupta* v. *S.C. Gudimani*, AIR 1986 Del. 329; *Essco Sanitations, Delhi* v. *Mascot Industries (India) Delhi*, AIR 1982 Del. 308; *Tobu Enterprises (P) Ltd.* v. *M/s Joginder Metal Works*, AIR 1985 Del. 244.
44. The Specific Relief Act, 1963, sec. 39. See *Anglo-French Drug Co. (Eastern) Ltd., Bombay* v. *M/s Belco Pharma (Haryana)*, AIR 1984 P & H 430.
45. *Tata Oil Mills Co. Ltd.* v. *M/s Wipro Ltd.*, AIR 1986 Del. 345; *K.P.M. Sundaram* v. *M/s. Rattan Prakashan Mondir*, AIR 1983 Del. 461.
46. See B.N. Kirpal, "Enforcement of Intellectual Property Rights in India", p 13, Paper presented at WIPO Symposium on "Effective Enforcement of Intellectual Property Rights" (Geneva, June 15-16, 1987).
47. The Copyright Act, 1970, secs. 63-70.
48. *Id.*, secs. 78-90.

provision either in the Designs Act, 1911 or the Patents Act, 1970.

The material difference in criminal provisions between the Trade and Merchandise Marks Act and the Copyright Act is that whereas under the former Act, the offence committed is non-cognizable[49] while in case of latter, by reason of the recent amendment in the Copyright Act,[50] the offence committed has been made a cognizable offence. This makes the criminal proceedings under the Copyright Act more effective as the delay in obtaining warrant from the magistrate before conducting a raid is eliminated. To make the copyright protection more effective, the Act also confers powers on a police officer not below the rank of a sub-inspector, even in the case of a threatened infringement, to seize without warrant all copies of infringing work and all plates used or likely to be used for the purpose of making infringing copies of the work.[51] The effect of this provision is that a threatened infringement of the copyright can be nipped even before the commission of an offence. To prevent the abuse of power by police officer, the Act gives right to any person having an interest in materials so seized to make an application to a magistrate, within 15 days of such seizure, for restoration of the materials to him.[52]

The Copyright (Amendment) Act, 1984 introduced certain important amendments, the object of which is mainly to discourage and prevent the wide-spread piracy prevailing in video-films. Among other things, it substantially enhances the punishment for committing the offence of infringement of copyright. The term of imprisonment, under the amended provision, shall not be less than 6 months but may extend upto 3 years, and the fine which shall not be less than Rs. 50,000/- but may extend upto Rs. 2 lakh.[53] Where the offence is repeated, the infringer shall be punishable for the second, and for every subsequent offence, with imprisonment for a term which shall not be less than one year but which may extend upto three years and with fine which shall not be less than one lakh of rupees but which may extend upto Rs. 2 lakh.[54]

## VI CHARGE OF INADEQUATE SYSTEM OF OPPOSITION TO REGISTRATION

Both the U.S. and Japan have emphasised in their submissions/ suggestions that owners of a trade mark identical or confusingly similar to a mark for which registration is sought should be given the opportunity to challenge promptly such registration.

In this regard, the position in India is that section 21 of the Trade and Merchandise Marks Act, 1958, provides for 'opposition to registration'. Sub-section (1) of section 21 lays down that any person may, within three months, from the date of the advertisement or re-advertisement of an application for registration

49. See *State of UP* v. *Ram Nath*, AIR 1972 SC 232.
50. The Copyright (Amendment) Act, 1984.
51. The Copyright Act, 1957, sec. 64.
52. *Ibid.*
53. *Id.*, sec. 63.
54. *Id.*, sec. 63A.



or within such further period not exceeding one month in the aggregate as the Registrar may allow give notice in writing in the prescribed manner to the Registrar of opposition to the registration. Two cases[55] show that opposition to registration succeeds in this counrty in all deserving cases. It is worth recalling here that in *Brandon & Co.* case,[56] the trade mark 'Monarch' for Brandon & Co. (Indian party) registered by the Joint Registrar of Trade Marks was ordered to be cancelled by the Bombay High Court merely on the ground that the American trade mark 'Monarch' was in use in this country through imports, even though it was not registered in India by the American company, the Consolidated Foods Corporation.

## VII ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS IN INDIA : JUDICIAL DECISIONS

An accusation commonly found in the submissions from the three aforesaid countries is that in some countries proper legal protection is not available to intellectual property rights consisting of patents, designs, trade marks and copyrights. It is a well-known fact that the real law is not what is embodied in the provisions of the statute but how it is really interpreted, implemented and enforced by the courts of the country. In India there are not only provisions in the statute but they are in fact enforced effectively. The following discussion of various decisions would prove this.

### (a) Trade and Merchandise Marks

Under this head, the cases in which foreign entities/companies were involved prove that there has not only been effective enforcement of the provisions of law but there has been no discrimination between an Indian party and a foreign party. In fact, the courts have taken not only an impartial view but a view which has in fact favoured the foreigner. In *Philip Morris Belgium S.A.* v. *Golden Tobacco Co. Ltd*,[57] the Belgian company had registered a trade mark in this country with the following particulars:

| Number | Trade Mark | Class | Goods |
|---|---|---|---|
| 243469 | VISA | 34 | Tobacco manufactured and un-manufactured |

This trade mark was valid and subsisting in India. It was being used by the plaintiff company in relation to cigarettes manufactured and sold in a large number of countries of the world but it had not been able to sell in India under this trade mark for some years because of import restrictions. The defendant Indian company advertised[57a] that it had introduced a new brand of cigarettes under the trade mark

55. *Consolidated Foods Corpn.* v. *Brandon & Co., supra* note 21 and *Surjit Singh* v. *Alembic Glass Industries Ltd.*, AIR 1987 Del. 319. For a discussion of these cases, see *infra* under "Effective Enforcement".
56. *Ibid.*
57. *Supra* note 21.
57a *The Times of India*, Delhi, October 27, 1980.

VISA. The plaintiff filed a suit asking for a permanent injunction. The Delhi High Court granted a temporary injunction pending disposal of the suit restraining the defendant from infringing the plaintiff's trade mark.

Several contentions of the defendant were rejected by the court. One of them was that the registered trade mark "VISA" of the plaintiff company was only in respect to tobacco, manufactured and unmanufactured, and was not in respect of cigarettes and so the display of the same on the cigarettes of the defendant could not constitute infringement. But this contention was rejected by the court on the ground that the actual constituent of cigarette was tobacco though enclosed in a paper. It was also contended that the plaintiff's trade mark was liable to be removed from the register of trade marks on the ground of its non-use under section 46 of the Trade and Merchandise Marks Act, 1958. The court rejected the argument on the ground that section 46(3) provided an exception to the aforesaid general rule when the non-use was occasioned due to 'special circumstances' in the trade and since in this case the non-use was due to import restrictions, it was considered to be special circumstance for the purposes of section 46(3). Keeping in view the canons of interpretation, the court in this case could have easily decided the dispute in favour of the Indian party, but it did not do so and put an interpretation which took more than due care of the interests of the foreign company. This shows the judicial attitude in this country which is responsible for holding the scales even between the Indian parties and the foreign parties.

Similarly, in *M/s. Banga Watch Co., Chandigarh* v. *M/s. N.V. Phillips, Holland*,[58] the plaintiffs, Dutch company and its Indian subsidiaries (respondents) were manufacturing and selling a wide range of goods in the engineering and electrical fields with the trade mark 'Philips'. The defendant (appellant) Indian company adopted the said trade mark for their watches and clocks. The respondent Dutch company had never manufactured watches or clocks but they had been manufacturing clock-work-timers used in photography and the radio clocks. The watches and clocks were sold on the same counter alongwith radio accessories and other electrical appliances even by the appellant. The plaintiffs filed a suit for perpetual injunction to restrain the defendant from using the name 'Philips' or any similar mark on watches, clocks and the like so as to *pass off* their goods as those of the plaintiffs. The defendant, a partnership firm, was carrying on business in the sale of watches, clocks, time-pieces and their accessories under the trade mark 'Philips' since 1954. The defendant-appellant contended that the acquisition of an exclusive right to trade mark in connection with a particular type of article of commerce could not entitle the owner of that right to prohibit the use by others of such mark or name in connection with goods of totally different character because an action for *passing off* was a common law remedy for *passing off* by a person of his own goods as those of another and unless it was established by the plaintiffs that their goods and the goods sold by the defendant were alike or of a similar nature, it could not be said that the use of the trade mark in dispute was likely to lead to any confusion. The Punjab and Haryana High Court, however, rejected the argument

58. *Supra* note 21.



upholding the order of the trial court granting perpetual injunction restraining the defendant-appellant from using the trade mark 'Philips'.

Yet another case worth mentioning here is *Glaxo Operations U.K. Ltd., Middlesex (England)* v. *Samrat Pharmaceuticals, Kanpur*.[59] In this case, the Glaxo Operations U.K. Ltd. and Glaxo Laboratories (India) Ltd. instituted a suit for restraining the defendant Indian firm, their servants and agents from manufacturing, selling, offering for sale, advertising and directly or indirectly dealing with glucose powder or any other medicinal or food preparations in cartons which were a substantial reproduction or colourable imitation of cartons of the product Glaxose-D and/or Glucon-D and from adopting an identical or deceptively similar colour combination, lay-out, get-up, etc. The plaintiffs prayed that an order for rendition of accounts of profits illegally earned by the defendant by infringing the trade marks, copyrights and by way of passing off its goods and business as the goods and business of the plaintiffs be made. They further prayed for issue of a direction for delivery up, for the purpose of destruction, of all the impugned materials including the infringing copies of the cartons, labels, wrapping and packing materials, etc.

It was complained by the plaintiffs that in violation and infringement of their trade mark and copy right, the defendant was selling its product Glucose-D in cartons having the various features including the lay-out get-up, colour combination and arrangement of cartons of Glaxose-D and/or Glucon-D, with a view to producing an impact on the public that the products of the plaintiffs were being sold, thus causing deception so as to encash upon the reputation of the plaintiffs and to pass its inferior products as those of the plaintiffs. On a comparison of the two, the court found that the two cartons were similar and that the resemblance was to the extent that any product in the carton of the defendant could be taken to be that of the plaintiffs. On the question of balance of convenience, which was a very important consideration while granting an injunction, the court held that the plaintiffs would suffer irreparable injury inasmuch as, firstly, the sale of the articles of the plaintiffs would be decreased by as much as the sale of the articles of the defendant took place and, secondly, if the articles of the defendant were inferior in quality to the articles of the plaintiffs, there was bound to be damage to the reputation of the plaintiffs resulting in considerable decrease of the sales of the articles of the plaintiffs. The court, therefore, allowed the application and issued an injunction prayed for till the disposal of the suit.

The Supreme Court considered the infringement of trade mark as a serious matter in *State of U.P.* v. *Ram Nath*[60] holding that a person charged with the offences under sections 78[61] and 79[62] of the Trade and Merchandise Marks Act, 1958, could not be exempted from criminal liability by showing that the registered user of the trade mark had discontinued its use. The court held that for the purposes of Chapter

59. *Supra* note 21.
60. *Supra* note 49.
61. Section 78 prescribes the penalty for applying false trade marks, trade descriptions, etc.
62. Section 79 prescribes the penalty for selling goods to which a false trade mark or false trade description is applied.

X (Offences, Penalties and Procedure) of that Act, a trade mark included a registered as well as un-registered trade mark and that, therefore, an offence under section 78 or 79 related to a trade mark whether registered or unregistered. The Supreme Court held that the contention that the registered trade mark of Habib Bank Ltd. had been abandoned since the said bank had discontinued its use from 1954 would not absolve the respondent from criminal liability because even if it was abandoned, it could only furnish a ground for a person to make an application under section 46 of the Act to have that trade mark removed from the register of trade marks. The court held that these circumstances did not entitle him to use the trade mark whether it was current or had been removed from the register or had been abandoned or even if it had never been initially registered but had acquired the currency of a trade mark.

The strict attitude of Indian courts towards infringement of trade marks is also reflected in *Anglo-French Drug Co. (Eastern) Ltd., Bombay* v. *M/s. Belco Pharma (Haryana)*.[63] In this case, the plaintiff (Anglo-French Drug Co.) got *BEPLEX* registered as a trade mark on 18-5-1945 and since then it had been manufacturing several medicines including vitamin B complex tablets under this trade mark. Somewhere in the year 1974, the defendants (M/s. Belco Pharma) started manufacturing medicines including vitamin B complex in the name of BELPLEX. When this came to the notice of the plaintiff, they served notice on the defendant not to use BELPLEX on their products as it was phonetically, as also visually, similar to their registered trade mark and was likely to cause confusion in the minds of the purchaser of the plaintiff's products. The Punjab and Haryana High Court held that BEPLEX and BELPLEX were visually and phonetically similar and since the plaintiff had BEPLEX as its registered trade mark, the defendant could not manufacture medicines under the trade name of BEPLEX. Accordingly, the defendant company was restrained by perpetual injunction from manufacturing medicines in the trade name BELPLEX. *In view of this, a decree for mandatory injunction was also issued for the destruction of dyes, printing blocks, literature, papers, vouchers, things and goods bearing trade name BELPLEX. A preliminary decree for rendition of accounts was also passed against the defendant company.* The court likewise granted a permanent injunction as also an order for delivery up of the infringing material in *Globe Super Parts* v. *Blue Super Flame Industries*.[64] It was held in this case that the plaintiffs were entitled to a permanent injunction restraining the defendants from using the word SUPERFLAME in the name of their business. The court also ordered the delivery up of the infringing material, namely, the small labels affixed at the rear of the "Hot Flame" or "Nutan Gas Cookers" made by the defendants unto the plaintiffs. The defendants were also directed to file an affidavit disclosing the number of labels in their possession and power, as also the dyes, jigs, tools and fixtures used by them, their servants or agents in the manufacturing and preparation of the same within two weeks from the date of the order and to deliver up all the aforesaid infringing articles within 4 weeks from the date of the order. In *M/s. Kalaniketan, Karol Bagh, New Delhi* v. *Kalaniketan South Extension*

63. *Supra* note 44. Another case of similar nature was *Ciba Ltd., Bagle, Switzerland* v. *M. Ramalingam and S. Subramaniam*, AIR 1958 Bom. 56.
64. *Supra* note 43.



*Market No. 1, New Delhi*,[65] it was proved that the disputed name 'Kalaniketan' had become descriptive of the plaintiff's business and the use of the identical trading style 'Kalaniketan' was likely or calculated to deceive or cause confusion and injury to the business reputation of the plaintiff. The trade name 'Kalaniketan' was not descriptive of the *sarees* in which the parties were dealing. The defendant was, therefore, not entitled to trade under the name 'Kalaniketan' and the plaintiff was held entitled to the relief of permanent injunction restraining the defendants, their servants, agents and representatives from selling or offering for sale or dealing in sarees under the trade name 'Kalaniketan' or any other identical or deceptively similar trade name.

In *Sarabhai International Ltd.* v. *Sara Exports International*,[66] a suit for perpetual injunction for restraining infringement of trade mark, passing off and rendition of accounts was filed by two palintiffs, namely, Sarabhai International Ltd. and Ambalal Sarabhai Enterprises Ltd. The Delhi High Court decreed the suit of the plaintiffs in the following manner:

*(a)* A decree for permanent injunction restraining the defendant by themselves, their servants, agents, stockists and all persons on their behalf from using the word 'SARA' as part of their trading style/trade name 'Sara Exports International" which was deceptively similar to the trading style Sarabhai International Ltd. of plaintiff No. 1 and the trading style Sarabhai Chemicals of plaintiff No. 2 and which included registered trade mark SARA of plaintiff 2 or part of their trade mark SARABHAI;

*(b)* A decree for permanent injunction restraining the defendant themselves, their agents, servants, dealers, importers and all other persons acting for and on their behalf from infringing by using the trade mark 'SARA' as part of defendant's trading style/trading name SARA EXPORTS INTERNATIONAL in respect of goods for which plaintiff 2 was the registered proprietor of the trade mark SARA under No. 113071 in Class 5 and No. 113072 in Class 1;

*(c)* A decree for permanent injunction restraining the defendant themselves, their servants, agents, stockists and all other persons on their behalf from passing off or enabling others and causing or assisting others to pass off their business and/or goods as and for business and/or goods of the plaintiffs by using the trading style 'Sara Exports International' or any other trading style/trade name in which the word SARA formed a part. *The defendant was also directed to deliver up offending wrappers, cartons, labels, stationary, literature, dyes, blocks and all other materials bearing the trading style Sara Exports International for destruction.*

In *Shri Swaran Singh, Trading as Appliances Emporium* v. *Usha Industries (India), New Delhi*,[67] the court issued an injunction to restrain the defendants from using the trade mark 'USHA' in respect of electric irons. Also the court upheld

65. *Supra* note 43.
66. *Supra* note 43.
67. *Supra* note 41.

the order of the learned single judge of the High Court, by which he had directed the defendants to use the name 'GOLDEN' and "USHA' equally prominently, that is, they would be entitled to use the name 'GOLDEN' provided that 'GOLDEN' and 'USHA' appeared equally prominently. This order was passed as a temporary measure pending final disposal of the matter. Likewise in *Tata Oil Mills Co. Ltd.* v. *M/s. Wipro Ltd.*,[68] the court held that the plaintiffs had not only made out a *prima facie* case but had also succeeded in establishing that in case the defendants were allowed to continue with the manufacture and sale of their products under the trade mark 'Bubbles', the plaintiff would suffer irreparable injury which could not be compensated by money. The court held that the balance of convenience also lay in favour of the plaintiff. *As a result, the ex parte injunction granted by the court earlier was confirmed. Of course, this order also was passed as a temporary measure pending the final disposal of the case.*

Yet another case worth mentioning is *M/s. Rightway* v. *M/s. Rightways Foot Wear.*[69] In this case, the court held that the plaintiff was entitled to the *ad interim* relief and, therefore, directed that the defendants be restrained from using the trade mark and trade name and the signboard of the plaintiff 'Rightway Foot Wear' with distinctive mark of foot on its left side. They were also restrained from using the signboard or trade mark or trade name "New Rightway" because the same was deceptively similar and was likely to cause confusion in the minds of the customers to the detriment of the plaintiff. The defendants were further directed not to pass off or sell their goods under the trade name or trade mark or label 'Rightway" or "New Rightway" with a distinctive mark of foot on its left side. Of course, this order too was passed as an interim measure pending the final disposal of the matter. A case of considerable significance involving a foreign corporation was *Consolidated Foods Corporation* v. *Brandon & Co.*[70] In *M/s. Vrajlal Manilal and Co.* v. *M/s. N.S. Bidi Co.*,[71] the court observed that they were *prima facie* of the view that the plaintiffs had been able to establish that their goods (bidis) had become by user distinctive of the plaintiff's goods. The court was also of the view that the conduct of the defendant was calculated to pass off their goods as those of the plaintiffs or at least to produce confusion in the minds of probable customers or purchasers or other persons with whom plaintiffs had business relations as was likely to lead to the other goods being bought and sold for theirs. The court accordingly restrained the defendant from manufacturing, selling, offering for sale or otherwise dealing in bidis under the trade mark/labels which might be identical with and/or deceptively similar to the label '22' of the plaintiffs till the final disposal of the suit.

In *M/s. Hindustan Radiators Co.* v. *M/s. Hindustan Radiators Ltd.*,[72] the plaintiff had filed a suit for permanent injunction against passing off and using its trading style and trade marks by the defendants on the ground that it was carrying

68. *Supra* note 45.
69. *Supra* note 41.
70. *Supra* note 21.
71. *Supra* note 41. See also *Vicco Laboratories* v. *Hindustan Rimmers*, AIR 1979 Del. 114.
72. *Supra* note 41. See also *M/s. Manoj Plastic India* v. *M/s. Bhola Plastic Industries, supra* note 41.



on business since 1959 and had been manufacturing about 100 types of radiators for use in various vehicles like buses, trucks, cars, jeeps, cranes, compressors, etc. under the mark "HINDUSTAN RADIATORS" and with the initials "H.R." (short form of Hindustan Radiator) on the radiators manufactured by it. The court issued an *ad interim* injunction restraining the defendants, their agents, servants, stockists and all other persons on their behalf from using the trading style 'HINDUSTAN RADIATORS LIMITED' and from using the trade mark 'HINDUSTAN RADIATOR/ H.R.' in respect of their radiators in any manner whatsoever or to pass off their business and goods as business and goods of the plaintiffs. Similarly, in *Surjit Singh* v. *M/s. Alembic Glass Industries Ltd.*,[73] the petitioner had filed an application with the registrar of trade marks to register in part A of the register of trade marks the mark consisting of the word 'YERA' in class 3 in respect of perfumery, cosmetics and non-medicated toilet preparations. The application was duly advertised in the *Trade Marks Journal*. The respondent, which held registration in respect of the same trade mark "YERA" in respect of various goods falling in classes 9, 10, 11, 14, 17, 19, 20 and 21 objected to the registration of the aforesaid trade mark under sections 9, 11(a), 11(e), 12(1) and 18(1) of the Trade and Merchandise Marks Act, 1958. The assistant registrar of trade marks rejected the application of the petitioner for registration on the ground that the trade mark applied for, if allowed to be registered in class 3 as prayed by the petitioner, was liable to deceive or cause confusion and also that the petitioner not being the proprietor of the said trade mark was not entitled to the protection in the court of law within the meaning of section 11(e) of the Act. The petitioner challenged the order under section 109 of the Act and article 227 of the Constitution of India. The Delhi High Court held that the word YERA was being copied by the petitioner in order to take advantage of the reputation acquired by the trade mark. It, therefore, held that the petitioner was not entitled to registration of the trade mark under section 11(a).

Another case worth mentioning here is *Dr. Ganga Prashad Gupta & Sons* v. *S.C. Gudimani*,[74] in which the suit for perpetual injunction sought to restrain the defendant from passing off medicinal preparations under the trade mark 'Goodmans' and for rendition of accounts on the ground that the plaintiff firm was carrying on old and established business of manufacturing and selling medicines of all kinds for the last more than four decades and had been using the trade mark 'Goodmans' as its house mark with regard to them. The same was incorporated at Sr. No. 4 of the declaration dated 6-7-1937 and registered with the Registrar of Assurances, Calcutta. A copyright registration entitled 'Amodine Cough Syrup' with regard to its artistic label was also registered and house mark 'Goodmans' appeared in the same. In the circumstances, the plaintiffs claimed that they had acquired an exclusive right to use the distinctive trade mark 'Goodmans' and the purchasing public had come to recognise and identify their medicines under that trade mark. The Delhi High Court issued a permanent injunction restraining the defendant from manufacturing and marketing disinfectants and purifiers under the trade name

73. AIR 1987 Del. 319.
74. *Supra* note 43.

'Goodmans'. As volunteered by the plaintiffs the defendants could use the trade mark corresponding to their surname 'Gudimani'. The defendant was also directed to cease marketing the goods under the name 'Goodmans' within a month of the order. Similarly, in *B.K. Engineering Co., Delhi* v. *U.B.H.I. Enterprises (Regd), Ludhiana*,[75] the plaintiffs-appellants had brought a passing off action against the defendant-respondent claiming permanent injunction, accounts and damages. The plaintiffs and the defendants were in the same line of business. Both were engaged in the manufacture of cycle bells. The plaintiffs started manufacturing bells as early as 1971. They adopted "B.K." as their house mark. They manufactured cycle bells under the trade mark 'Crown' and 'Venus'. The house mark "B.K." was used, prominently and in a conspicuous manner on the cartons as a circular logo device in the form B.K. in the stand of the bell and on the carton, the name of the manufacturer "B.K. Engineering Co." was stamped. The defendants, on the other hand, were marketing cycle bells under the trade mark "B.K.-81". They had entered the manufacturing line in 1981. The mark "B.K.-81" was embossed on the dome-shaped cover as well as on the push handle. "U.B.H.I. Enterprises (Regd.)" was engraved on the dome-shaped cover alongwith the words "B.K.-81". On the stand of the bell and the carton, their manufacturing name U.B.H.I. appeared. The plaintiffs' case was that the defendants' mark "B.K.-81" was deceptively similar to the house mark "B.K." of the plaintiffs and was bound to cause confusion and deception in the course of trade. The plaintiffs made an application for a temporary injunction seeking to restrain the defendants from using the mark "B.K.-81" on the cycle bells till the decision of the suit. A Division Bench of Delhi High Court, hearing the appeal, observed that competition must remain free but it was essential that trading must not only be honest but must not even un-intentionally be unfair. If it is shown that a product or business of a trader has acquired a distinctive character, the law would restrain a competitor from using that other's name. A line must be drawn somewhere between honest and dishonest trading and between fair and unfair competition. The court thought that here the real mischief was in the adoption of the name "B.K." which was associated with the plaintiffs' business, if not the goods. For these reasons, the court allowed the appeal and issued injunction against the defendants restraining them, their servants, agents, representatives and dealers from manufacturing, selling or offering for sale or otherwise dealing in cycle bells under the mark "B.K.-81" or "B.K." or any other mark which might be identical or deceptively similar to the house mark "B.K." of the plaintiffs till the decision of the suit.

In *Bata India Limited* v. *M/s. Pyare Lal & Co., Meerut City*,[76] the plaintiff-appellant company had filed a suit in the court of district judge, Meerut, against the defendant-respondent praying that they themselves, their servants and agents be restrained from using the mark "Batafoam" or otherwise associating the name of "Bata" in any manner or form in advertisements, etc. and further restraining them from "passing off" or enabling others to pass off mattresses, sofas, cushions and

75. *Supra* note 41.
76. AIR 1985 All. 242.



other articles as and for the plaintiff company's goods and from selling or offering for sale any articles associating them with the name of "Bata" in any manner or form. Their further prayer was that the defendants and their servants and agents be directed to deliver the infringing labels and marks of 'Bata' for destruction. The Allahabad High Court felt satisfied that the plaintiff-appellant had a cause of action for instituting a proceeding for passing off. The court also thought that the plaintiff had been able to make out a case for issue of injunction in respect of the user of the name 'Bata' for any of their products by the defendants. The court further observed that the name 'Bata' was neither a fancy name nor in any way connected with the defendants, also it was not the name of a flower or fauna, "it is a fancy name of a foreigner who has established his business in making shoes and the like products in this country. The name is well-known in the market and the user of such a name is likely to cause not only deception in the minds of an ordinary customer but may also cause injury to the plaintiff company." In view of these facts and considerations, the court restrained the respondents from using the name "Bata" or any other name using the word 'Bata' as a part of that name, on any of their packages, advertisements and the like, until the final disposal of this suit.

In *Essco Sanitations, Delhi* v. *Mascot Industries (India), Delhi*,[77] the main question for determination was whether the mark "OSSO" adopted by the respondents judgment-debtors was deceptively similar to the registered trade-mark 'ESSCO' of the petitioners decree-holders and amounted to disobedience of the decree for permanent injunction passed by the Delhi High Court in favour of the petitioners against the respondents on July 30, 1980. On February 14, 1980, the petitioners decree-holders had brought a suit seeking permanent injunction restraining—

(i) The judgment-debtor or their servants, agents, representatives, dealers, workers and all those acting for and on their behalf from infringing their registered trade-mark by adopting and/or using the mark 'ESSO' and/or any other deceptively or confusingly similar mark which was an infringement of their registered trade-mark "ESSCO" in relation to Brass cocks (sanitary and bath room fittings);

(ii) From manufacturing, selling, offering for sale and/or otherwise dealing in sanitary and bath-room fittings including brass cocks under the mark 'ESSO' or any other deceptively similar mark being colourable imitation of their trade mark 'ESSCO' as was likely to cause confusion and deception and from passing off these goods as those of the decree-holders in any manner whatsoever. They had also prayed for an order for destruction of the goods, cartons, dyes, blocks, labels and other media bearing the impugned mark ESSO, and for rendition of accounts, etc.

The Delhi High Court held that trade mark 'OSSO' adopted by the judgment-debtors was deceptively similar to the registered trade mark ESSO of the

77. *Supra* note 43.

decree-holders and thus the judgment-debtors had disobeyed the decree for permanent injunction granted in favour of the decree-holders by the court on July 30, 1980. The court, however, observed that in the interest of justice, it would have been proper had an opportunity been given to the judgment-debtors to discontinue the user before passing an order for their detention in civil prison which would be a very harsh order. Accordingly, the court warned and directed the judgment-debtors to stop manufacturing, selling, offering for sale or otherwise dealing in sanitation and bath-room fittings including brass cocks under the mark 'OSSO' within one month from the date of that order. The judgment-debtors were also directed to file an affidavit within one month from the date of the order before the registrar stating that they had complied with the directions and had stopped the disobedience of the decree, failing which they were liable to be detained in civil prison.

In *M/s. Virendra Dresses, Delhi* v. *M/s. Varinder Garments, Delhi,*[78] plaintiff-appellant challenged the judgment and order of the lower court refusing to issue a temporary injunction restraining the respondent-defendant from adopting a trade name in relation to readymade garments business or any other allied business amounting to passing off and from giving an impression to the trade and public that the defendant was associated with the plaintiffs. The plaintiffs filed a suit for permanent injunction for passing off and rendition of accounts against the defendants alleging that the plaintiffs constituted a partnership firm, and had been manufacturing and dealing in all kinds of readymade garments at Ashok Gali, Gandhi Nagar, Delhi under the name and style of Virendra Dresses since August, 1978. The Delhi High Court accepted the appeal and set aside the judgment of the trial court. The High Court granted a temporary injunction till the decision of the suit by the trial court, restraining the defendant-respondent from adopting or carrying on business in the name of Varinder Garments or any other name calculated to mislead the people to believe that the business of the defendants was the business of the plaintiffs so as to cause confusion between the two businesses.

Another case worth mentioning is K.*Krishna Chettiar* v. *Ambal & Co.,*[79] in which the appellant was the sole proprietor of a trading concern known as Radha & Co. while the respondents, Ambal & Co., were a partnership firm. The respondents and the appellant were manufacturers and dealers in snuff, carrying on business at Madras and had business activities inside and outside the State of Madras. On March 10, 1985, the appellant filed an application for registration of trade mark in class 84 in respect of "snuff manufacture in Madras". The respondent filed a notice of opposition. The main ground of opposition was that the proposed mark was deceptively similar to their registered trade-mark. The respondents were the proprietors of two registered trade marks, one consisting of a label containing a device of a Goddess, Sri Ambal, seated on a globe floating on water enclosed in a circular frame with the legend "Sri Ambal Parimala Snuff" at the top of the label, and the name and address "Sri Ambal & Co., Madras" at the bottom. The other trade mark consisted of the expression "Sri Ambal". The mark of which the appellant was

78. *Supra* note 41.
79. *Supra* note 41.



seeking registration consisted of a label containing three panels. The first and the third panels contained in Tamil, Devnagari, Telgu and Kannada the equivalents of the words "Sri Andal Madras Snuff". The centre panel contained the picture of Goddess Sri Andal and the legend "Sri Andal". The respondent had been in the snuff business for several decades and had used the word Ambal as part of their mark for more than half a century. The question was whether the proposed mark was deceptively similar to the respondents marks. A single judge of the Madras High Court dismissed the plaintiff's application for registration of the trade mark and the Division Bench dismissed his appeal. The Supreme Court also dismissed his appeal by holding that there was a striking similarity and affinity of sound between the word 'Andal' and 'Ambal' and that, therefore, there was a real danger of confusion between the two marks.

### *(i) Strict action in case of counterfeiting*

Even if a party has not registered any 'trade mark' and if the 'property mark' used by him has been invaded by counterfeiting, the Indian courts have come down heavily on the infringer of the property mark and have subjected the culprit to criminal punishment. Thus, in *Sumat Prasad Jain* v. *Sheojanan Prasad (Dead, through legal representative) and State of Bihar,*[80] an appeal, by special leave, was preferred against the judgment and order of the High Court of Patna whereby the High Court had set aside the order of 'acquittal' passed by the additional sessions judge and restored the order of conviction and sentence passed by the trial magistrate under sections 482 and 486 of the Indian Penal Code, 1860. One Sheojanan Prasad (who died during the pendency of his appeal before the High Court) was, at all the material time, the proprietor of a provision store in Arrah. He claimed to have evolved a formula for the manufacture of a scent to which he gave the name of 'Basant Bahar'. The scent when put into market, soon became popular. The scent used to be packed in cartons and other receptacles which carried on them the picture of a *pari* (an angel) holding a bunch of flowers in her hands and an inscription "*Basant Bahar Scent Khushbuon Ka Badshah*". The cartons and the receptacles were of green colour and had on them in print name of the manufacturers, namely, 'Basant Bahar Perfumery Company, Shahabad'. Sheojanan Prasad thereafter applied before the registrar of trade marks for registration of the trade mark. The application was, however, not granted as it contained certain technical defects. His case was that even though this trade mark was not registered, the said scent with the aforesaid marks became popular in the market as the scent manufactured and sold by him.

The case of Sheojanan Prasad was that the appellant was also conducting a provision store in Arrah. Finding that his Basant Bahar scent had become popular, the appellant put out for sale a scent prepared by him and gave it the name of Pushp Raj. Pushp Raj scent, however, did not become popular with customers. The appellant, therefore, started putting out for sale his said scent under the name of Basant Bahar in cartons and receptacles similar to those of his (Sheojanan Prasad), in the same colour, shape and size, except for one particular only, namely, the name

80. *Supra* note 16.

of the manufacturer. Before the trial magistrate, the defence taken up by the appellant was that Basant Bahar scent was his original product, that he had put that scent in the market and that it was Sheojanan Prasad, who imitated the genuine scent evolved by him, and that, therefore, there was no question of his having committed any offence either under section 482 or section 486 of the Indian Penal Code. The Supreme Court held that the name Basant Bahar with the picture of an angel with flowers in her hands and the inscription of Basant *Bahar Khushboan ka Badshah* printed on the packets and receptacles was the property mark denoting that the scent in question was the one manufactured and belonging to the complainant. It held that from the findings arrived at by the trial magistrate it must follow that the appellant marked his scent and the packets and receptacles in which it was packed with the same name, the same picture and the same inscriptions with the intention of causing it to be believed that the scent so marked or the scent contained in the said packets and receptacles so marked was the one manufactured by and sold in the market by the complainant. The evidence clearly showed that the scent so marked by the appellant was sold by him in the market with the intention and object aforesaid. It was, therefore, held that the appellant committed offences of both using false property mark and of selling goods marked with counterfeit property mark. The conviction of the appellant under sections 482 and 486 by the lower court was upheld by the Supreme Court.

*(ii) Appellations of origin protected in India*

There is no particular case declaring that protection should be given to appellations of origin, yet the well-known cases on protecting appellations of origin, such as *J.Bollinger* v. *Costa Brava Wine Co. Ltd.*[81] have been relied upon by Indian courts while deciding cases. Thus, in *Ellora Industries, Delhi* v. *Banarsi Dass Goela,*[82] Avadh Behari Rohatgi J had observed that in recent times there have been extensions of *passing off.* According to him, it is an expanding business tort because the courts have developed the concept of misappropriation and law has thrown protection around all intangible elements of value. The learned judge observed that the views of Holmes and Brandeis JJ were indeed minority opinions in the *International New Service* v. *Association Press*,[83] in which the U.S. Supreme Court laid the foundations for a general tort of misappropriation of trade values. Rohatgi J thought that these are "property rights" and injunction could be issued against the infringer because predatory business practices and piracy of business rights were denounced by commercial morality as also by law. He held that confusing customers as to source, as in the present case, was invasion of another's property rights as the unfairness arose from the fact that the purchasing public were likely to be misled. For its view, the court relied on the *Spanish Champagne* case,[84] which is a well-known case on protecting appellations of origin. The decree for injunction passed by the trial court was affirmed and the defendants were ordered to deliver up the offending boxes, wrappers and letter-heads for destruction.

81. *Supra* note 19.
82. *Supra* note 18.
83. [1918] 248 US 215.
84. *Supra* note 19.



**(b) Cases on Copyright**

The first case worth mentioning here is *Penguin Books Ltd., England* v. *M/s. India Book Distributors,*[85] in which the appellant, M/s. Penguin Books Ltd., England (original plaintiff) brought a suit for perpetual injunction against the respondents, M/s. India Book Distributors, New Delhi, Bombay, Madras, Calcutta (original defendants) restraining them from infringing Penguin's territorial copy-rights/ licence in 23 books, the subject matter of the suit. Admittedly, India Book Distributors, Bombay were importing, distributing and offering for sale in India, 13 out of these 23 titles. Some of these books were well-known works such as *Animal Farm* by George Orwell and *Far Pavillion* and *Shadow of the Moon*, both by M.M. Kaye. Some were recent publications such as *Celebrity* by Thomas Thompson and *Lace* by Shirley Conran. Penguins asked for a temporary injunction in the suit. The learned single judge refused injunction because by reason of the consent decree which was passed by the district court in the United States of America, Penguins were disentitled to claim the equitable relief of injunction. The Division Bench held that what had happended was that the U.S. Government had brought a suit against various publishers, British and American, including Penguins Inc., on the complaint that their agreements were in breach of the provisions of the Sherman Act, 1890. This suit had ended in a consent judgment. Clauses V and VI of the consent decree provided:

> V. Each defendant is enjoined and restrained, directly or indirectly from preventing or restricting any purchaser of a lawfully published book from importing or exporting such book "to or from the United States or such purchaser from selling, distributing or providing for resale of such book to customers in United States interstate or foreign commerce.
>
> VI. Nothing in this final judgment shall prevent any defendant, in and of itself, from acquiring, granting or otherwise transferring exclusive or non-exclusive copyright rights, or from exercising or authorising the exercise of such rights under the copyright law of any country, including the United States, or from the assertion of such other statutory rights as such defendant may have, provided that no foreign copyright law or other foreign statutory right may be used by any defendant to exclude or restrict the importation or resale in the United States of a lawfully published book.

The learned single judge on construction of these clauses had come to the conclusion that Penguins could not prevent any purchaser of lawfully published books in America from importing them into India. His Lordship had observed:

> On a plain reading of the clauses, it is clear that liberty is given to any purchaser in any part of the world to purchase lawfully published books in America and to export them whenever he likes.

85. *Supra* note 21.

The Division Bench set aside[86] the order of the single judge, allowed the appeal of M/s. Penguin Books Ltd., England and issued temporary injunction restraining the defendants (Indian parties) 1 to 4, by themselves, their servants, agents, dealers and stockists, from infringing the plaintiffs' territorial copyrights/rights/licence by importing, distributing and offering for sale in India 13 titles which admittedly they were importing into India. The court permitted the defendants to sell their existing stocks as on the date of the order but ordered that no further imports would be made. The defendants were also directed to keep accounts of the sale of the existing stocks and submit the same in court every 3 months. The defendants were also directed to submit the account of their existing stocks within a week.

Another case worth mentioning is John *Richard Brady* v. *Chemical Process Equipments P. Ltd.*[87] In this case, a suit was filed by the plaintiffs for permanent injunction to restrain the defendants from infringing copyright of the plaintiffs, from passing off defendants product as those of the plaintiffs, for rendition of accounts of profits, and for delivery up of all infringing materials and articles, etc. In the instant application made under order 39, rules 1 and 2, read with section 151 of the Code of Civil Procedure, 1908, the plaintiffs prayed for an *ad interim* injunction to restrain the defendants from manufacturing, selling, offering for sale, advertising, directly or indirectly, dealing in machines that were substantial imitations and reproduction of design, manuals and drawings of the plaintiff's fodder production unit and thereby amounting to infringement of the plaintiffs' copyright therein, or from dealing in those machines made on the basis of information and knowhow disclosed to them by the plaintiffs in conditions of strict confidence, and from doing any other thing as was likely to lead to passing off the defendants' product as those of the plaintiffs.

According to the plaintiffs, John Richard Brady was an American national. He was a mechanical engineer and was the president and managing director of Fometa Overseas S.A. Castellana, Madrid, Spain. He conceived the idea of growing fresh green grass used as basic food for livestock in a compact unit capable of producing grass throughout the year irrespective of internal climatic conditions. He developed the original fodder production unit (FPU) in the year 1972. It was tested under extreme climatic conditions in various countries in the world. Steps were taken, from time to time, to improve the unit by optimising its size and achieving greater productivity. The plaintiffs further claimed that after extensive experimentation, an improved FPU was invented by Brady and he applied for grant of patent in India in relation to the same which was pending. The technical details of FPU were contained in catalogues which illustrated the same by technical drawings and other specifications. It was claimed by the plaintiffs that the drawings were the original artistic work in which Brady was the owner of the copyright and was,

86. This was largely on the basis of section 53 (1) of the Copyright Act, 1957, which empowers the Registrar of Copyrights to "order that copies made out of India of the work which if made in India would infringe copyright, shall not be imported."
87. *Supra* note 21.



therefore, entitled to exclusive right to publish and reproduce the drawings whether two dimensionally or three dimensionally.

It was further alleged that Brady collaborated and set up plaintiff No. 2, a joint venture company, Fometa (India) Machine Pvt. Ltd. and that plaintiff No. 3, Sanjeevani Fodder Production Pvt. Ltd. was formed for the purposes of establishing and operating the first fodder production feed station as a prototype model commercial facility in India. The plaintiff claimed that it was decided by them that a phased programme would be adopted to manufacture the FPU in India for both domestic and export sales, and that to indigenise manufacture of the FPU, the plaintiffs sought quotations from defendant No.1 for the supply of thermal panels manufactured by them. The panels required were of highly specialised type and to enable the defendants to send their quotations for the supply of the said components and to precisely match those components with FPU, all the technical material, detailed knowhow, drawings and specifications concerning the FPU were passed on to defendant No. 1 under the express condition that they must maintain strict confidentiality regarding the knowhow. The plaintiffs learnt that in the month of November, 1985, the defendants were falsely representing that the innovation concerning the FPU originated from them. The plaintiffs also acquired a pamphlet of a FPU manufactured by the defendants or on their behalf, without the consent, permission and authorisation from the plaintiffs. The plaintiffs also alleged that the machine produced by the defendants was entirely based upon disclosures made by plaintiffs to the defendants and that, therefore, the defendants committed breach of confidence reposed in them and wrongfully converted and misappropriated the knowhow, information, drawings, designs and specifications disclosed to them under strict confidentiality and had also infringed the copyright of Brady by making the machine in three dimensional form from the two dimensional artistic work of the plaintiffs in drawings of the FPU.

The Delhi High Court noted that although the case really related to enforcement of copyright, particularly in the drawings of Brady and the enforcement of confidentiality of the relationship between the parties, the plaint as also the written statement suffered from a mixture of pleadings, generally applicable to both patent and copyright, in spite of different nature and attributes of the two rights.[88] The court did not finally express any opinion on the question of infringement of the copyright claimed by the plaintiffs in drawings of Brady by the production of the machine in question by the defendants, but it held that the plaintiffs had definitely made out a strong *prima facie* case of infringement of their copyright and of strict confidentiality under which the specifications, drawings and other technical information about FPU were supplied to the defendants. Therefore, an *ad interim* injunction was granted as prayed by the plaintiffs restraining the defendants from manfacturing, selling, offering for sale, advertising, directly or indirectly, dealing in machines that were substantial imitations and reproductions of the drawings of the plaintiffs' FPU or from using in any other manner whatsoever the knowhow, specifications, drawings and other technical information about the FPU disclosed

88. *Id.* at 378. See also *K.P.M. Sundhram* v. *M/s. Rattan Prakashnan Mandir*, *supra* note 45.

to them by the plaintiffs till the final disposal of the suit.

Likewise, in *Pillalamarri Lakshmikantham* v. *Ram Krishna Pictures, Vijayawada*,[89] a suit was instituted by the publishers for infringement of copyright in a book against the producers and directors of a film. It was held that it could not be said that the injunction was not the appropriate remedy. It was also held that since the publishers were accorded relief of damages, they could not claim relief of accounts. In *Shyam Lal Paharia* v. *Gaya Prasad Gupta*,[90] it was admitted that the defendant had a copy of the plaintiff's book *Hisabi Machine*, the first edition of which had been published by the plaintiff himself. A copy of the book was, however, found with the defendant when the commissioner had gone to seize copies of the impugned book. The court also found other evidence of infringement of plaintiff's copyright of 49 pages of his book by the defendant in his book. Under these circumstances, the court held that the defendant had infringed the plaintiff's copyright to the extent of 49 pages in his book. The impugned book of the defendant had been seized under the court's orders and the same was not allowed to be sold in the market. A small amount of Rs. 50 was also granted as damages to the plaintiff.

(c) Cases on Patents and Designs

In *Y.S. Prakasa Rao* v. *Chief Secretary, Government of Andhra Pradesh, Hyderabad*,[91] the petitioner had obtained patent in respect of Telugu typewriters. The government of Andhra Pradesh had evolved a standard key board which was nothing but replica of the key board invented by the petitioner. The government got the typewriters manufactured from companies other than the petitioner and thus committed infringement of petitioner's patent. On the question of damages, the Andhra Pradesh High Court held that the petitioner was in a position to get the typewriters manufactured from standard companies and was entitled to damages on the basis of royalty it might have received on the typewriter machines which could have been sold to the private parties. The petitioner company was also held entitled to damages for loss of goodwill and also interest @ 10% *per annum*. Another case worth mentioning here is *Tobu Enterprises (P) Ltd.* v. *Joginder Metal Works*,[92] in which Delhi High Court held that a suit for permanent injunction restraining infringement of registered design and for rendition of accounts was maintainable. The court also held that the provisions of section 53 (Piracy of Registered Design) could not be interpreted so as to exclude any action for passing off and for rendition of accounts. The court observed that a person complaining of infringement of his design could certainly ask for accounts from the defendant to show the profits earned by the defendant by unlawfully using the design of the registered proprietor because the plaintiff might say that the profit earned by the defendant would be a loss sustained by him which he could claim as damages. Likewise, in *M/s. Niky Tasha (India) Pvt. Ltd.* v. *M/s. Faridabad Gas Gadgets Pvt. Ltd.*,[93] the court

89. *Supra* note 41.
90. *Supra* note 34.
91. *Supra* note 34.
92. *Supra* note 43.
93. AIR 1985 Del. 136.



observed that it was open to a plaintiff at any time after the institution of the suit for infringement of design to move for interlocutory injunction to prevent the defendant from infringing his design between then and the date of trial.

## VII CONCLUSION

## PREVENTION OF IMPORTATION OF INFRINGING PRODUCTS

In their submissions/suggestions, the United States suggests that the procedures contemplated by them include "provisions enabling owners of intellectual property to enforce their rights by petitioning governments to prevent importation of infringing products." In this connection, it is submitted that in India as seen in *Penguin Books Ltd., England* v. *M/s. India Book Distributors*,[94] M/s. Penguin Books Ltd., England were able to stop the imports of books (into India by Indian parties) which infringed their copyright. Likewise, in *Gramophone Company of India Ltd.* v. *Birendra Bahadur*,[95] the Supreme Court held that the word 'import' in sections 51 and 53 of the Copyright Act, 1957 meant 'bringing into India from outside India' and that it was not limited to importation for commerce only but included importation for transit across the country. As a result of this interpretation, the court laid down an authority for the proposition that import of infringing material is to be stopped not only when the infringing material is to be used in India but also in the case when the infringing material is being taken through India to a foreign country. Thus, it is clear that in India the owner of the intellectual property has an enforceable right to prevent importation of infringing products as contemplated by the Americans.

There is another Supreme Court decision on the same point. In *American Home Products Corporation* v. *Mac Laboratories Pvt. Ltd.*,[96] the Supreme Court decided in favour of the American multinational and held that the intention of the American company to use trade mark through its Indian subsidiary, which was to be registered subsequently as the registered user of the said trade mark was *bona fide*. Therefore, the application filed under section 46(1)(a) of the Trade and Merchandise Marks Act, 1958 by the Indian company to have the trade mark in question removed from the register on the ground that the American company had not at any relevant time made use of the trade mark itself and that permitting the use of the trade mark in this manner through a registered user would amount to permitting trafficking in trade marks, was rejected.

The above analysis of the Indian law and cases shows the Indian position in regard to various accusations made before the Negotiating Group on Trade-related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods. The position in Indian law relating to intellectual property rights and their enforcement adequately meets the expectations/aspirations expressed by U.S.A., E.E.C. and Japan.

94. *Supra* note 21.
95. AIR 1984 SC 667.
96. AIR 1986 SC 137.

# PRIVACY AND THE INDIAN LEGAL SYSTEM

GOVIND MISHRA*

## I

IN 1890, Charles Warren and Louis Brandeis published their celebrated article "The Right to Privacy" in the *Harvard Law Review*,[1] which is generally acknowledged as the take off point in the journey of the right to privacy. Commenting upon that article, Roscoe Pound observed that it did nothing less than add a chapter to the law.[2] Whenever any new concept or discipline has emerged, scholars try to trace its origin in the earliest historical documents.[3] And, "privacy" has not been an exception to it.[4]

Professor Westin maintains that man's need for privacy is rooted in his animal origins and that men and animals share several basic mechanisms for claiming privacy among their own fellows.[5] No doubt, there are similarities in the patterns of life of man, animal and plant. All forms of life eat, all classes of animal procreate. Even the plants and trees after they have grown up, bear fruits. There are dissimilarities also which make human life different from animal and plant lives. Rationality and freedom of choice are said to be distinctive properties of human life as compared to animal and plant lives. Thus, there are certain properties of human life which are not shared by animals such as feeling of shame, guilt, indignity, disrespect, etc. It is, therefore, submitted that the origin of privacy is rooted in the above unshared properties of human life which is natural, yet different from animal life. However, all moral and legal considerations are meaningful and applicable only in the context of human behaviour.

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1. 4 *Harv. L. Rev.* 193 (1890).
2. Zelman Cowan, *Individual Liberty and the Law* 80. However, in *Nuth Mull* v. *Zuka-oollah Beg and Kareem-oollah Beg*, SDA, NWP Rep 92 (1855), Begbie, Smith and Jackson JJ recognised the right to privacy in India. In *Manishankar Hargovan* v. *Trikam Narsi*, (1867) 5 Bom. HCR ACJ 42, Tucker and Gibbs JJ held that an invasion of privacy was an infraction of a right for which person injured has remedy at law. In *Gokal Prasad* v. *Radho*, ILR 10 All. 358 (1888), Edge CJ held that substantial interference with such a right of privacy afforded a good cause of action. In the light of these cases, the observation of Roscoe Pound may be accepted as limited to the jurisdiction of the U.S.A. only.
3. Sociology is the last to join the family of social sciences. But antecedent and origin of sociology include the works of Plato and Aristotle.
4. a. Almost the first page of the Holy Bible, writes M.R. Konvitz, introduces us to the feeling of shame as a violation of privacy. After Adam and Eve had eaten the fruit of the tree of knowledge, "the eyes of both were opened, and they knew that they were naked, and they sewed fig leaves and made themselves aprons": M.R. Konvitz, "Privacy and the Law: A Philosophical Prelude", 31 *Law and Contemporary Problems* 272 (1966).
   b. Roman legal system from the very beginning accepted the rules against personal injury (*injuria*) which include rights to feelings of human dignity and self-respect. A person could not be dishonoured or shamed.
   c. Centuries ago eaves-dropping was regarded as a misdemeanor, involving an element of trespass. Offensive shadowing in a public place also came to be treated as wrong: Paul A. Freund, "Privacy: One Concept or Many," in J. Roland Penonock and John W. Chapman (eds.), *Privacy Nomos XIII*, p. 182 (1971).
5. Alan F. Westin, *Privacy and Freedom* 8 (1970).



But human beings are individuated differently in different cultures. The value of a culture lies not only in raising and enlarging the internal man but also in shaping his external existence and advance towards high and great ideals.[6] Thus, the growth of man's total personality is, to a great extent, predicated upon a sound political, economic and social institutions. In a totalitarian state, which traditionally attacks the idea of privacy as "immoral" "anti-social" and "part of the cult of individualism",[7] privacy may not find favourable climate to grow. On the other hand, liberal democratic theory assumes that a good life for the individual must have substantial areas of interest apart from political participation—time devoted to sports, arts, literature and similar non-political pursuits. A liberal democratic system maintains a strong commitment to the family as a basic and autonomous unit responsible for important educational, religious and moral roles and, therefore, the family is allowed to assert claims to physical and legal privacy against both society and the state. As a result of religious diversity and ideas of toleration, most democratic systems make religious choice a "private concern"; both law and custom forbid government controls over the nature and legitimacy of religious affiliation and allow maximum privacy for religious observance.[8]

The political ideology which finds its expression in the regulatory measures of human behaviour in a given society, which is divorced from the natural properties of man and cultural ethos of the society, is bound to be ineffective in the long run. As, for example, recent changes in Soviet law, writes M.C. Setalvad, clearly show a tendency to depart from the original idea of a free dissolubility of the marriage tie. The evolution of Soviet law in various fields is undoubtedly due largely to the change in the form of the state which has developed into an absolute government in which the interests of the state are considered to be paramount. But the return in part to the old ideas in regard to the marriage tie indicates a recognition of the importance of the marriage institution and its need to Soviet society. Nothing could illustrate with greater emphasis the powerful impact which social views and culture have even on absolute governments determined to make a revolutionary break with the past.[9] Further, the 19th All Union Communist Conference in the Soviet Union held in June, 1988 had on its agenda, "to uphold firmly personal and privacy rights" under judicial reform. It also aimed at free speech and untapped telephones.[10]

The importance of privacy as a human right and its need for legal protection has been acknowledged in the following three international documents:

(i) Article 12 of the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on December 10, 1948, reads:

> No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and

6. R. Pal, *History of Hindu Law* 88 (1958).
7. Alan F. Westin, *supra* note 5 at 23.
8. *Id.* at 24.
9. M.C. Setalvad, *Law and Culture* 13 (1965).
10. *Time*, June 27, 1988, pp. 10-11.

reputation. Every one has the right to the protection of the law against such interference or attacks.

(ii) Article 17 of the International Covenant on Civil and Political Rights provides:

> No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

(iii) Article 8 of the European Convention for Protection of Human Rights and Fundamental Freedoms, 1950, provides:

1. Every one 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 a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for protection of the rights and freedoms of others.

A number of international conferences[11] have been held emphasizing the need to protect privacy by law. In several countries, legal measures have been adopted to protect the right to privacy[12] and in many others, committees were appointed to investigate the problem connected with the privacy and make suitable recommendations.[13] Despite its heightened importance, there is no consensus in the legal and philosophical literature on the definition of privacy.[14] For some, privacy is a psychological state, a condition of "being-apart-from-others" —closely related to alienation.[15] To others, privacy is a form of power, "the control we have over information about ourselves",[16] or "the condition under which there is control over acquaintance with one's personal affairs by the one enjoying it",[17] or the individual's ability to control the circulation of information relating to him."[18] Privacy is also defined as "the claim of individuals, groups, or institutions to determine for themselves when, how and to what extent, information about them is communicated

11. May 22-23, 1967, Stockholm, organised by the Swedish section of the International Commission of Jurists, April 14, 1970, Paris, a "round-table" discussion about Legal Data Processing and Human Rights, September 30— October 3, 1970, Brussels, an International Colloquy, as reported by A.H. Roberson (ed.), *The Right of Privacy* (1972).
12. U.S.A., England, Germany, France and Switzerland.
13. England: *Report of the Committee on Privacy* (Chairman: K. Younger); Canada: *Privacy and Computers* a report by a task force, 1972; Isreal: A Committee headed by Supreme Court Judge, I. Cahn, was appointed for the similar purpose; The Australian Law Reform Commission proposed a draft bill on "Publication Privacy", *Discussion Paper No. 1977*.
14. Richard B. Parker, "A Definition of Privacy," 27 *Rutgers L. Rev.* 275 (1974).
15. Weinstein, *The Uses of Privacy in the Good Life, Privacy Nomos* XIII, p. 94.
16. Fried, *An Anatomy of Values* 140 (1970).
17. Gross, *Privacy and Autonomy, Privacy Nomos* XIII, p.169.
18. A. Miller, *The Assault on Privacy. 25 (1971).*



to others."[19] For still others, an important aspect of privacy is the freedom not to participate in the activities of others, a freedom which is lost when we are forced to hear the roar of automobile traffic or breathe polluted air.[20] "Privacy", says Clark Havinghurst, "is viewed, to a large extent, as a cultural norm which has been introduced into a variety of legal issues and which serves the purpose of providing a rallying point for those concerned about the encroachments of mass society on the individual. Its utility is thus much like that of "due process" or "equal protection" in galvanizing the legal system into recognizing and contesting specific threats to freedom - in this case, deep intrusions on human dignity by those in possession of economic or governmental power."[21] They agree neither on the nature of privacy (is it a claim? an area of life? a condition of life?) nor on its characteristics (is it related to being known? to being sensed? to being interfered with?).[22] However, given such diversity of opinion, it will not be out of place to trace briefly the manner in which the western scholars have defined privacy.

In 1888, noting for the first time, "a right to be let alone", Judge Thomas M. Cooley planted the seed for the legal profession's interest in privacy.[23] Two years later, Sammuel Warren and Louis Brandeis cultivated the notion with the seminal analysis of the concept of privacy.[24] They argued:

> Thus, in very early times, the law gave a remedy only for physical interference with life and property, for trespass viet armis. Then the "right to life" served only to protect the subject from battery in its various forms: liberty meant freedom from actual restrain; and the right to property secured to the individual his lands and his cattle. Later, there came a recognition of man's spiritual nature of his feelings and his intellect. Gradually, the scope of these rights broadened; and now the right to life has come to mean the right to enjoy life - the right to be let alone....[25]

They believed that the expansion of property rights constituted a "recognition of man's spiritual nature." The principle which protects personal writings and all other personal productions, not against theft and physical appropriation but against publication in any form is in reality not the principle of private property, but that of an inviolate personality.[26] Many psychologists and sociologists have also defined privacy almost in similar tone. Thus, Bates defines it as "a person's feeling that others should be excluded from some thing which is of concern to him and also recognition that others have right to do this."[27] Chapin defines it as "a value to be

19. Alan F. Westin, *Privacy and Freedom* 7 (1968).
20. Ernest Van Den Haag, *On Privacy, Privacy Nomos* XIII, p. 161.
21. "Foreword", 31 *Law and Contemporary Problems 251 (1966).*
22. Ruth E. Gavison, *Privacy and its Legal Protection* (Unpublished Ph.D. Thesis submitted to the University of Oxford in 1975).
23. Thomas Cooley, *Torts 91 (2nd ed.,1888).*
24. Sammuel D, Warren and Louis D. Brandeis, "The Right to Privacy", *supra* note 1.
25. *Ibid.*
26. *Id.* at 205.
27. A. Bates, "Privacy - A Useful Concept?" 42 *Social Forces* 432 (1964).

oneself: relief from the pressures of the presence of others."[28] Jourard defines it as the "outcome of a person's wish to withhold from others certain knowledge as to his past and present experience and action and his intention for the future; a desire to be an enigma to others or to control others' perceptions and belief about the self."[29]

The above definitions have two common features: The equation of privacy with withdrawal, or the desire to be withdrawn, from public affairs and the assumption that privacy is voluntary and essentially involves individual self-control. It has, however, been criticised from an analytical perspective. Warren and Brandeis interpretation of privacy as a "right to be let alone" that protects man's inviolate personality" is unsatisfying. Their definition is too imprecise for judicial construction and principled application, let alone incorporation into public policy.[30] The criticism, it appears, is too wide to be accepted fully. For instance, the U.S. Supreme Court in *Adair* v. *United States*,[31] declaring a federal antiyellow dog statute unconstitutional as an "invasion of personal liberty" guaranteed by the Fifth Amendment, quoted with approval, from the treatise by Cooley:

> It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason or is the result of whim, caprice, prejudice or malice. With his reasons neither the public nor third persons have any legal concern.[32]

It has rightly been observed[33] that privacy has largely a negative meaning to many Americans in the same sense that Warren and Brandeis's characterization of it as "the right to be let alone" may misleadingly suggest a sense of aloofness and withdrawal from every day life. The opinions of Douglas and Goldberg JJ in *Griswold* v. *Connecticut*,[34] imply that privacy may also be the character of acts performed in public view, for example, joining the NAACP or performing an act of public worship in church. A person may be asserting his right of privacy when he dresses in an unorthodox way,[35] or when he 'loafs' in a public park.[36] A person may claim the right to be let alone when he acts publicly as when he acts privately. Davis suggested that privacy is an interest or condition which derives from and is automatically secured by the protection of more recognizable rights.[37] This approach is extreme in as much as it constitutes an absolute denial of a legal right

28. F.S. Chapin, "Some Housing Factors Related to Mental Hygiene", 7 *J. Soc. Issu.* 164 (1951).
29. Sidney M. Jourard, "Some Psychological Aspects of Privacy", 31 *Law and Contemporary Problems* 307 (1966).
30. David M. O. Brien, *Privacy, Law and Public Policy* 5 (1979)
31. 208 U.S. 161 (1908).
32. *Ibid.*
33. William M. Beaney, "The Right to Privacy and American Law", 31 *Law and Contemporary Problems* 253 (1966).
34. 381 U.S. 479 (1965).
35. *People* v. *O. Gorman*, 274 N Y 284, 8 N. E. 2d 862 (1937)
36. *Territory of Hawai* v. *Anduha*, 48 F 2d 171 (9th Cir.) 1931.
37. Frederick Davis, "What do we Mean by 'Right to Privacy?" 4 *South Dakota L.Rev. 1 at 4-5 (1959).*



and assumes that interests in privacy are not intrinsic but merely derivative from, and instrumental to, other individual rights.

In 1960, William Prosser, after having reviewed a large number of cases, observed:

> It is not one tort, but a complex of four. The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff, in the phrase coined by Judge Cooley, to be let alone.[38]

The four interests and torts Prosser found were described as follows:

1. Intrusion upon the plaintiff's seclusion or solitude or into his private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.
4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

Prosser's classification of privacy interests raised much controversy over the theoretical and legal foundations of privacy. If Prosser's analysis was correct, then Warren and Brandeis were wrong. Instead of a single interest, there were four interests represented by four torts, none of which bore a distinctive interest in privacy. By re-analyzing Prosser's classification, Bloustein attempted to show that the principle of "inviolate personality" was still the fundamental interest in privacy cases. He argued:

> The injury is to our individuality to our dignity as individuals, and the legal remedy represents a social vindication of the human spirit thus threatened rather than a recompense for the loss suffered.[39]

Like Warren and Brandeis, Bloustein assumed that privacy interests have an intrinsic value, and for this reason they involve more than mere protection of instrumental value, such as protection of property, reputation and mental suffering. It has rightly been commented that although Bloustein's critique usefully emphasizes that Prosser's re–examination cannot be accepted unconditionally, his definition, like that of Warren and Brandeis, remains imprecise. The problem with Bloustein's analysis, however, is not that his "explanation is so wide as to be meaningless"[40] but that he does not define and analyze privacy itself. Rather, his approach consists of a broad characterization of the reason privacy is of value at all,

38. William Prosser, "Privacy", 48 *Cali. L.Rev.* 389 (1960)
39. Edward Bloustein, "Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser," 39 N.Y.U.L. Rev. 962 (1964).
40. Gerald Dworkin, "The Common Law Protection of Privacy", 2 U. *Tas. L. Rev.* 418 at 433 (1967).

namely, that privacy is associated with human freedom and dignity. Hyman Gross's[41] definition of privacy as "the condition of human life in which acquaintance with a person or with affairs of his life which are personal to him is limited" does not escape ambiguity although it gives a new dimension to the definition of privacy in terms of control over personal information about oneself which contradicts his analysis of privacy as a condition of life. This definition is too narrow and presupposes that privacy primarily involves control.

Charles Fried offers similar definition of privacy:

> Privacy is not simply an absence of information about us in the minds of others; rather it is the control we have over information about ourselves...
>
> The person who enjoys privacy is able to grant or deny access to others.... Privacy, thus is control over knowledge about oneself...[42]

Alan F. Westin has defined privacy thus:

> The claim of individuals groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others... The right of an individual to decide what information about himself should be communicated to others and under what circumstances viewed in terms of the relation of the individual to social participation, privacy is the voluntary and temporary withdrawal of a person from the general society through physical or psychological means, either in a state of solitude or small group intimacy or, when among larger groups, in a condition of anonymity and reserve.[43]

Arthur Miller has also defined privacy as "the individual's ability to control the circulation of information relating to him."[44] Richard Parker has defined privacy in the following words:

> Privacy is control over when and by whom the various parts of us can be sensed by others.... (more specifically,) control over who can see us, hear us, touch us, smell us, and taste us, in sum, control over who can sense us, is the core of concept of privacy. It is control over the sort of information found in dossiers and data banks.[45]

In certain situations, for instance, when a private "eye" a photographer tracks an individual, that person's privacy may be invaded but in such an instance there is no communication or disclosure of personal information. Many privacy interests that have been constitutionally recognized involve neither dissemination nor acquisition of personal information. Examples range from cases involving music on public buses, loudspeakers on public streets and door to door salesmen to

41. Hyman Gross, "The Concept of Privacy", 42 N.Y.U.L. Rev. 36 (1967)
42. Charles Fried, "Privacy" 77 *Yale* L.J.482-83 *(1965).*
43. Alan F. Westin, *supra* note 5 at 7-8.
44. Arthur Miller, *supra* note 18 at 25.
45. Richard B. Parker, "A Definition of Privacy", *supra* note 18 at 280-81.



decisions on the use of contraceptives and the permissibility of abortions. In all these instances, the interests in privacy have nothing to do with disclosures of personal information but rather with an individual's freedom to engage in private activities. Despite the above criticisms, the definitional approach to privacy as "control over personal information has been appealing for a number of reasons: It embraces a broad range of privacy interests; it appears appropriate and applicable to the problems associated with personal information held by the government agencies, and finally, it tends itself to normative arguments for legislating privacy safeguards.[46]

The conclusions reached at the Nordic conference of jurists in May, 1967 give a considerable broader definition of the legal field covered by the concept of privacy. According to these conclusions, the right to privacy means the right of the individual to lead his own life protected against:

a. Interference with his private, family and home life.
b. Interference with his physical or mental integrity or his moral or intellectual freedom.
c. Attacks on his honour or reputation.
d. Being placed in a false light.
e. The disclosure of irrelevant, embarrassing facts relating to his private life.
f. The use of his name, identity or likeness.
g. Spying, prying, watching and besetting.
h. Interference with his correspondence.
i. Misuse of his private communications, written or oral.
h. Disclosure of information given or received by him in circumstances of professional confidence.[47]

The Indian scholars,[48] who have written articles on privacy, have preferred to rely upon the definition given by the western scholars rather than contributing their own. One of them, of course, initiated the question regarding the concept of privacy in India but concluded with the following observations:

> Our ancient law in Dharmshastras also recognised the concept of privacy. Really, the law of privacy has been well-expounded in the commentaries of the old law. Kautilya in his Arthashatra has prescribed a detailed procedure to ensure right to privacy while ministers were consulted. But neither in ancient law nor in the present

46. David M. O Brien, *supra* note 30 at 13,
47. A. H. Robertson, *supra* note 11 at 31.
48. B. Shanta Kumari, "Infringement of Privacy as an Actionable Tort", VIII The *Year Book of Legal Studies* 92 (1972); F.S. Nariman, "The Right to be Let Alone, - A Fundamental Right", XVII *The Indian Advocate* 76 (1977) Anirudh Prasad, "New Dimensions of the Right to Privacy under the Indian Constitution", XIV J.C.P.S. 252 (1980); Shrinivas Gupta, "Right to Privacy: A Kind of Personal Autonomy", *Lex et Juris* (August 30, 1988).

law the term 'privacy' has anywhere been defined nor any judicial pronouncement has so far come to make the position clear.[49]

Because of certain common features in privacy, secrecy and confidentiality, the distinctive feature among them gets blurred. Privacy as a human right has got to be distinguished from 'secrecy' and 'confidentiality'. Secrecy is a means to an end while privacy is an end in itself. Confidentiality is reposed, secrecy is maintained and privacy is respected. The sole purpose of the detailed procedure prescribed in the Kautilya's *Arthashastra* for consulting the ministers is to ward off possible leakage or divulgence of the state policies in the statecraft the legacy of which is found even today in the provisions of the Indian Official Secrets Act, 1923. This was not to ensure any one's right to privacy. At times, secrecy is maintained to respect one's privacy. In fact, there are several statutes[50] in India which prohibit divulgence of information acquired in the course of one's official capacity. In all such cases, institutional secrecy is maintained to respect individual's privacy who have business relations with institutions. Uncertainty of meaning which thrives because of the conceptual vacuum surrounding the legal notion of privacy is partly because of *a priori* assumptions on the part of the western scholars and derivative status of 'privacy' as interpreted by the judiciary. Even the Warren and Brandeis' article[51] was influenced by their personal grievance against the yellow press. Their work was thus something of a lawyer's catharsis rather than objective scholarship.[52] Privacy, whether legal or mata-legal, cannot be conceived of without "exclusion". But it raises the question: Exclusion from what?." And here is the rub. The end of any legal system is to promote the welfare and happiness of man and not to make him annoyed, embarrassed and unhappy. Viewed in the cross-cultural background, even the concepts of annoyance and embarrassment vary rather widely. The feelings of shame, indignity, disrespect, guilt, embarrassment, annoyance and inconvenience are properties of human nature. But the questions such as what is shameful or disrespect, etc. have got to be decided in the context of a particular culture. This is one of the reasons which defies a universally acceptable definition of privacy. There cannot be a common definition of privacy with uncommon human behaviour. Valmiki rightly defined privacy thus:

49. Shrinivas Gupta, "Right to Privacy: A Kind of Personal Autonomy", *ibid.*
50. Section 44 read with the second schedule of the State Bank of India Act, 1955; secs. 11 and 15 of the Census Act, 1948; sec. 5 of the Bankers' Book Evidence Act, 1891; sec. 51 read with the first schedule of the National Bank for Agriculture and Rural Development Act, 1981; sec. 20 read with the schedule of the National Co-operative Development Corporation Act, 1962; sec. 4(3) of the International Monetary Fund and Bank Act, 1945; secs. 21 and 30 of the Industrial Disputes Act, 1947; sec. 38 read with the schedule of the Export-Import Bank of India Act, 1981; secs. 35 and 36 of the Children Act, 1960; secs. 80 and 80A of the Estate Duty Act, 1953; sec. 39 read with the first schedule of the Deposit Insurance and Credit Guarantee Corporation Act, 1961; sec. 41 read with the first schedule of the Agricultural Refinance and Development Corporation Act, 1963; sec. 13 read with the third schedule of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970; secs. 34A and 36AD of the Banking Regulation Act, 1949 and sec. 9 of the Capital Issues (Control) Act, 1947.
51. *Supra* note 1.
52. *Supra* note 21.



Na Greehani Na Vastrani Na Prakarastirskriya,
Ne Dreesha Rajastkarah Vrittamavararan Striyah.[53]

(Neither the shelter of a house nor the veil, neither high walls, nor honours such as these are the proper safeguards for a women's modesty: it is her own conduct that should guard her).

The word 'avarana' used in the above text means a shield or screen.[54] It connotes exclusion and, thus, may be understood as Sanskrit equivalent of privacy. The genius of Valmiki in indentifying privacy (avarana) with one's conduct adds dynamism to the concept and its definition may vary with varying modes of conduct. It may be understood in the same way as Stammler's celebrated phrase, "natural law with variable contents". Nakedness is not a matter of shame, annoyance or embarrassment for a member of the nudist club. Different legal systems, thus, emphasize different aspects and the customs related to privacy differ greatly from culture to culture, social system to social system and situation to situation. There are frontiers, writes Arnold Simmel, not artificially drawn within which men should be inviolable, these frontiers being defined in terms of rules so long and widely accepted that their observance has entered into the very conception of a normal human being. The frontiers mentioned are "not artificially drawn" because they are recognized in a given culture as legitimate boundarised of the personality.[55] This line of argument becomes clear if one keeps in mind the functional justification of privacy. According to Westin,[56] the functions of privacy in democratic societies can be grouped under the following four headings: (a) Personal autonomy; (b) Emotional release; (c) Self-evaluation; and (d) Limited and protected communication.

### (a) Personal Autonomy

The most serious threat to the individual's autonomy is the possibility that some-one may penetrate the inner zone and learn his ultimate secrets either by physical or psychological means. This deliberate penetration of the individual's protective shell, his psychological armor, would leave him naked to ridicule and shame and would put him under the control of those who knew his secrets. The autonomy that privacy protects is also vital to the development of individuality and consciousness of individual choice in life. Leontine Young noted that "without privacy there is no individuality. There are types only. Who can know what he thinks and feels if he never has the opportunity to be alone with his thoughts and feelings?"[57] This development of individuality is particularly important in democratic societies since qualities of independent thought, diversity of views and non-conformity are considered desirable traits of individuals. Such independence requires time for sheltered experimentation and testing of ideas for preparation and

53. N. Raghunathan (Trans.), III *Srimad Valmiki Ramayanam* 344.
54. Wilson, *Sanskrit English Dictionary*.
55. Arnold Simmel, "Privacy", 12 *International Encyclopedia of Social Sciences* 480.
56. Alan F. Westin, *supra* note 5 at 32.
57. Leontine Young, *Life Among the Giants* (1966), quoted by Alan F. Westin, *id.* at 34.

practice in thought and conduct without fear of ridicule or penalty and for the opportunity to alter opinions before making them public. The individual's sense that it is he who decides when to "go public" is a crucial aspect of his feeling of autonomy. Summing up the importance of privacy for political liberty, Clinton Rossiter stressed the feature of autonomy in the following words:

> Privacy is a special kind of independence, which can be understood as an attempt to secure autonomy in at least a few personal and spiritual concerns, if necessary in defiance of all the pressures of modern society.... It takes to erect an unbreachable wall of dignity and reserve against the entire world. The free man is the private man, the man who still keeps some of his thoughts and judgements entirely to himself, who feels no overriding compulsion to share every thing of value with others, not even those he loves and trusts.[58]

**(b) Emotional Release**

Social scientists agree that each person constantly plays a series of varied and multiple roles depending on his audience and behavioral situation.[59] On any given day, a man may move through the roles of stern father, loving husband, car-pool comedian, skilled lathe operator, union steward, water-cooler flirt, and American legion committee chairman—all psychologically different roles that he moves from scene to scene on the social stage. Like actors on the dramatic stage, Goffman noted,[60] individuals can sustain roles only for reasonable periods of time and no individual can play indefinitely, without relief, the variety of roles that life demands. There have to be moments "off stage" when the individuals can be "himself" tender, angry, irretable, lustful or dream-filled. Such moments may come in solitude; in the intimacy of family, peers or woman to woman and man to man relaxation; in the anonymity of park or street or in a state of reserve while in group. Privacy in this aspect gives individuals, from factory workers to Presidents, a chance to lay their masks aside for rest. To be always "on" would destroy the human organism.

Another form of emotional release is provided by the protection privacy gives to minor non-compliance with social norms. Some norms are formally adopted - perhaps as law - which society really expects many persons to break. This ambivalence produces a situation in which almost every one does break some social or institutional norms - for example, violating traffic laws, breaking sexual mores, cheating on expense accounts, overstating income-tax deductions or smoking in rest rooms when this is prohibited. Although society will usually punish the most flagrant abuses, it tolerates the great bulk of the violations as "permissible" deviations. If there were no privacy to permit society to ignore these deviations- if all transgressions were known—most persons in society would be under organizational discipline or in jail, or could be manipulated by threats of such action. The

58. Clinton Rossiter, *The Pattern of Liberty*, quoted by Alan F. Westin, *ibid.*
59. Goffman, *Presentation of Self* 56-57, quoted by Alan F. Westin, *ibid.*
60. *Ibid.*



firm expectation of having privacy for permissible deviations is a distinguishing characteristic of life in a free society. At a lesser but still important level, privacy also allows individuals to deviate temporarily from social etiquette when alone or among intimates, as by putting feet on desks, cursing, letting one's face go slack or scratching wherever one itches.

Another aspect of release is the "safety-valve" function afforded by privacy. Most persons need to give vent to their anger at "the system", "city hall", "the boss" and various others who exercise authority over them, and to do this in the intimacy of family or friendship circles or in private papers, without fear of being held responsible for such comments. This is very different from freedom of speech or press, which involves publicly voiced criticism without fear of interference by government and subject only to private suit. Rather, the aspect of release concerned here involves commentary that may be wholly unfair, frivolous, nasty and libelous, but is never socially measured because it is uttered in privacy. Without the aid of such release in accommodating the daily abrasions with authorities, most people would experience serious emotional pressure.

Surveillance of bodily and sexual functions by outsiders is practised with social approval only in what sociologists call "total institution"— such as jails, mental institutions and monasteries—or on volunteers in medical or behavioral-science experiments. Even then, prisoners and patients usually complain about being watched and seek ways to escape the constant surveillance of guards.

**(c) Self-evaluation**

Every individual needs to integrate his experiences into a meaningful pattern and to exert his individuality on events. To carry on such self-evaluation, privacy is essential. This is particularly true of creative persons. Studies of creativity show that it is in reflective solitude and even "day dreaming" during moments of reserve that most creative "non-verbal" thought takes place. At such moments, the individual runs ideas and impressions through his mind in a flow of associations; the presence of others tends to inhibit this process. The evaluative function of privacy also has major moral dimension that exercise of conscience by which the individual "represses himself", while people often consider the moral consequences of their acts during the course of daily affairs, it is primarily in periods of privacy that they take a moral inventory of on-going conduct and measure current performance against personal ideals. For many persons, this process is a religious exercise. Religious contemplation, said Coe, was a time for "organizing the self" and William James called religion the experience of "individual men in their solitude".[61] Thus, periods for rumination over past events and for communication with oneself have been said to be "institutionalized in all societies.[62]

A final contribution of privacy to evaluation is its role in the proper timing

61. William James, *The Varieties of Religious Experience* 31 (1902), quoted by Alan F. Westin, *id.* at 37.
62. Alfred R. Lindesmith and A.L. Strauss, *Social Psychology* 435 (1956), quoted by Alan F. Westin, *ibid.*

of the decision to move from private reflection or intimate conversation to a more general publication of acts and thoughts. This is the process by which one tests his own evaluations against the responses of his peers. Given the delicacy of a person's relations with intimates and associates, deciding when and to what extent to disclose facts about himself—and to put others in the position of receiving such confidences-is a matter of enormous concern in personal interaction, almost as important as whether to disclose at all.

**(d) Limited and Protected Communication**

The greatest threat to civilized social life would be a situation in which each individual was utterly candid in his communications with others, saying exactly what he knew or felt at all times. The havoc done to interpersonal relations by children, saints, mental patients and adult "innocents" is legendary. Privacy for limited and protected communication has two general aspects. First, it provides the individual with the opportunity he needs for sharing confidences and intimacies with those he trusts—spouse, the family, personal friends and close associates at work. The individual discloses because he knows that breach of confidence violates social norms in a civilized society. In addition, the individual often wants to secure counsel from persons with whom he does not have to live daily after disclosing his confidences. He seeks professionally objective advice from persons whose status in society promises that they will not later use his distress to take advantage of him. To protect freedom of limited communication, such relationships—with doctors, lawyers, ministers, psychiatrists, psychologists and others—are given varying but important degrees of legal privilege against forced disclosure. The privacy given to the religious confessional in democratic societies is well-known, but the need for confession is so general that those without religious commitment have institutionalized their substitute in psychiatric and counselling services.

In its second general aspect, privacy through limited communication serves to set necessary boundaries of mental distance in interpersonal situations ranging from the most intimate to the most formal and public. In marriage, for example, husbands and wives need to retain island of privacy in the midst of their intimacy if they are to preserve a saving respect and mystery in the relation. These small matters, involving management of money, personal habits and outside activities, to the more serious levels of past experiences and inner secrets of personality. Successful marriages usually depend on the discovery of the ideal line between privacy and revelation and on the respect of both partners for that line. In work situations, mental distance is necessary so that the relations of superior and subordinate do not slip into an intimacy which would create a lack of respect and an impediment to directions and correction. Thus, physical arrangements shield superiors from constant observation by subordinates and social etiquette forbids conversation or off-duty contacts that are "too close" for the work relationship. Similar distance is observed in relation between teacher and student, parent and child, minister and communicant and many others.

Having discussed the above functions of privacy, Westin further observes that privacy functions basically as an instrument for achieving individual goals of



self-realization.[63] As such, it is only part of the individual's complex and shifting system of social needs, part of the way he adjusts his emotional mechanism to the barrage of personal and social *stimuli* that he encounters in daily life. Individuals have needs for disclosure and companionship every bit as important as their need for privacy. To be left in privacy when one wants companionship is as uncomfortable as the inability to have privacy when one craves for it. This balance of privacy and disclosure will be powerfully influenced, of course, both by the societies cultural norms and the particular individual's status and life situation. The basic point is that each individual must, within the larger context of his culture, status and personal situation, make a continous adjustment between his needs for solitude and companionship, for intimacy and general social intercourse for anonymity and responsible participation in society for reserve and disclosure. A free society leaves this choice to the individual for this is the core of the "right of individual privacy"—the right of the individual to decide for himself with only extraordinary exceptions in the interests of society when and on what terms his acts should be revealed to the general public.[64]

It is rather difficult to add anything more to such a detailed description of the functions of privacy as Westin mentioned as noted above. However, his entire description is predicated upon a civilized social life. He has not deliberated over the role of privacy in the transformation of a natural society to a civilized one. For, civilization itself is the progress towards a society of privacy. The savage's whole existence is public. Civilization is the process of setting man free from men.[65] The more one knows about a person, the greater one's power to damage him.[66] To sum up, the functional justification of privacy as a human right lies in protecting human beings against emotional disturbances of anxiety, humiliation, embarrassment,[67] disgrace,[68] inconvenience,[69] annoyance[70] shame and feeling of indignities. It protects morals and ideas of decency.[71]

## II

India, it has been said, is far behind both the United Kingdom and the United States of America in active judicial enforcement or even public discussions of privacy laws.[72] The lack of demand of public debate on the threat to the right to privacy may mislead a casual observer to believe that there are no laws safeguarding this human right in India.[73] In fact, it has not misled a casual observer only but also

64. *Id.* at 39-42.
65. Ayn Rand, *The Fountainhead* 660 (1986)
66. Stanley I. Benn, "Privacy, Freedom and Respect for Persons" *Privacy* Nomos XIII, p. 6.
67. Julius Stone, *Social Dimension of Law and Justice* 213 (1966).
68. *Gokul Prasad* v. *Radho*, *supra* note 2 at 388.
69. *Keshav Harkha* v. *Ganpat Hirachand*, 8 Bom HC ACJ 87 (1871); *Shrinivas Udpirav* v. *Reids*, 9 Bom HC ACJ 266 (1872) and *Bhagwan Das* v. *Sheikh Zamurrad Hussain*, 119 IC 833 (1929).
70. *Kuvarji Premchand* v. *Bai Javer*, 6 Bom HC Rep 143 (1869).
71. *Kanbi Deva Karsan* v. *Kanbi Bara Punja*, AIR 1953 Sau. 67.
72. Richard P. Claude (ed.), *Comparative Human Rights* 150 (1976).
73. *Ibid.*

jurists,[74] journalists[75] and public men[76] to believe that there is no right to privacy in the Indian legal system.

Jagannadhdas J., went one step further to maintain that the Constitution of India does not recognize right to privacy and there is no justification to import it by some process of strained construction.[77] Professor Baxi went to the extreme in subscribing to the view that privacy is alien to Indian culture.[78] The main reason, it appears, which gave rise to such a climate of opinion, is the lack of any serious research in the Indian law on the subject. It has rightly been observed:

> No Indian scholar has yet synthesized existing privacy law so as to identify those principles which are now recessed in the vaults of the law libraries.[79]

It is to dispel such erroneous climate of opinion and as an effort to clean a few layers of dust thus far accumulated on the vaults of law libraries, the present study undertakes a critical examination of the Indian legal system to highlight the safeguards it provides to the right to privacy.

Every society in course of its evolution gathers certain intellectual, ethical and spiritual values. The aggregate of these values can perhaps be said to be the culture of a society at a given period of time. The beliefs, the dogmas, the predilections and the antipathies of the people constituting the society have all a share in the formulations of these values.[80] Ancient Indian theory of knowledge based on the *Upnisads*, aims at the ultimate *Reality* of the universe. Perception deals with objects that come within the range of our senses in which field it is paramount. Inference, which is based on perception, is operative regarding things that are not so perceived but are accessible to the mind. But where perception, inference, etc. fail to give definite knowledge, scriptures like the *Upnisads* are our only guide. The methodology suggested in the *Upnisads* is called *Upasana* or meditation. Its aim is gradually to withdraw the aspirant's mind from external things and direct it inward—to make him more and more introspective so that he may get rid of his dependence on the objective world.[81] Meditation is not possible without concentration and concentration is possible if the person concentrating is not disturbed. Thus, from the very dawn of the Vedic culture, disturbing a mediating sage came to be regarded as a sin or a wrong of the highest order in the Indian society. The following text from the epic *Ramayan* illustrates it:

74. V.R. Krishna Iyer, *Justice and Beyond* 180 (1980); Zelman Cowen, *Individual Liberty and the Law* 80.
75. Ranjit Lal, *Vidura*, Feb. 1981, p. 9.
76. V.N. Gadgil (then Member of Parliament) had introduced "The Right to Privacy Bill, 1981" in Lok Sabha in March, 1981.
77. *M.P. Sharma* v. *Satish Chandra*, AIR 1954 SC 300 at 306-307.
78. K. K. Mathew, *Democracy, Equality and Freedom*, Intro. LXXIV, note 262 (1978).
79. Richard P. Claude (ed.), *Comparative Human Rights supra* note 72 at 150.
80. M.C. Setalvad, Law and Culture, *supra* note 9 at 1.
81. S. Radhakrishnan (ed.), *The Cultural Heritage of India*, vol. 1, pp. 349-50 (1970).



> Yanman lobhayase Rambhe kama krodh jayaininam,.
> Dash varsh sahasrani shailee sthasyasi durbhaga.[82]

(In order to win over sex and anger I was meditating, you have disturbed my meditation as punishment for which you turn to be stone for ten thousand years).

The *Manu Smriti* in its following text also supports the above view:

> Ekaki chintayennityan vivikte hitmatmanah,
> Ekaki chintayanohi paran shreyoadhigachchhati.

(One should meditate alone in a lonely place for only by meditating alone he will attain salvation).[83]

The *Grihya Sutras* contain elaborate rules for the construction of a house. The house consisted of a number of rooms, such as a bed-room *(sayaninya)*, a store-room, a kitchen *(bhakta-sarana)*, a hall or drawing room *(sabha)* and compound.[84] Apte maintains that a bed-room, a drawing-room, provision room and a nursery used to be the parts of a house.[85] The main door of the house was not supposed to face the door of another house and the construction of the house was to be so devised that the house-holder should not be seen by unholy persons while performing religious acts or while dinning in his house.[86] Even in the selection of site for a dwelling house, the main consideration, it appears, was to avoid the sight of persons or things that formed impediments to the studies of the *vedas*.[87]

A few conclusions that may be drawn from the above descriptions are that people wanted to exclude even the sight of unholy persons or strangers while performing religious acts and while dinning. Further, the need or the purpose of having a separate bed-room or a nursery reflects a modicum of privacy in its rudimentary form, a fore-runner of the modern psychiatrists' thesis.[88]

In Kautilya's *Arthashastra* also, elaborate rules regulating the construction of houses are prescribed. The rules prescribed run thus:

82. Ramanarayan Dutta Shastri (ed.), *Valmiki Ramayan* 154.
83. Hargovind Shastri (ed.), *Manusmriti* 276.
84. Ram Gopal, *India of Vedic Kalpasutras* 151.
85. V. M. Apte., *Social and Religious Llife in the Grihya Sutras* 142.
86. *Id.* at 141.
87. *Id.* at 180.
88. Privacy in the bed-room is a necessity for both children and parents and faulty sleeping arrangements represent a subtle form of sexual abuse, observes psychiatrist Gabriel V. Laury of the State University of New York: "Such arrangements are generally made by well meaning parents who are unaware that their child has become an individual with his own personality, his own sexuality, and with a right of modesty and privacy." "Privacy begins with birth", advises Sugar: Keep an infant in a bed-room separate from yours. Psychiatrists generally agree that regular sleeping in a parent's bed can impair the child's psycho-sexual development. An infant who remains in his mother's bed upto a year may have trouble acquiring a sense of identity—separate from his mother, cautions Sugar. The child may develop anxiety, even panic, when separating from his mother. As a boy gets older, sleeping in his parent's bed may promote an unconscious wish to possess his mother and remove his father. A little girl can develop similar feelings for her father and against her mother. R. Howard and E. Lewis Martha, "Bedrooms", *Sexology Today* 41-42 (Sept., 1980).

> The owners of houses may construct their houses in any other way they collectively like, but they shall avoid whatever is injurious. With a view to ward off the evil consequences of rain, the top of the roof shall be covered over with a broad mat, not blowable by the wind. Neither shall the roof to be such as will easily bend or break. Violation of this rule shall be punished with the first amercement. The same punishment shall be meted out for causing annoyance by constructing doors or windows facing those of others' houses, except when these houses are separated by the king's road or the high road....[89]
>
> With the exception of private rooms and parlours (angana) all other parts of houses as well as apartments where fire is ever kindled for worship or a mortar is situated shall be thrown open for common use.[90]

It is evident from the above excerpts that the houses used to be divided into two main parts, viz. (a) private rooms and parlours meant for exclusive use of ladies and (b) the rest of the house open for common use. Here the phrase "common use" must be understood in a sense implying common use for the family members alone. The sanctity of the family house was secured by prohibiting persons to enter another's house (without the owner's consent) either during the day or night. The punishment prescribed for violation of such prohibition was the first amercement and the middle most amercement respectively.[91] Further, any one who used to construct doors and windows facing others' houses causing annoyance to his neighbours was to be punished. One among the factors causing annoyance was the exposure of private rooms and parlours meant for exclusive use of ladies, for they were not supposed either to be seen by male (stranger) or go out of their houses. This prescription of *Arthashastra* is nothing but the contemporary customary right to privacy as adhered to by the Indian and British Indian courts which got codified under section 18 of the Indian Easements Act, 1882 also.[92]

The ancient Indian society in general was duty-oriented and, therefore, the right of an individual can be inferred from the duties thus imposed. For example, the text, *na suptan pratibodhayet* (a sleeping man ought not to be disturbed), imposes a general duty not to disturb any one's sleep. It may be inferred from the above text that every one enjoyed the right of undisturbed sleep. The *Manu Smriti* enjoins, *"shreyansan na prabodayet"* (the elders should not be disturbed while sleeping).[93] In fact, even the laws of war as enshrined in the epic, *Mahabharat* prohibited killing

89. R. Shamasastri (Trans.), *Kautilya's Arthasastra* 189 (1961).
90. *Id.* at 190.
91. *Id.* at 261.
92. Section 18, Illustration (b) is worded thus :
    By the custom of certain town no owner or occupier of a house can open a new window therein so as substantially to invade his neighbours' privacy. A builds a house in the town near B's house. A thereupon acquires an easement that B shall not open new windows in his house so as to command a view of the portions of A's house which are ordinarily excluded from observation, and B acquires a like easement with respect to A's house.
93. Hargovind Shastri (ed.), *Manusmriti* 339.



of a person while sleeping.[94] A woman was not supposed to be seen by any male (stranger). This is amply supported by both the epics *Ramayan* and *Mahabharat*. But mere glance was not considered a wrong. It was the mental approach revealed through such glance that was the determining factor to establish whether a wrong was committed.[95] The practice of putting veil while stirring out of the house for ladies is also described in the epic.[96] Further, not only to see other women but to touch them was also considered a wrong.[97] Overhearing confidential talks and seeing others involved in such talks was meted out with rigorous punishment.[98] Impersonation was prohibited and penalized.[99] One who used to divulge the misdeeds of another when confidentially informed in a lonely place for keeping it secret was to be punished.[100] Once the King Pandu, killed a he-deer while it was enjoying sex with a she-deer. The deer was none else but a transmigrated sage, named Kindam, who made his dying declaration as under:

> Ahan hi Kindamonama tapasapratimo munih,
> Vyapatra panmanushyanan mreegah maithun macharam.[101]
>
> (I am a sage named Kindam. To avoid the feeling of shame I became a deer and was enjoying sex with a she-deer).

The above text establishes that the feeling of shame is a peculiar property of human nature which distinguishes human sex from animal sex. It is the feeling of shame that drives human beings to a lonely place for the enjoyment of sex. The sage, Parasara, desired to have sexual intercourse with the girl known as Matsyagandha and signified his desire to her. This all happened near a river on both sides of which several people were having their bath. Matsyagandha replied:

> Sabravitpashya Bhagwanparavare rishinshthitan,
> Avaryodrishyatorevih kathan tusyatsmagamah.[102]
>
> (Don't you see many sages standing on both sides of the river? How can I have sexual intercourse with you within the reach of their sight).

A review of the above authorities amply proves the prevalence of rules respecting the privacy of individuals in ancient Indian society. A person was not to be disturbed while meditating, sleeping or studying. Enjoyment of sex and food were recommended in a secluded place, away from the sight of others. Even the call of nature was attended in a secluded place where one may not be observed by others. Even the prisoners and slaves were protected in their daily avocations of sleeping, eating, sitting or excreting. A male was enjoined not to see, touch or meet other woman in a lonely place. Visits to others' house without the owner's consent at odd

94. Shreepad Damodar Satavalekar (ed.), *Mahabharat* 34 and 424.
95. Ramanarayan Dutta Shastri (ed.), *Valmiki Ramayan* 775.
96. *Id.* at 1401 and 1402.
97. *Id.* at 496, 606, 915 and 963.
98. *Id.* at 1666.
99. *Id.* at 126.
00 *Id.* at 392.
101. Shreepad Damodar Satavalekar (ed.), *Mahabharat* 595.
102. *Id.* at 301.

hours and during nights were prohibited. The practice of veiling eyes among a section of women was also in existence. Information given in confidence was not supposed to be divulged. The *Mitakshara* enjoins that one who wears other's garments shall be punished.[103] It may be relevant to mention here that the considerations as to what information ought to be withheld by an individual entered into the very ethical code of conduct prescribed in the ancient Indian society. The following texts exemplify this:

> Susidhh moukhadhan dharman greehachchhidran cha maithunam,
> Kubhuktan kushrutan chairva matimannaprakashyet.[104]

(The medicine the effectiveness of which has been tested or proved, acts pertaining to religion, defect of one's family, sexual matters, eating prohibited food and hearing insulting words ought not to be made open by a prudent man).

> Darekhu kinchit swajanekhu kinchid gopyan vayasyekhu,
> Sutekhu kinchit, yuktan na va yuktan maidan vichintya,
> Veda dvipashchinma haton anurodhat.[105]

(One ought to keep secret something from his wife, something from his relatives, something from his friends and something from his son. When asked by his elders, a prudent man should reply after having taken into consideration whether such disclosure of confidential matter is proper).

In 1888, Edge CJ of the Allahabad High Court had observed :

> In my opinion, the fact that there is no such custom of privacy known to the law of England can have no bearing on the question whether there can be in India an usage or custom of privacy valid in law. The conditions of domestic life in the two countries have from remote times been essentially different, and in my opinion, it is owing to that difference in the conditions of domestic life alone that a custom which appears to me to be a perfectly reasonable one in India should be unknown in England.[106]

Urging the right to privacy for the British nationals on the basis of the Indian cases, Percy H. Winfield, in 1931, made an appeal to the House of Commons wherein he said:

> The Indian cases have been referred to not of course, for the purpose of urging their application to the different particular circumstances which prevail in England, but as an illustration of pliability of Indian law where the need of protecting privacy has been felt. It will be seen when we pass to consider personal privacy that our law probably lags behind the needs of a community in which intrusion on privacy is apt to take offensive forms owing to the modern development of instantaneous photography and of method of advertisement which, to say the least of them, are totally indifferent to the feelings of private individuals.[107]

103. J. R. Gharpure (Trans), *The Mitakshara*, verse 238, p. 364.
104. Rupnarain Pandey (Trans), *Chanakyaniti Darpan* 103.
105. Ramchandra Jha, (ed.), Panchatantra 180.
106. *Gokal Prasad* v. *Radho, supra* note 2.



The customary right to privacy, referred to above, has been upheld by several High Courts in India even today.[108] For almost a century, the criminal law in India has embodied some of the modern constitutional safeguards which the other nations did not apply as national standards until the 1960's.[109] The Indian Penal Code[110] makes it a crime to intrude upon the privacy of a woman. It was neither imported from England nor a creation of the genius of Thomas Babington Macauley but only a codification of a long established tradition of the Indian people. The penal provisions not only guarantee one's right to life[111] but also protect him against infliction of any pain, disease or infirmity.[112] The prohibition of the use of criminal force[113] is to protect one from injury, fear and annoyance.[114] In making an arrest, the police officer has been authorised actually to touch or confine the body of the person to be arrested,[115] but the provision does not make it mandatory that for effecting the arrest, the police officer should actually touch or confine the body of the person to be arrested before a person can be said to be taken in custody; submission to the custody by word or action is sufficient.[116] Handcuffing and iron bar have been outlawed by the Supreme Court except in exceptional circumstance,[117] of course, that too with the approval of the presiding judge. Hovever, the power to arrest is not unrestricted. If the police officers (or any other person having authority to arrest) maliciously confine persons knowing that in doing so they are acting contrary to law, they are liable to be punished.[118] There are several other statutes[119] which make vexatious and unnecessary detention or arrest of an individual punishable if there exists no reasonable ground of suspicion.

107. P.H. Winfield, "Privacy", 47 LQR 23 at 29-30 (1931).
108. *Ganesh Lal* v. *Smt. Rasool Fatima*, AIR 1977 All. 118; *Bhajgovind Chunilal Sevak* v. *Heeralal Gordhandas Sevak*, AIR 1942 Bom. 217; *Achhar Singh* v. *Pritoo*, ILR 1974 Him. 876; *Gulab Chand Gappa Lal Sarawgi* v. *Manik Chand Gulab Chand Sarawgi*, AIR 1960 M P 263; *Keshao Sahu* v. *Dasarath Sahu*, AIR 1961 Ori. 154; *Syed Habib Hussain* v. *Kamal Chand*, AIR 1969 Raj. 31; *Kaur Sain* v. *Bibi Birinder Kaur*, AIR 1971 P & H 489.
109. The United States Supreme Court decided *Miranda* v. *Arizona*, 384 U.S. 436 (1966), which is less stringent in some regards as compared to sec. 164(3) of the Code of Criminal Procedure, 1898 and secs. 25 and 26 of the Indian Evidence Act, 1872. The latter prohibits the admissibility of any confession of guilt made to a police officer "unless it be made in the immediate presence of a Magistrate."
110. The Indian Penal Code, 1860, sec. 509.
111. *Id.* sec. 302.
112. *Id.* sec. 319 read with sec. 321.
113. *Id.*, sec. 352.
114. *Id.* sec. 350
115. The Code of Criminal Procedure, 1973, sec. 46.
116. AIR 1960 SC 1125 at 1131.
117. *Prem Shankar* v. *Delhi Administration*, AIR 1980 SC 1535 at 1541-43.
118. The Indian Penal Code, 1860, sec. 220.
119. The Opium Act, 1878, sec. 18; the Central Excises and Salt Act, 1944, sec. 22; the Medicinal and Toilet Preparations (Excise Duties), Act, 1955, sec. 17; the Gold Control Act 1968, sec. 94; the Foreign Exchange Regulation Act, 1973, sec.58 and the Customs Act, 1962, sec. 136.

The relevancy of a confession in criminal proceedings depends on whether or not the confession had been made because of any inducement, threat or promise.[120] The exclusion of confessions made to a police officer[121] or while in the custody of a police officer[122] from permissible evidence is not only to ward off the malpractices of police officers in extorting confessions from the accused in order to gain credit by securing convictions,[123] but also to manifest the legislative policy that the confession must always be made by the accused out of his free will. Further, it has been provided that no influence by means of any promise, threat or otherwise shall be used on an accused person to induce him to disclose or withhold any matter within his knowledge.[124] The Indian legal system thus projects an individual as a free willing entity. It further ensures that the consent of an individual as and when required to be exercised must be free.[125] Consent is said to be free when it is not caused by coercion, undue influence, fraud, misrepresentation and mistake.[126] The free consent is a condition precedent for the validity of a contract.[127] A fundamental legal principle embodied in the maxim, *volenti non-fit injura* (i.e. damage suffered by consent is not a cause of action) usually relied upon in tort cases, as a general defence, also requires 'consent' to be free.[128] Consent obtained by fraud or compulsion does not serve as a good defence in tort cases.[129] In certain cases, consent is a defence in the criminal proceedings as well.[130]

If any commission, corporation or other body constituted under an Act collects information in respect of any industry or commercial concern or any undertaking required under the Act from the owner of such industry, commercial concern or the undertaking, the information thus collected shall not be disclosed without the consent of the owner.[131] There are several statutes[132] which require the consent of the occupier or owner (as the case may be) to be obtained prior to any entry made into any dwelling house, building or the like premises. The wife is not permitted to disclose any communication made by her husband without his consent and the husband cannot disclose any communication made by his wife unless she

120. The Indian Evidence Act, 1872, sec. 24.
121. *Id.*, sec. 25.
122. *Id.*, sec. 26.
123. *Queen Empress* v. *Babu Lal*, (1884) 6 AU 509 cited by Woodroff and Ameer Ali, *Law of Evidence*, vol. I, p. 585.
124. The Code of Criminal Procedure, 1973, sec. 316.
125. Distinctive fracture between "will and "consent" lies in the decisional aspect of the latter which is wanting in "will", though both pertain to an individual's volition.
126. The Indian Contract Act, 1872, sec. 14.
127. *Id.*, sec. 10.
128. *Broom's Legal Maxims* 181 (1969).
129. R.K. Bangia, *The Law of Torts*, 39 (1989).
130. The Indian Penal Code, secs. 87-92.
131. The Tariff Commission Act, 1951, sec. 22; the Collection of Statistics Act, 1953, sec. 7 and the Monopolies and Restrictive Trade Practices Act, 1969, sec. 60.
132. The Oriental Gas Company Act, 1857, sec. 2; the Indian Works of Defence Act, 1903, sec. 4; the Cantonments Act, 1924, sec. 247; the Road Transport Corporations Act, 1950, sec. 42; the Slum Areas (Improvement and Clearance) Act, 1956, sec. 27 and the National Waterways Act, 1982, sec. 10.



consents.[133] An advocate is not permitted to disclose any communication made to him in the course and for the purpose of his professional employment without his client's express consent.[134] Thus, all possible precautions seem to have been taken in the Indian legal system in providing safeguards to an individual against his annoyance or vexation. Several statutes, over and above criminal law, make vexatious and unnecessary entrance into the house, searches and seizures and arrests punishable.[135]

Much before the Constitution of India, the right to freedom of religion was well protected in the Indian legal system. Chapter XV of the Indian Penal Code, 1860, dealing with offences relating to religion, presupposes the existence of such a right. Any one who outrages the religious feeling of others or insults or attempts to insult the religious beliefs of any class is liable to be punished.[136] Even causing disturbance to religious assembly engaged in worship or other religious ceremonies is prohibited and made punishable.[137] The religious feeling of an individual, thus, is well protected in the system.[138] Those subject to the Army Act and Air Force Act, have similar protection of their religious freedom.[139] Similar provisions for performing religious duties have been extended to the naval officers and the members of the crew even on their respective ships.[140] Even for prisoners of war[141] and protected persons,[142] due facilities for performance of their religious duties have been provided. Religion, as a matter of faith, is so personal that it cannot be shared by even one's nearest and dearest. If the wife is obstructed in the observance of her religious duties by her husband, she is entitled to obtain a decree for the dissolution of her marriage.[143] The foregoing provisions establish it beyond any doubt that an individual enjoys complete autonomy in matters of religious faith in the Indian legal system.

Formed out of an instinctive nature of man to love and procreate,[144] the family group is based on the privacy of relations between husband and wife and their children.[145] Although with the growth of welfare state and the trend towards expansion of individual rights, the state is taking an active and, often , a command-

133. The Indian Evidence Act, 1872, sec. 122.
134. *Id.*, sec. 126.
135. The Opium Act, 1878, sec. 18; the Glanders and Farcy Act, 1899, sec. 12; the Dourine Act, 1910, sec. 12; the Ancient Monuments Preservation Act, 1904, sec. 17; the Indian Forest Act, 1927; sec. 62; the Central Excises and Salt Act, 1944, sec. 22; the Medicinal and Toilet Preparations (Excise Duties) Act, 1955, sec. 17; the Foreign Exchange Regulation Act, 1973, sec. 58 and the Customs Act, 1962, sec. 136.
136. The Indian Penal Code, 1860, sec. 295-A.
137. *Id.*, sec. 296.
138. *Id.*, sec. 290.
139. The Air Force Act, 1950, sec 66; the Army Act, 1950, sec. 64; the Border Security Force Act, 1968, sec. 41 and the Manoeuvres, Field Firing and Artillery Practice Act, 1938, sec. 3.
140. The Indian Navy (Discipline) Act, 1934, sec. 1-A.
141. The Geneva Conventions Act, 1960, article 34 read with third schedule.
142. *Id.*, article 27 read with fourth schedule.
143. The Dissolution of Muslim Marriages Act, 1939, sec. 2.
144. H.S. Gour, *Penal Law of India*, vol. I., p. 3.
145. W. Friedmann, *Law in a Changing Society* 172.

ing role in the regulation of family life yet the protection of the institution of family and its inviolability is considered as indispensable in any orderly society. And the Indian legal system is no exception to it. It ensures every man to enjoy complete freedom within his house. Trespass may be justified either by the authority or consent of the person concerned or the authority of law.[146] Even where entry into a dwelling house is authorised by or under an Act, such entry is not made without the consent of its occupier or owner.[147] In some Acts, seven days previous notice to the owner or occupier is required to be given before the intended entry into the dwelling house.[148] In some others, it is only after giving reasonable notice to the occupier or owner that entry is allowed.[149] The entries thus authorised by or under an Act are further regulated keeping in view the convenience of the inmates of the dwelling houses. Most of the entries are required to be made only during the day time[150] or reasonable time[151] or in the reasonable hour in the day time.[152] Whenever a dwelling house is entered, due regard ought to be paid to the social and religious customs and usages of the occupants.[153]

Barring the above authorised entries into the dwelling house, the crime of 'house trespass'[154] (which is punishable[155] under the Indian Penal Code) preserves the inviolability of one's dwelling house. The underlying purpose of chapter XX of the Code is to penalise extra-marital sex. But, for the offences mentioned in the chapter, no court can take cognizance except upon a complaint made by some person aggrieved by the offence.[156] It has been observed that the offences referred to in the section are of private character and the object of the section is to limit the persons by whom proceedings can be initiated and ensure that it is not in the power of any and every body to drag such offences in a court of justice.[157] The inviolability of the family life is further protected under the Indian Evidence Act which provides that no person shall be compelled to disclose any communication made between husband and wife.[158] The underlying basis of the above provision is that the

146. B.S. Sinha, *An Introduction to Law of Torts through Indian Cases* 155.
147. The Orient Gas Company Act, 1857, sec. 2; the Cantonments Act, 1924, sec. 247; the Road Transport Corporations Act, 1950, sec. 42; the Slum Areas (Improvements and Clearance) Act, 1956, sec.57; the National Waterways (Allahabad-Haldia Stretch of the Ganga-Bhagirathi, Hoogli River) Act, 1982, sec. 10.
148. The Indian Works of Defence Act, 1903, sec. 4 and the Northern India Canal and Drainge Act, 1873, sec. 14.
149. The Electricity Supply Act, 1948, sec. 74; the Metro Railways (Construction of Works) Act, 1978, sec. 24.
150. The Code of Civil Procedure, 1908, secs. 55 and 62; the Slum Areas (Improvement and Clearance) Act, 1956, sec. 26; the Cantonments Act, 1924, sec. 246; the Road Transport Corporations Act, 1950, sec. 42.
151. The National Waterways (Allahabad-Haldia Stretch of the Ganga-Bhagirathi, Hoolgali River) Act, 1982, sec. 10; the Electricity Supply Act, 1948, sec. 74.
152. The Metro Railways (Construction of Works) Act, 1978, sec. 24.
153. The Cantonments Act, 1924, sec. 248.
154. The Indian Penal Code, 1860, sec. 442.
155. *Id.*, sec. 448.
156. The Code of Criminal Procedure, 1973, sec. 198.
157. *A.I.R. Manual*, vol. 13, p. 398 (4th ed., 1979).
158. The Indian Evidence Act, 1872, sec. 122.



admission of such testimony have a powerful tendency to disturb the peace of families and weaken, if not to destroy, the mutual confidence upon which the happiness of the married life depends. The prohibition rests on no technicality that can be waived at will, but is founded on a principle of higher import which no court is entitled to relax.[159] The protection is not confined to cases where the communication sought to be given in evidence is of a strictly confidential character, but the seal of the law is placed on all communications of whatever nature which pass between the husband and wife. It continues even after the marriage has been dissolved by death or divorce.[160]

There are provisions prohibiting the employment of children below fourteen years of age in any hazardous industry or workshop. The parents or guardians of such children are liable to penal consequences if they agree to pledge the labour of such child.[161] It is significant to note that the above restriction in respect of the child labour does not hold good if the child is employed in a workshop wherein any process is carried on entirely with the aid of his family members without employing outside hired labourers.[162] Such relaxation speaks nothing else except inviolability of family life in the Indian legal system.

Regard being had to the delicate and confidential nature of relationship between the client and the lawyer, the patient and the doctor and the like, the Indian legal system obligates the professionals not to reveal the confidential information obtained in the course of their professional functions. An advocate is not permitted to disclose any communication made to him in the course, and for the purpose, of his employment as an advocate without the express consent of his client. The contents or condition of any document with which he has become acquainted in the course of his professional employment or any advice given are also not to be disclosed by him. The obligation thus imposed on him continues even after his employment has ceased.[163] The interpreters and the clerks or servants of such advocates are also under the same obligation.[164] Further, no one is to be compelled to disclose to the court any confidential communication which has taken place between him and his legal professional adviser.[165]

Commenting upon the above provisions, it has been observed that the rule is established for the protection not of the legal adviser but of the client and the privilege, therefore, may only be waived by the latter. It is founded on the impossibility of conducting legal business without professional assistance and on the necessity in order to render that assistance effectual, of securing the fullest and most unreserved communication between the client and his legal adviser.[166] Simi-

159. *Ram Chandra* v. *Emperor*, 1933 Bom. 153: 35 Bom L R 174.
160. Woodroff and Ameer Ali, *Law of Evidence*, vol.3, p. 2402 (12th ed., 1968).
161. The Children (Pledging of Labour) Act, 1933, sec. 4.
162. The Employment of Children Act, 1938, sec. 3 read with schedule; the Beedi and Cigar Workers (Condition of Employment) Act, 1966, sec. 43.
163. The Indian Evidence Act, 1872, sec. 126.
164. *Id.*, sec. 127.
165. *Id.*, sec. 129.
166. Woodroff and Ameer Ali, *Law of Evidence*, vol. 3, *supra* note 160 at 2531.

larly, the respect for human dignity is the principal objective of the medical profession.[167] Confidences concerning individual or domestic life entrusted by patients to a physician and defects in the disposition or character of the patient observed during medical attendance should never be revealed unless their revelation is required by the laws of the state.[168] To publish without permission photographs or case reports of the patients in any medical or other journal in a manner by which their identity could be made out is prohibited.[169] Every dentist has a duty to keep all the information of a personal nature which he comes to know about a patient directly or indirectly in the course of professional practice in utmost confidence.[170] The Chartered Accountants Act,1949 provides that if a chartered accountant discloses information acquired in the course of his professional engagement to any person other than his client, without his consent or otherwise than as required by any law for the time being in force, he shall be guilty of conduct rendering him unfit to be a member of the institute.[171] For the practising cost accountant as well, it is a professional misconduct to disclose information acquired in the course of his professional engagement to any person other than the client, without the consent of such client, or otherwise than as required by any law for the time being in force.[172] If any cost accountant is found guilty of such a misconduct, the council shall forward the case to the High Court for proper and adequate action along with its own comments.[173]

The Indian legal system provides measures to ensure an individual's free choice at an election. The officers and the staff employed in conducting the election including members of a police force attached thereto, have been prohibited from persuading any person to give or not to give his vote at an election or to influence the voting of any person in any manner. The violation of the above prohibition entails penal consequences.[174] Interference or an attempt to interfere with the free exercise of any electoral right amounts to the offence of undue influence at an election[175] which has been made punishable.[176] Elaborate provisions have been made to prevent personation of electors.[177] An indelible ink mark is to be put on the elector's left forefinger before he is allowed to vote. In case he refuses such marking, he may not be allowed to vote or he many not be issued any ballot paper at all.[178] Any one who commits the offence of personation at an election is punishable under the criminal law as well.[179] The most important aspect of the election law in India (for

167. The Code of Medical Ethics, reg. 2, p. 2.
168. *Id.*, reg. 11, p. 4.
169. *Id.*, reg. 11 and 14, p. 11.
170. The Dentists (Code of Ethics) Regulations, 1976, reg. 4(g).
171. The Chartered Accountants Act, 1949, sec. 22 read with schedule (g).
172. The Cost and Works Accountant Act, 1959, sec. 22 read with second schedule.
173. *Id.*, sec. 21 (5).
174. The Representation of the People Act, 1951, sec. 129.
175. The Indian Penal Code 1860, sec. 171C.
176. *Id.*, sec. 171F.
177. The Representation of the People Act, 1951, sec. 61.
178. The Conduct of Election Rules, 1961, rule 37.
179. The Indian Penal Code, 1860, sec. 171D read with sec. 17F.



the present purpose) is that which immunises an individual from even being questioned as to whom he has voted for at an election. In case of dispute, it has been provided that no witness or other person shall be required to state for whom he has voted at an election.[180]

Under almost a century old statutes,[181] the Indian legal system provided for inviolability of mails and messages of an individual. Anybody employed to carrv and deliver the postal article (which expression has been defined to include a letter, post card, newspaper, book, pattern or sample packet, parcel and every article or thing transmissible by post,)[182] if found guilty of carelessness endangering the safety of postal articles or causing delay in its conveyance or delivery is liable for punishment.[183] Detaining the mails or postal articles or even opening the mail bag in course of transmission by post by any person without due authority under the Indian Post Office Act or any other Act for the time being in force, is made punishable.[184] If any officer of the post office, contrary to his duty, opens any postal article in the course of transmission by post or wilfully detains or delays such postal article, he is liable for punishment.[185] Similarly, the Indian Telegraph Act prescribes additional punishment for one who unlawfully tries to learn the contents of any message given for transmission in the telegraph office.[186] A telegraph officer is under a duty not to disclose the contents of any telegram to any person other than the sender or the addressee or the authorised representative of either.[187] It is only the sender or the addressee or their duly authorised representative who is permitted either to inspect or obtain copies of the telegrams kept as record in the telegraph office.[188] The Indian Telegraph Act, 1885 was amended by the Parliament in 1972 which authorises certain officers to intercept such messages or stop their transmission if it was considered to be in the interest of the country or the public for the maintenance of friendly relations with foreign states, etc.[189]

Commenting upon the above amendment, it has observed[190] that the right of privacy in India suffered a set back in 1972. It is submitted that the amendment may be rationalised if it is thought of as imposing a reasonable restriction on the right in question keeping in view the paramount interest of national security risks and friendly relations with foreign countries. But the most obnoxious and controversial provision of the Act, which has missed the learned commentator's attention is the emergency power of the state. Both the Acts empower the state to intercept mails and messages during public emergency.[191] In sub-section (2) of section 26 of the

180. The Representation of the People Act, 1951, sec. 94.
181. The Indian Post Office Act, 1898 and the Indian Telegraph Act, 1885.
182. The Indian Post Office Act, 1898, sec. 2(i).
183. *Id.*, sec. 49.
184. *Id.*, sec. 67.
185. Id., sec. 53.
186. The Indian Telegraph Act, 1885, sec. 24.
187. The Indian Telegraph Rules, 1951, rule 7.
188. *Id.*, rr.165 and 166.
189. The Indian Telegraph (Amendment) Act, 1972, sec. 2.
190. Richard P. Claude (ed.), *Comparatine Human Rights 80* (1976).
191. The Indian Telegraph Act, 1885, sec.5 and the Indian Post Office Act, 1898, sec. 26.

Post Office Act (which corresponds to sub-sec. (2) of section 5 of the Indian Telegraph Act, 1885), it is provided that if any doubt arises as to the existence of a public emergency or as to whether any act done under that provision was in the interest of public safety or tranquility, a certificate of the central government or the state government shall be conclusive proof on the point.[192] Both the sections make the issue of a certificate by the government conclusive proof of the existence of public emergency and thereby making it non-justiciable which is the hall-mark of its infirmity and misgivings. Serious objections have been raised from responsible quarters which have sought the repeal of the above two sections. A petition was presented to the Lok Sabha by the People's Union for Civil Liberties of this effect.[193] Even when section 26 was enacted, P. Ananda Charlu, who was the member of the Select Committee, penned a strong note of dissent. In its thirty-eighth report, submitted in February, 1968, the Law Commission expressed misgivings about the constitutional validity of section 26. The Commission suggested deletion of sub-section (2) relating to certificates and its substitution by a new sub-section, according to which the power under the section could be exercised only in the interest of the security of the state, public order, friendly relations with foreign nations or preventing incitement to commission of an offence.[194] Thus, as the position stands to-day, subject to the overriding powers of the state during public emergency, inviolability of mails and messages is well protected in the Indian legal system in normal and general circumstances.

Yet another but related aspect is the provision regarding *in camera* trial which stands as an admission on the part of the administration of justice of those qualities of individuals which inhibit them to speak out certain facts in front of general public coupled with a policy consideration that certain matters of intimate and personal nature or prejudicial to the safety of the state[195] ought not to be discussed in general public. Majority of the Acts which provide for *in camera* proceedings relate to, and deal with, the metrimonial causes.[196] In some cases,[197] proceedings may be conducted *in camera* if (a) either party so desires, or (b) if the court thinks fit to do so. If either party should desire the proceedings to take place *in camera*, the court has no discretion to refuse such desire. Even when neither party so desires it is open to the court in its discretion to hear and conduct such proceedings *in camera*. In some cases, it is entirely left to the discretion of the court alone to conduct the proceedings in *camera*.[198] On the other hand, in one case, it is the

192. The Indian Post Office Act, 1898, sec. 26 (2) and the Indian Telegraph Act, 1885, sec. 5 (2).
193. *The Hindustan Times*, April 9, 1982.
194. H.R. Khanna, "Intercepting letters: Invasion of the Right to Privacy", *The Statesman*, Sept. 15, 1981.
195. The Indian Official Secrets Act, 1923, sec. 14.
196. The Converts' Marriage Dissolution Act, 1866, sec. 14; the Indian Divorce Act, 1869, sec. 53; the Parsi Marriage and Divorce Act, 1936, sec. 43; the Special Marriage Act, 1954, sec. 33 and the Hindu Marriage Act, 1955, sec. 22.
197. The Special Marriage Act, 1954, sec. 33; the Hindu Marriage Act, 1955, sec. 22.
198. The Converts' Marriage Dissolution Act, 1866, sec. 14 and the Indian Divorce Act, 1869, sec. 53.



discretion of the parties alone to request for *in camera* proceedings and no reference to the court's discretion is mentioned.[199]

The Code of Criminal Procedure empowers the presiding judge or magistrate to exclude the general public or any particular individual from any enquiry or trial of any case, at any stage at his discretion.[200] The Lunacy Act provides for the consideration of the petition in private in the presence of the petitioner or his or her representative and such other persons as thought fit.[201] Under the Monopolies and Restrictive Trade Practice Act, it is provided that if the commission is satisfied of the confidential nature of any offence or for any other reason, it may hear proceeding in private, give directions as to the persons who may be present there and prohibit any publication of evidence given before it.[202]

Much of the significance of the trial *in camera* will be lost if the proceedings are allowed to be published to the knowledge of the general public. The courts, therefore, have been empowered to prohibit any publication of such proceedings without obtaining their prior permission. The Hindu Marriage Act provides that no person shall be allowed to print or publish any matter in relation to the proceeding *in camera* without obtaining prior permission of the court.[203] Any publication of such proceeding *in camera* without obtaining prior permission of the court will amount to contempt of the court.[204] In the Customs Act, however, a special provision pursuant to the recommendation of the Law Commission in its 47th report, providing for public censure of persons convicted of offences under the Act, has been inserted empowering the court to publish the name, place of business or residence of persons convicted under the Act.[205] But for this special provision, the court generally has no power to publish the name or place of business or residence of any person, convicted under the Act, leading to the disclosure of his identification. Had it not been so, insertion of the above provision would not have been thought of. Under the Children Act, if any one makes any despatch to any newspaper or magazine disclosing the name, address or school or any other particulars which may lead to the identification of the child involved in any proceeding under the Act including the publication of his photograph he would be punishable.[206]

The Indian legal system, thus, provides for trial *in camera* for four categories of cases, viz., (a) matrimonial cases, (b) cases involving lunacy, (c) cases involving trade secrets, and (d) cases involving safety of the state. Barring the last two categories, the justification for holding trial of cases involving lunacy *in camera* is that these cases are considered private or domestic with which the public, in general, have no concern. Similarly, the matrimonial cases are kept out of publicity

199. The Parsi Marriage and Divorce Act, 1936, sec. 43.
200. The Code of Criminal Procedure, 1973, sec. 327.
201. The Indian Lunacy Act, 1912, sec. 9.
202. The Monopolies and Restrictive Trade Practices Act, 1969, sec. 17.
203. The Hindu Marriage Act, 1955, sec. 22.
204. The Contempt of Courts Act, 1971, sec. 7.
205. The Customs Act, 1962, sec. 135B.
206. The Children Act, 1960, sec. 36.

because they involve sordid details of domestic life and, therefore, embarrassing to parties.[207]

The Constitution of India, in its Preamble, *inter alia*, secures equality of status to all citizens and assures their dignity.[208] Dignity of an individual has been adjudged as an essential feature of the Constitution.[209] The Constitution, further, guarantees a person equality before the law and the equal protection of the laws.[210] Equality among the equals, however, is the quintessence of the judicial interpretation of article 14.[211] Such interpretation is obviously based on an assumption that men are not equal. It is a truism that men have always been unequal. Men, no doubt, have similar thoughts, desires and wants but at the same time they have entirely different thoughts, desires and wants. They have identical needs but different needs as well. Differentiation has progressed in the same measure as civilization or, to be more exact, civilization itself is nothing more than the accentuation of dissimilarities between the individuals. Nevertheless, the idea of equality is a product of civilization. Buddha proclaimed the equality of men at the time when inequality was strongly felt.[212] Again, the idea of equality cannot be disengaged from the idea of solidarity. The more men differ one from another in this world, the greater becomes their mutual usefulness and there comes a better understanding of the fact that individual activities, though different, are nevertheless socially equal since they all contribute to social solidarity.[213] It is in this view of the matter, the right to be different which is inherent in man, does not run counter to article 14 of the Constitution, it is rather well comprehended in it.

As elsewhere submitted,[214] keeping in view the societal and political contents of article 19 (1) (a) of the Constitution, it cannot be contemplated that it creates a zone of privacy for Indian citizens. Freedom of speech and expression guaranteed under article 19 (1) (a) includes freedom of press.[215] Although press has been responsible for giving rise to privacy as a legal concern in America,[216] privacy in India being judicially neglected, there is no case law developed in this area, restricting the press to intrude upon the privacy of the citizen. There is no code of conduct for jurnalists prescribed by the Press Council of India on lines similar to those of advocates, medical practitioners and chartered accountants. It is, therefore, only in rare circumstances that the court happens to lay down any code of conduct for the profession of journalism. However, a Division Bench of Delhi High Court advised journalists not to write about personal controversies where no public issue was involved as that would be "unjournalistic and derogatory to the dignity of the profession." The court observed:

207. *Naresh* v. *State of Maharashtra*, AIR 1967 SC 1 at 25.
208. Preamble to the Constitution of India.
209. *Kesavananda Bharati* v. *State of Kerala*, AIR 1973 SC 1461.
210. Constitution of India, art. 14.
211. *Satish Chandra* v. *Union of India*, AIR 1953 SC 250 at 252.
212. Radhabinod Pal, *History of Hindu Law*, 242.
213. *Ibid.*
214. For detailed discussion and analysis of cases in this area, see Govind Mishra, "Privacy: A Fundamental Right under the Indian Constitution," 8 & 9 *Del. L. Rev.* 134 (1979-1980).
215. *Romesh Thapper* v. *State of Madras*, AIR 1950 SC 124.



> It makes us sad to find that our journalists can spare so much space in their newspapers as to give undue publicity to causes which are purely private in nature and are of no public importance.[217]

Article 20 (3) of the Constitution lays down that no person accused of an offence shall be compelled to be a witness against himself. Born out of a feeling of revulsion against the inquisitorial methods adopted, and the barbarous sentences imposed by the Court of Star Chamber in the exercise of its criminal jurisdiction, the privilege against self-incrimination, bringing about the abolition of the Star Chamber, travelled across the Atlantic Ocean and settled in the United States of America as its common law.[218] This privilege against self-incrimination, according to Griswold, is one of the great landmarks in man's struggle to make himself civilized.[219] In India, section 3 of Act 15 of 1852 recognized that the accused in a criminal proceeding was not a competent or compellable witness for or against himself.[220] The Supreme Court, explaining the scope of article 20 (3), observed:

> The prohibitive sweep of Art. 20 (3) goes back to the stage of police interrogation— not. . . commencing in court only. It extends to and protects the accused in regard to other offences pending or imminent, which may deter him from voluntary disclosure. The phrase compelled testimony must be read as evidence procured not merely by physical threats or violence but by physic torture, atmospheric pressure, environmental coercion, tiring interrogative, prolixity, over bearing and intimidatory methods and the like. Even when relevant questions are loaded with guilty inference in the event of an answer being supplied, the tendency to incriminate springs into existence. Arts. 20 (3) and 22 (1) in a way may be telescoped by making it prudent for the police to permit the advocate of the accused, if there be one, to be present at the time he is examined.[221]

The Constitution further guarantees to every person the protection of life or personal liberty.[222] The right to life has been glossed over by the Supreme Court to include the right to live with dignity and all that goes along with it.[223] Thus it has rightly been observed that an intrusion (of one's persons privacy) is demeanding to individuality and is an affront to personal dignity.[224] The Supreme Court has observed:

216. Edward J. Bloustein, "Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser", *supra* note 39 at 971.
217. *The Hindustan Times*, Feb. 16, 1986.
218. Wigmore on *Evidence*, vol. 8, pp. 301-3.
219. Griswold, *Fifth Amendment Today*. He further onserves:
   We do not make even the most hardened criminal sign his death warrant, or dig his own grave, or pull the lever that springs the trap on which he stands. We have, through the course of history, developed a considerable feeling of the dignity and intrinsic importaance of the individual man... neither torture nor an Oath nor the threat of punishment such as imprisonment for contempt should be used to compel him to provide the evidence to accuse for to convict himself.
220. H.M. Seervai, *Constitutional Law of India*, vol. I., p. 449 (2nd ed., 1975).
221. *Nandini Satpathy* v. *P.L. Dani*, AIR 1978 SC 1025 at 1046.
222. Constitution of India, art. 21.
223. *Francis Coralie* v. *Union Territory of Delhi*, AIR 1981 SC 746 at 753.
224. Edward J. Bloustein, *supra* note 39 at 973.

> The policy of the law is that each individual, accused included, by virtue of his guaranteed dignity, has a right to a private enclave where he may lead a free life without overbearing investigatory invasion or even crypto-coercion.[225]

Yet another provision of the Constitution which upholds the autonomy of an individual and assures his dignity is the provision which prohibits traffic in human beings and *begar* and other similar forms of forced labour.[226] It would include traffic in women and children for immoral or other purposes.[227] The Suppression of Immoral Traffic in Women and Girls Act, 1956 is a law made by Parliament under article 35 of the Constitution for the purpose of punishing acts which result in traffic in human beings. In a case under section 15 (6) of the Act, Anantanarayanan J observed:

> Here, we have an instance of the officer accompanied by witnesses, proceeding into the bed-room of a young girl and pushing open a closed door without even the civility of a knock or the warning to her to prepare for the intrusion. Such conduct would be quite inexcusable unless the officer thereby hopes to gather the evidence which is essential for proof of any charge. But, since prostitution is not an offence, I am really quite unable to see how the officer and party were justified in thus bursting into the bed–room of a girl and surprising P.W. I and the third accused together in a state of undress.
>
> There can be no doubt that such conduct implies an outrage on the modesty of the girl; and I must reiterate that the modesty of prostitute is entitled to equal protection, with that of any other woman. The technique of such raids must be totally altered; otherwise grave abuses of the law might enter into the very attempt to enforce the law. I put it to the learned public prosecutor whether the officer would similarly think himself justified, in proceeding into a bath-room where a young girl suspected to be a prostitute was having a bath in the hope of finding incriminating evidence, the learned Public Prosecutor was compelled to concede that as raids were conducted at present, such an incident would conceivably occur.[228]

In a similar case, the Kerala High Court observed:

> The conduct of the police officer in proceeding into the bed-room of the revision petitioner and entering through the back door without the civility of a knock on the front door, which was locked inside, or warning the revision petitioner for the intrusion would be a misuse of his powers in the instant case.[229]

225. *Nandini Satpathy* v. *P.L. Dani, supra* note 221 at 1045.
226. Constitution of India, art. 23.
227. *Raj Bahadur* v. *Legal Rmembrancer*, AIR 1953 Cal. 522.
228. *In re Retnamala*, AIR 1962 Mad. 31 at 35. Also *Bai Radah* v. *State of Gujarat*, AIR 1970 SC 1396.
229. *T. Jacob.* v. *State of Kerala*, AIR 1971 Ker. 166.



The Constitution guarantees freedom of conscience and the right to profess, practise and propagate religion to all persons subject to public order, morality and health.[230] Religion cannot be disengaged from individualism.[231] In the words of Professor P.K. Tripathi, the Constitution accepts the principles of giving primacy to the individual, placing him before and above religion and recognizing freedom of religion only as incidental to his well-being and liberty.[232] Religion symbolises seclusion and exclusiveness.[233]

A careful analysis of the foregiong textual provisions of the Indian Constitution propels a concept of man which coincides with Douglas J's. "principle of individuality"[234] and runs parallel to Edward J. Bloustein's principle of 'inviolate

230. Constitution of India, art. 25.
231. Pulszky says that when a community reaches a stage in which life as afforded by it preludes all high hopes and the mere bettering of the individual lot presents itself as an object of a subordinate and precarious nature, men's minds revert to their inward aspiration and the striving after individual perfection and the ordering of life according to ideal considerations are left as the only worthy and appropriate tasks. Hence, indifference to the cares of the world and disregard of material profits and advantages more and more gain ground in the highest strata of the society as well as in the lowest; and it may indeed be said that from the very moment of the formation of conquest, the assertion of the independence of the intimate world of inward individual sentiment over the social ties becomes a characteristic phenomenon. These aspirations among persons of a higher position who are troubled by no worldly care assume the shape of philosophy, and among the oppressed classes, that of religion:
    Pulszky, *Theory of Law and Civil Society* 175 (emphasis added) quoted by Radhabinod Pal, *History of Hindu Law* 111.
232. P.K. Tripathi, Secularism: Constitutional Provision and Judicial Review, 8 *JILI* 1 at 7 (1966).
233. "Religion in the early consanguineous society, was at first the result of fear or admiration, afterwards the consequence of a covering spirit of blind submission to tradition and finally a symbol of seclusion and exclusiveness"; Radhabinod Pal, *History of Hindu Law* 243 (emphasis added).
234. Douglas J's. principle of individuality is:
    a. The first facet of the principle is the right of personal choice: the individual should be free to pursue his own goals, to develop his talents and abilities the way he deems most fitting, and to realise his potential as a human being. "If people are let alone in those choices" that freedom "will pay dividends in character and integrity."
    b. The right to privacy also guards one's right to be different. Douglas opposed governmental wiretapping, searches and seizures and collection of personal information because such governmental surveillance would instill a fear of being overheard and thereby stiffle dissent and induce submissiveness. Hence Douglas's principle of individuality ensures the individual's freedom to be different in his ideas and life style. "The democratic way of life", Douglas suggested, "rejects standardized thought. It rejects orthodoxy." The presence of the unorthodox compels society to re-assess its values and stimulates the diversity that is necessary for progress. "Without the freedom to expose the failings and abuses and frustrations of the status quo, existing conditions would be or become insufferable."
    c. Douglas's privacy opinions uniformly protect the sanctity of the human body and the inviolability of the individual conscience. In a case in which a conviction was obtained partially on the basis of a blood test performed on an unconscious defendant, Douglas described "the indignity to the individual that results when his body is "invaded and assaulted by the police." Similarly, in Douglas's view, the Fifth Amendment right of silence protects individual conscience against coercive invasion by the government. Douglas believed in the "sanctity of the person" and therefore strove to prevent 'the indignity (that is) suffered when a lawless hand is laid upon him." To Douglas, "Man is a child of God.. (is) accountable not to the state but to his own conscience and to his God":
    S.S. Adler, "Towards a Constitutional Theory of Individuality: The Privacy Opinion of Justice Douglas," 87 *Yale L.J.* 1579 at 1579-90 (1978).

personality[235] and the doctrine of individuality formulated by John Stuart Mill.[236]

In *M. P. Sharma* v. *Satish Chandra,*[237] the validity of section 96 of the Code of Criminal Procedure, 1898, (which authorised search and seizure as an aid to criminal process) was challenged as violative of articles 20(3) and (19) (1) (f) of the Constitution. Upholding the constitutional validity of the section, the court held that the "power of search and seizure is in any system of jurisprudence an overriding power of the state for the protection of social security and that power is necessarily regulated by law." Jagannadhdas J, speaking for the court, observed:

> When the Constitution makers have thought fit not to subject such regulation to Constitutional limitations by recognition of a fundamental right to privacy, analogous to the American Fourth Amendment, we have no justification to import it, into a totally different fundamental right, by some process of strained construction.[238]

It is submitted that an amendment, on the lines of the Fourth Amendment to the U.S. Constitution, was moved by Kazi Syed Karimuddin in the Constituent Assembly[239] which was negatived but significant statement of B.R. Ambedkar[240]

235. Bloustein observes:

> I take the principle of "inviolate personality" to posit the individual's independence, dignity and integrity; it defines man's essence as a unique and self-determining being. It is because our western ethico-religious tradition posits such dignity and independence of will in the individual that the common law secures to a man "literary and artistic property"- the right to determine "to what extent his thoughts, sentiments, emotions shall be communicated to others"... The fundamental fact is that out Western Culture defines individuality as including the right to be free from certain types of intrusions. This measure of personal isolation and personal control over the conditions of its abandonment is of the very essence of personal freedom and dignity, is part of what our culture means by these concepts. A man whose home may be entered at the will of another, whose conversation may be overheard at the will of another, whose marital and familial intimacies may be overseen at the will of another is less of a man and has less human dignity on that count. He who may intrude upon another at will is the master of the other in fact, intrusion is a primary weapon of the tyrant... The man who is compelled to live every minute of his life among others and whose every need, thought, desire, fancy or gratification is subject to public scrutiny, has been deprived of his individuality and human dignity. Such an individual merges with the mass. His opinions being public, tend never to be different; his aspirations, being known, tend always to be conventionally accepted ones; his feelings, being openly exhibited, tend to loose their quality of unique personal warmth and to become the feelings of every man. Such a being, although sentient, is fungible; he is not an individual.... : supra note 39 at 962.

236. Mill formulates his doctrine of individuality as "the right of the moral nature to develop itself in its own way": John Stuart Mill, *On Liberty* (1965).
237. AIR 1954 SC 300.
238. *Id.* at 306-307.
239. He had stated:

> Mr. Vice President, Sir, I beg to move: That in Article 14, the following be added as clause (4): "(4) The right of the people to be secure in their persons houses, papers and effects against unreasonable searches and seizures shall not be violated and no warrants shall issue but upon probable cause supported by Oath or affirmation and particularly describing the place to be searched and the person or things to be seized.:

VII CAD 794.

240. B.R. Ambedkar said:

> I am however prepared to accept amendment No. 512 moved by Mr. Karimuddin. I think it is a useful provision and may find a place in our Constitution. *There is nothing novel in it because the whole of the clause as suggested by him is to be found in the criminal procedure code so that it might be said in a sense that this is already the law of the land.....* I am, therefore, prepared to accept his amendment:

VII CAD 796 (emplasis added.).



supporting the amendment would not have justified his Lordship's above observation. Although only an *obiter*, the above observation has influenced the successive judicial opinions denying the right to privacy its judicial patronage. No right can be absolute. But a reasonable restriction on a right should not be taken as abrogation of such right. The cases show[241] that a police office searchig a dwelling house without a warrant must take precautions. Prior to search, he should record reasons why the search cannot be made after obtaining a warrant and state what he expects to find as a result of the search. Strict compliance with this procedure is required in law to avoid humiliation and reckless search in disregard of citizen's right.

In *Kharak Singh* v. *State of U.P.*,[242] the sole question for determination by the court was whether 'surveillance' under chapter XX of the U.P. Police Regulations constituted an infringement of the citizen's fundamental rights guaranteed by Part III of the Constitution. The deliberations of the court mainly rested on two articles of the Constitution, *viz.* articles 19 (1) (d) and 21, against which the U.P. Police Regulation was examined. The court held that since regulation 236(6), which authorised domicilliary visits, was violative of article 21 as there was no law on which the same could be justified, it was unconstitutional. The court further observed:

> Having given the matter our best consideration we are clearly of the opinion that the freedom guaranteed by Art. 19(1) (d) is not infringed by a watch being kept over the movements of the suspect. Nor do we consider that Art. 21 has any relevance in the context as was sought to be suggested by learned counsel for the petitioner. As already pointed out, the right of privacy is not a guaranteed right under our Consitiution and therefore the attempt to ascertain the movements of an individual which is merely a manner in which privacy is invaded is not an infringement of a fundamental right guaranteed by Part III.[243]

*Govind* v. *State of M.P.*[244] raised identical factual situation as the *Kharak Singh* case. In the *Kharak Singh* case, the U.P. Police Regulations had no support of any law while in the *Govind* case, the impugned regulations 855 and 856 were framed by the government of Madhya Pradesh under section 46(2) (c) of the Police Act and hence were held to have the force of law. After quoting American authority on the point, Mathew J observed:

> The right to privacy in any event will necessarily have to go through a process of case by case development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can character-

241. *State of Rajasthan* v. *Rahman*, AIR 1960 SC 210.
242. AIR 1963 SC 1295.
243. *Id.* at 1303. For criticisms of the case, see Govind Mishra, "Privacy: A Fundamental Right under the Indian Constitution", *supra* note 214.
244. AIR 1975 SC 1378.

ize as a fundamental right, we do not think that the right is absolute.[245]

His lordship further observed:

> Even if we hold that Article 19 (1) (d) guarantees to a citizen a right to privacy in his movement as an emanation from that Article and is itself a fundamental right, the question will arise whether regulation 856 is a law imposing reasonable restriction in public interest on the freedom of movement falling within Article 19 (5); or, even if it be assumed that Article 19(5) does not apply in terms, as the right to privacy of movement cannot be absolute, a law imposing reasonable restriction upon it for compelling interest of state must be upheld as valid.[246]

Mathew J, it appears, was influenced by the opinion of Douglas J in *Griswold* v. *Connecticut* [247] which found the source of right to privacy in various guaranteed rights said to create zones of privacy.

As applied to the Indian constitutional scheme, the penumbral theory suffers from an inherent limitation, specially in this particular instance. The interpretation give to article 19(1) (a) of the Constitution, as submitted earlier, does not protect anything or everything that is uttered by the citizen. What is whispered in the ear of wife by her husband in the dead of night or when some one is singing in the bath-room is not included in the contents of speech protected under article 19(1)(a). It is outside the purview of the protection afforded by the article. The speech contemplated to be protected under this article, as submitted earlier,[248] has societal and political content. How can it be said to create a zone of privacy ?

Further, Mathew J had assumed article 19 (1) (d) of the Constitution as the source of right to privacy. It may be recalled that the majority opinion in the *Kharak Singh* case maintained that the attempt to ascertain the movement of an individual which was merely a manner in which privacy was invaded was not an infringement of a fundamental right guaranteed by Part III. Even the dissenting opinion of Subba Rao J had concluded that article 19(1) (d) was not the source of privacy. Assuming that the assumption of Mathew J was based on an interpretation of the term "freely"

245. *Id.* at 1385.
246. *Id.* at 1386.
247 Douglas J observed:
The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from there guarantees that help give them life and substance.... various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers"in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, papers and effects against unreasonable searches and seizures." The Fifth Amendment in its 'Self-incrimination' clause enables the citizen to create a zone of privacy which the government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people:
*supra* note 34 at 484.
248. *Supra* note 214.



which includes psychological inhibition, the right to movement cannot be said to include privacy. If at all, privacy is said to be inferred, it is from the qualifying word 'freely' and not from the qualified word 'movement' in article 19 (1) (d).

Had Mathew J not been wedded to the penumbral theory of Douglas J, he would have paved the way for right to privacy in India when he observed:

> Rights and freedoms of citizens are set forth in the Constitution in order to guarantee that the individual, his personality and those things stamped with his personality shall be free from official interference except where a reasonable basis for intrusion exists. "Liberty against government", a phrase coined by Professor Corwin, expressed this idea forcefully. In this sense, many of the fundamental rights of citizens can be described as contributing to the right to privacy.[249]

Among those things stamped with the personality of an individual are his dignity, right to be different and to be treated equally among equals,[250] right to be free from psychological and physical compulsion and forced labour,[251] and freedom of conscience and the right freely to profess, practise and propagate religion.[252] The Supreme Court has established the view that the term 'life' in article 21 of the Constitution includes one's dignity and all those that go along with it.[253] Mathew J in his above observation, came very near to this view but he preferred to derive privacy from "liberty", "speech", and "movement" rather than reading it into "life" in article 21 of the Constitution. But the contribution of Mathew J lies in salvaging the right to privacy and giving it an assumed existence in the scheme of fundamental rights as against its non-existence in two earlier decisions mentioned above. Commenting upon the *Govind* case, Nariman rightly observed:

> The right to privacy had two rounds in Court—first before a Bench of 8 then before a Bench of 6. In both it had been worsted. It could not have survived a third bout. It was thought that privacy as a fundamental right had been buried - a more appropriately, burnt to a cinder. But the ashes of lost freedoms are ever smouldering. In Govind the cherished right has risen Phoenix - like from the ashes ...... Neatly side stepping the ratio of larger benches the Court has given the right a new base of life.[254]

He further observed that the decision in the *Govind* case would not go down as a landmark in the development of Indian constitutional law. But it will help to point the way. With dexterous judicial steering and mild understatement, the Supreme Court has given to the right of privacy a foothold in the fundamental rights

249. AIR 1975 SC 1378 at 1385.
250. Constitution of India, art. 14.
251. Id., arts. 20(3) and 23.
252. *Id.*, art. 25.
253. *Francis Coralie Mulin* v. *Union Teritory of Delhi*, *supra note* 223.
254. F.S. Nariman, "The Right to be Let Alone - A Fundamental Right", XVII *The Indian Advocate supra* note 48 at 80-81.

chapter. But it has done more. It has set the tone.[255] In *Malak Singh* v. *State of Punjab*, two principal questions raised for consideration of the court were: (a) Whether a person was entitled to be given an opportunity to show cause before his name was included in the surveillance register; and (b) whether in the instant case the appellants' names were included in the register without any ground for reasonably believing them to be habitual offenders or receivers of stolen property as required by rule 23.4(3) (b) of the Punjab Police Rules. The *vires* of the Punjab Police Rules, which provide for the maintenance of surveillance register, was, however, not challenged by the appellants. As regards the first question, the court answered that making an entry in the surveillance register was so utterly administrative that the rules of *audi alteram partem* could not be applied. The application of the rule in this case would defeat the very object of the rule providing for surveillance. Answering the second question, the court seems to have taken the view that it might not be necessary to supply the grounds of belief to the persons whose names were entered in the surveillance register. It might become necessary in some cases to satisfy the court when an entry was challenged on the ground that there was no justification to entertain such belief. Rejecting the appeals, the court made following observations regarding the mode of surveillance:

> But all this does not mean that the police have a licence to enter the names of whoever they like (dislike?) in the surveillance register; nor can the surveillance be such as to squeeze the fundamental freedoms guaranteed to all citizens or to obstruct the free exercise and enjoyment of those freedoms; nor can the surveillance so intrude as to offend the dignity of the individual. Surveillance of persons who do not fall within the categories mentioned in Rule 23.4 or for reasons un-connected with the prevention of crime, or excessive surveillance falling beyond the limits prescribed by the rules, will entitle a citizen to the Court's protection which the court will not hesitate to give. The very rules which prescribe the conditions for making entries in the surveillance register and the mode of surveillance, appear to recognise the caution and care with which the police officers are required to proceed... Surveillance, therefore, has to be unobtrusive and within bounds....[257]
>
> Organised crime cannot be successfully fought without close watch of suspects. But, surveillance may be intrusive and it may so seriously encroach on the privacy of a citizen as to infringe his fundamental right to personal liberty guaranteed by Art. 21 of the Constitution and the freedom of movement guaranteed by Art. 19 (1) (d).[258]

It may be observed that impermissible surveillance as stipulated in the Punjab Police Rules implicitly protects the right to privacy. Subjecting the power

255. *Id.* at 82-83.
257. AIR 1981 SC 760 at 763-64.
258. *Id.* at 763.



of the police officer to enter one's name in surveillance register only on reasonable ground is also pointer in the same direction. However, the decision does not take the law any further than where it was left by the *Govind* case.

## III

Ordinarily, fundamental and human rights do not evoke ready response from our politicians unless they serve a political purpose. The Karnatak telephone-tapping incident brought the issue of individual's right to privacy to public attention leading to the resignation of Ramkrishna Hegde, the then Chief Minister of the State. It was observed that the readiness and glee with which the central government released the list of those whose telephones were being tapped was well matched by the chukle with which Hedge tried to turn the table on the Rajiv Gandhi government by asking it to institute an inquiry at the all-India level.[259] Despite its political under-current, the event is significant in so far as the opposition and the ruling party both expressed their common concern against telephone-tapping, an acknowledgement of the existence of right to privacy in our system.

The Ministry of Law, Government of India, while rejecting a proposal made by the Indian Council of Medical Research (ICMR) for a legislation to ban sexual intercourse by Indian citizen with foreigners to prevent the spread of *AIDS* in the country, expressed its opinion that such legislation would violate the provisions of article 21 of the Constitution which gives people the right to life and liberty including the right to privacy.[260] It is significant to note that the Ministry of Law located the right to privacy in article 21 of the Constitution. However, the Preamble to the Constitution of India assures the dignity of the individual. The state is directed to recognize and enforce international law as a matter of state policy. It is in these commands of the Constitution also lies the necessary basis for affording constitutional protection to the right to privacy.

The diverse facets of right to privacy protected in the Indian legal system (much before the Constitution came into force) may much favourably be compared with the contents of the right to privacy determined and deliberated over by the Nordic Conference held in Stockholm in 1967. Intensity of privacy consciousness and desirability of its protection may be assessed in such provisions of Indian legal system which make intrusion of privacy a crime rather than a tort. The richness of the Indian life style as manifested in our scriptures has even today contributed to the world by giving a message of peace through transcendental meditation. Regard being had to our glorious heritage, our legal and constitutional system, to maintain either that right to privacy is not protected in our system or that privacy is a prerogative of English-speaking world, will amount to an admission of ignorance either of the Indian legal system or our culture.

259. *The Hindustan Times*, Aug. 13, 1988.
260. *The Hindustan Times*, June 10, 1988.

# NOTES AND COMMENTS

## CIVIL SERVICES—SUPREME COURT HELPS 'OPERATION CLEAN-UP'

### A Comment on *Tulsiram Patel* Case*

THE MOMENTOUS decision of the Supreme Court in *Union of India v. Tulsiram Patel*[1] has been assailed not only by leaders of almost all the political parties—the leftist, the rightist, left of the centre, right of the centre and the middle-roader—, the trade union leaders and the leaders of the civil servants' organisations but even by the retired judges of the Supreme Court and eminent jurists. It appears that the 'holding' in the case is one of the most misunderstood or little understood ones on the subject of civil services. One is not so much worried about the understanding or misunderstanding of the case and its consequent criticism by politicians, trade union leaders and the like because, by and large, they offer their comments without reading the judgments and their motivation and their objectives are usually political. But one is certainly concerned, and at times even alarmed, when such attacks come from eminent judges, jurists and scholars who not only profess to be, but are also known as, the champions of social justice, no matter what it means.

In the humble opinion of this author, which would be gradually unfolded, the holding of the case is both (i) anti-civil servant and pro-state and (ii) pro-civil servant and anti-state, depending upon whether we are looking at the judgment through a microscope or through a telescope. Microscopic look magnifies and gives us the immediate effect whereas the telescopic look tells us the far or remote or even the final effect. The immediate effect would certainly help the government in its 'operation clean-up' without waste of time, but in the final analysis, we will discover that the Supreme Court has given more to the civil servants than it has taken away.

## I SUMMARY OF THE MAJOR 'HOLDING'

The court, by a majority of 4:1, in effect held that a civil servant had no right to hearing either at the stage of inquiry, if any, or thereafter when any of the three major penalties, viz, dismissal, removal or reversion, was being imposed upon him under any of the sub-clauses(a), (b) and (c) of the second proviso to clause (2) of article 311 of the Constitution. The court, on the basis of the above premise, over-

* This paper was presented at a seminar jointly organised by the Faculty of Law, University of Delhi and United Lawyers Association, New Delhi immediately after the Supreme Court delivered its judgment in *Union of India v. Tulsiram Patel*, infra note 1. Some cases decided later have been added in it to bring it uptodate without affecting the original text

1. *Union of India v. Tulsiram Patel*, AIR 1985 SC 1416.



ruled an earlier decision of a Bench comprising of Krishna Iyer, A.C. Gupta and Fazl Ali JJ in *Divisional Personnel Officer, Southern Railway v. T.R. Challappan*.[2] In that case, the Supreme Court had held that rule 14 of the Railway Servants Rules which provided that 'the disciplinary authority may consider the circumstances of the case and make such orders thereon as it deems fit' obliged the authority to give a hearing to the delinquent employee when a penalty was proposed to be inflicted in cases covered by the three sub-clauses of the second proviso. The court further held that article 14, and the principles of natural justice including *audi alteram partem* rule which are now associated with it, had no application to cases covered by the three sub-clauses of the second proviso which expressly exclude that rule.

Applying the principles so declared, the court upheld the termination of the following class of civil servants:

(i) *Sub- clause (a) of the second proviso to clause (2) of article 311*

Tulsiram Patel, an auditor in the Regional Audit Office, M.R.S. Jabalpur, was compulsorily retired by way of punishment on the ground that he had injured his boss on the head with an iron rod and was convicted under Section 332 of I.P.C.

(ii) *Sub- clause (b) of the second proviso to clause (2) of article 311*

Some members of the CISF (Central Industrial Security Force) were dismissed for their indulgence in agitational acts, violent indiscipline and incitement to disobey lawful orders, etc., which necessitated calling of the army resulting in exchange of fire between the indisciplined section of the CISF and the army in which, besides other casualities, an army major and two army jawans were killed.

(iii) *Sub- clause (b) of the second proviso to clause (2) of article 311*

Railway servants (many belonging to all-India locorunning staff) were dismissed or removed for their participation in the illegal all-India strike of the railway employees.

(iv) *Sub- clause (c) of second proviso to clause (2) of article 311*

Some members of the M.P. police force were dismissed/removed for indulging in violent demonstration or rioting demanding release of their two colleagues who were arrested in connection with an incident at the annual *mela* at Gwalior in which one man was burnt alive.

The common factors in all the above cases were: (1) All were civil servants; (2) terminations were made under the second proviso to article 311 (2) and (3) the civil servants were not heard either at the stage of inquiry, if any conducted, or at the time of imposition of the penalty.

## II SUMMARY OF THE RELEVANT CONSTITUTIONAL PROVISIONS AND THE SERVICE RULES

### (a) Constitutional Provisions

Article 310, in substance, provides that the civil servants hold office during

2. AIR 1975 SC 2216.

the pleasure of the President or the Governor, as the case may be. In other words, it means that the President and the Governor can terminate the services of the civil servants at their pleasure. Article 311 places a two-fold restriction on the above power of dismissal at pleasure: Clause (1) provides that no civil servant can be dismissed or removed by an authority subordinate to that by which he was appointed and clause (2) incorporates the principles of natural justice, i.e. right to be heard, by providing that no civil servant "shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges." There are two provisos attached to clause (2). The first proviso makes it clear that after the inquiry conducted under clause (2) is over and a penalty is proposed to be inflicted on the delinquent employee, it shall not be necessary to give any opportunity to the employee of making representation against the penalty proposed. The second proviso containing three sub-clauses provides that clause (2) shall not apply:

(a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or

(b) where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry; or

(c) where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to hold such inquiry.

Clause (3) is linked with the clause (b) above. It provides:

> If, in respect of any such person as aforesaid, a question arises whether it is reasonably practicable to hold such inquiry as is referred to in clause (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank shall be final.

### (b) Service Rules

The rules for various services made either under article 309 of the Constitution or relevant Acts of the state legislatures generally reproduce or substantially incorporate the provisions of article 311. One provision is common in almost all the service rules which incorporate the provisions of sub-clauses (a), (b) and (c) of the second proviso to article 311 (2). The usual provision as incorporated after clause (c) provision is in the following language:

> The disciplinary authority may consider the circumstances of the case and pass such order thereon as it deems fit.

## III INTERPRETATION OF THE ABOVE PROVISIONS

### (a) The Microscopic Look

The major 'holding' in the case has been summarised earlier which



authoritatively declares that the principle of *audi alteram partem* does not apply where major penalties are proposed to be imposed on a delinquent employee by resort to the power of dismissal, removal or reduction in rank covered by sub-clauses (a), (b) and (c) of the second proviso to clause (2) of article 311. There has not been much of a controversy regarding the exclusion of the 'right to be heard' rule at what was earlier known as the stage of inquiry. Once the authority exercises its power/discretion given to it by the Constitution under sub-clause (b) of the second proviso, that it is not reasonably practicable to hold such inquiry (i.e., as described in clause (2) of article 311), he can proceed to make his own inquiry *ex parte* into the alleged misconduct of the employee concerned. In the application of sub- clause (a), the disciplinary authority has less arduous task to perform compared to his responsibility under sub-clause (b). He has only to decide whether the employee, who has been convicted of a criminal charge, has to be visited with any of the three major penalties. In reaching this decision, the right to be heard rule stands excluded.

Turning to sub-clause (c) of the second proviso, the court pointed out the differences between it and the previous two sub-clauses (a) and (b), both with regard to the nature of power and also the repository of the power. In sub-clause (c), the power is conferred on the President or the Governor. It is he who has to be *satisfied* (although constitutionally, i.e. through his cabinet) that in the interest of the security of the state, it is not *expedient* to hold such an inquiry. Unlike the authority in sub-clause (b), he has not to record reasons for his satisfaction, which in the nature of things has to be subjective. The court almost conceded that the President's/Governor's decision was not subject to judicial review. The court resisted all temptations to make a categorical statement, on the strength of some earlier observations of some of the judges of the Supreme Court, that it could review the President's satisfaction/decision on the ground of *mala fides* or whether the decision was taken in the interest of the security of state. The court simply observed that on the basis of all the records placed before it, it was satisfied that the decision was not *mala fide* or that it was not in the interest of security of the state.

To sum up, there are two stages at which the decision has to be taken:

1. *Whether the employee had to be visited with punishment ?* This decision is to be taken in case of sub-clause (a) on conviction of the employee on a criminal charge; in case of sub-clause (b), the authority after deciding that it is not reasonably practicable to hold clause (2)—type inquiry, finds the employee guilty of the alleged misconduct; in case of sub-clause (c), the President or the Governor finds the employee guilty of the alleged misconduct without holding clause (2)-type inquiry in the interest of the security of state.

2. After deciding the first question in the affirmative, the question has to be decided which of the three penalties, viz. dismissal, removal or reduction in rank, is to be inflicted on the delinquent employee.

As discussed earlier, there is a sort of consensus that 'right to be heard' rule is excluded when first decision is to be taken. The controversy is in relation to the second stage, i.e., whether 'right to be heard' rule is applicable before deciding the

issue of quantum of punishment. The Supreme Court in the *Challappan* case[3] interpreted rule 14 of the Railway Servants Rules (quoted earlier) that it imported the rule of natural justice. It observed:

> The statutory provision...merely imports a rule of natural justice in enjoining that before taking final action in the matter the delinquent employee should be heard and the circumstances of the case may be objectively considered. This is in keeping with the sense of justice and fair-play.[4]

The Supreme Court in the *Tulsiram Patel* case over-ruled the *Challappan* case and held that 'right to be heard' rule had been expressly taken away by the second proviso to article 311 (2) at every stage of the disciplinary proceeding. A power has been conferred on the relevant authority to dispense with the 'rule of hearing'. This power flew from the Constitution and could not be taken away or circumscribed by any law or rule. The immediate effect (on microscopic look) of the decision is that a delinquent civil servant is not only denied the benefit of the *audi alteram partem* rule at the stage of inquiry into his alleged misconduct and also at the stage of taking the decision as to whether he should be punished or not on the basis of his guilt or conviction on a criminal charge, but he is also denied right to be heard even as to the quantum or extent of punishment which is proposed to be inflicted upon him. The decision thus, on the face of it, appears to be anti-civil servant and pro-state power and indirectly helps the government to weed out the corrupt and inefficient elements from the services without wasting time in elaborate inquiry contemplated by clause (2) of article 311. It is on this count that the decision has been criticised and even dubbed as retrograde. Krishna Iyer J, as reported in the newspapers, has much to say against this decision. His adverse comments on the decision are quite understandable. It over-rules the *Challappan* decision to which he was a party and the *Challappan* decision is considered to be in consonance with social justice.

In the *Challappan* case, the end product, was correct but the decision was wrong. For the wrong decision, the three judges who decided the case cannot be blamed. They were led to make the error by wrong arguments or the absence of vital arguments by the counsel for the railways. We all know that under our judicial process, fortunately or unfortunately, a judge sits only as an umpire. He is supposed to be both ignorant of the facts in the case as well as neutral to the application of law to the facts when established. The lawyers who represent the parties must state the grounds and tell the law on the basis of which they are challenging or defending any action. This way, the counsel help the court in the correct interpretation of statutes and formulation of principles of law, besides reaching a correct decision. But in a particular case, if the counsel has failed to plead a vital ground or refer to a vital law, the judge, even if he is aware of this failure or ommission on the part of

3. *Ibid.*
4. *Id.* at 2225.



the counsel, cannot on his own invoke the ground not taken by the counsel to decide an issue in the case.

Many of us may not be knowing that we could not have that dynamic interpretation of article 21 by P.N. Bhagwat J. (as he then was) by which he infused life into the lifeless word 'procedure' had the court, on the first hearing of the *Maneka Gandhi*[5] case, not allowed the petitioner to invoke article 21 as another ground of attack. In the original petition, only article 14 was invoked. The counsel in the case argued that the word 'procedure' meant a fair, reasonable and just procedure. This gave an opportunity to the learned judge to evolve, formulate and lay down the historic principles we are all familiar with. In the *Challappan* case, the counsel did not argue that a power which was conferred by the Constitution cannot be circumscribed by any rule. The court was only asked to interpret rule 14 that it did not incorporate the rule of natural justice. The court did not accept this argument and held otherwise. In the *Tulsiram Patel* case, the argument to exclude the rule of natural justice from the service rules was based on the ground of the second proviso to article 311(2) and so accepted and as a necessary consequence, the *Challappan* case had to be over-ruled. The end product of the *Challappan* case, which was correct in the opinion of this author, will be taken up below.

**(b) The Telescopic Look**

The rights which have been denied to a civil servant because of the second proviso to article 311(2), in the first instance, have been given back to him at the subsequent stages. This the Supreme Court has done even at the cost of apparent contradictions and logic. Madon J observed:

> The phrase "this clause shall not apply" is mandatory and not directory. It is in the nature of a Constitutional porhibitory injunction restraining the disciplinary authority from holding an inquiry under Article 311(2) or from giving any kind of opportunity to the concerned government servant. There is thus no scope for introducing into the second proviso some kind of inquiry or opportunity by a process of inference or implication... The conclusion which flows from the express language of the second proviso is inevitable and there is no escape from it. It may appear harsh but... the second proviso has been inserted in the Constitution as a matter of public policy and in public interest and for public good.... Sympathy and commiseration cannot be allowed to outweigh considerations of public policy, concern for public interest, regard for public good and the peremptory dictate of a Constitutional prohibition.... *After all, it is not as if a government servant is without any remedy when the second proviso has been applied to him. There are two remedies open to him, namely, departmental appeal and judicial review* (emphasis added)[6]

5. *Maneka Gandhi* v. *Union of India*, AIR 1978 SC 597.
6. *Union of India* v. *Tulsiram Patel*, *supra* note 1 at 1450-51.

The learned judge repeated his observation :

> [C]lause (2) of Article 311 embodies in express words the *audi alteram partem* rule, This principle of natural justice having been expressely excluded by a Constitutional provision, namely, the second proviso to clause (2) of Article 311, there is no scope for reintroducing it by a side-door to provide once again the same inquiry which the constitutional provision has expressly prohibited.[7]

After having said so, the court brought back by the side-door what it held was prohibited by the proviso. The court held that a government servant was not wholly without any opportunity where the second proviso applied. Though there was no prior opportunity to a government servant to defend himself against the charges made against him, he had the opportunity to show in appeal filed by him that the charges made against him were not true. This would be a sufficient compliance with the requirements of natural justice.[8] The court not only gives the 'right to be heard', the only right which is guaranteed by article 311(2) and denied by the second proviso, but indirectly confers additional rights (i) to challenge the penalty on the ground of harshness and being disproportionate to the guilt and(ii) to challenge the decision of the disciplinary authority to dispense with clause (2)-type of inquiry (a) on the ground that it was not 'reasonably impracticable' to hold the inquiry and (b) on the ground that the decision of the authority was arbitrary, *mala fide* and perverse. The contradiction in the judgment is writ large when it interprets clause (3) to article 311. The clause makes the decision of the disciplinary authority final when it decided under sub-clause (b) of the second proviso that it was not reasonably practicable to hold such inquiry. The court held that this finality given to the decision was not binding on the court and in a proper case the court could strike down the order dispensing with the inquiry and also the penalty imposed. Perhaps one may not object to court having assumed the power of judicial review even where the Constitution has made any decision final.

The real difficulty arises in accepting the view of the court where it held that an inquiry, which had been denied under sub-clause (b), could be asked for when the employee files a departmental appeal. If the circumstances have changed, then, according to the court, the appellate authority must hold the inquiry and hear the employee. So the natural justice was not an essential requirement when the case was decided first but it became an essential principle to be observed at the subsequent stages. The court further observed that the quantum of punishment was subject to review both in the departmental appeal and also by the courts. There cannot be any quarrel with this view. All arbitrary actions must be reviewed and if in any particular case the court finds the penalty imposed to be harsh and disproportionate to the guilt of the employee, the court must give relief. In the

7. *Id.* at 1462.
8. *Id.* at 1463.



*Challappan* case, the penalty of removal/dismissal from job of the railway pointsman, a lowly paid employee, was not only harsh but utterly disproportionate to his guilt of drunken and disorderly behaviour for which he was convicted but put on probation. The Supreme Court could have struck down the penalty on this ground alone but it preferred to give relief to the employee on the ground of denial of natural justice as required by rule 14 which, as we have said earlier, was a wrong reasoning for a right decision. Thus, in the final analysis, we find that, contrary to the belief being propagated, the civil servant is the 'gainer' in this case. He has more rights—rights in addition to what is given to him by article 311.

## IV SOCIAL JUSTICE AND THE DECISION

Social justice does not necessarily mean that the court must always give a decision, even by twisting the law or, if need be, ignoring it, in favour of the 'weaker party' in the case, no matter who that weaker party was or what his guilt or miscouduct was. Social justice means justice to those who deserve justice but have been denied. Even in such a case, we should always remember that we are governed by rule of law. Society may accept, and has accepted, decisions of the Supreme Court, even where they were given under a doubtful jurisdiction/power, where such decision served the ends of social justice. We have accepted *Rudal Sah*,[9] *Deokinandan*,[10] *Asiad Workers*,[11] *Bandhua Mukti Morcha*[12] and the like, where the court passed orders of the nature which were considered earlier to be outside its powers. But does social justice also mean to take a sympathetic and compassionate view and adopt a benevolent construction in cases involving mutineers and such other class of employees who hold the entire society to ransom in the name of trade unionism? Hopefully, it does not.

## V DICHOTOMY NEEDS A FRESH LOOK

The dichotomy created by the Supreme Court in the *Tulsiram Patel* in the interpretation of the exclusionary provision of the three sub-clauses of the second proviso to clause (2) of article 311, whereby it meant that the observance of the principles of natural justice stood prohibited when the case against the public servant was taken first, but it became an essential requirement at subsequent stage in departmental appeals, was reiterated and followed in some subsequent cases by the Supreme Court.[13] In *Satyavir Singh* v. *Union of India*, the court perhaps to dispel the misgiving that the *Tulsiram Patel* decision was anti-civil servant, observed:

> It is important to note that the majority judgment in Tulsiram Patel's case is more beneficial to civil servants and confers greater rights upon them than Challappan's case (AIR 1975 SC 2216) did. According to Challappan's case, a civil servant to whom a service rule

9. *Rudal Sah* v. *State of Bihar*, AIR 1983 SC 1086.
10. *Deokinandan Prasad* v. *State of Bihar*, AIR 1984 SC 1560.
11. *Peoples' Union for Democratic Rights* v. *Union of India*, AIR 1982 SC 1913.
12. *Bandhua Mukti Morcha* v. *Union of India*, AIR 1984 SC 802.
13. *Satyavir Singh* v. *Union of India*, AIR 1986 SC 555; *A.K. Sen* v. *Union of India*, AIR 1986 SC 335 and *S.A. Sawant* v. *State of Maharashtra*, AIR 1986 SC 617.

> analogous to the second proviso to Art. 311(2) is sought to be applied has only the right to be heard with respect to the penalty proposed to be imposed upon him. The majority judgment in Tulsiram Patel's case has, however, conferred upon the civil servants who have been dismised or removed from service or reduced in rank by applying the second proviso to Art. 311 (2) or an analogous service rule the right to a full and complete inquiry in an appeal or revision unless a situation envisaged by the second proviso is prevailing at the time of the hearing of the appeal or revision application. Even in such a case under the majority judgment the hearing of appeal or revision application is to be postponed for a reasonable length of time for the situation to become normal.[14]

The facts in the *Satyavir* case were no different from those in the *Tulsiram* case. The employees of RAW (Research and Analysis Wing), an organisation concerned with international affairs and under-cover activities pertaining to national security, while protesting against tight security regulations, forced their entry into the room of the director, counter-intelligence section and forced him, his deputy and other security officials to stand in a corner and did not allow them to move from the spot and kept them as hostages. The police ultimately rescued them. This incident was followed by more agitations, strikes and gross acts of indiscipline. A large number of these employees were suspended and later dismissed without any inquiry. The dismissal orders were passed under sub-clause (b) of the second proviso to article 311(2) read with rule 19 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965. Following the *Tulsiram* ruling, the appeal of the dismissed employees was dismissed by the court, but it gave the appellants time to file departmental appeal and directed the disciplinary authority to dispose of the appeals expeditiously. In *A.K. Sen v. Union of India*,[15] the dismissed employees of the Central Industrial Security Force posted at Bokaro, Hoshangabad and Eloor met the same fate as their counter-parts in the *Satyavir* case at the hands of the Supreme Court when Madon and Sen JJ dismissed their appeals on the ground that the witnesses were being threatened and intimidated from giving evidence and the charge-sheet could not be served upon them despite attempts to do so. In *Shivaji Atmaji Sawant* v. *State of Maharashtra*,[16] some members of Bombay police force, who had indulged in strike, widespread rioting, arson and loot and other acts amounting to mutiny, were dismissed in exercise of the power given under sub-clause (b) of the second proviso to article 311(2). While dismissing the appeals, the court directed the Inspector General of Police to entertain revision applications of the appellants under the Bombay Police Act, 1951 and dispose them of on merits.

The three cases discussed above exhibit similar extra-ordinary fact-situation as were present in the *Tulsiram* case. In all the four cases, the employees who were dismissed for gross misconduct and mutinous behaviour were persons working in sensitive and security departments of the government. It has been very

14. *Id.* at 571-72.
15. *Supra* note 13.
16. *Supra* note 13.



rightly observed by a scholar that it was difficult to agree that the *ratio* of all these cases could be applied to cases which did not present such abnormal situation.[17] But the Supreme Court in *Ikramuddin Ahmed Borah* v. *Supdt. of Police, Darrang*[18] did apply the *Tulsiram* ruling to dismiss the appeal of a sub-inspector of police who was dismissed by invoking sub-clause (b) of the second proviso to article 311(2) under circumstances which cannot be regarded as abnormal or extra-ordinary.[19] The ground of his dimissal was:

> Whereas said Ikramuddin Ahmed Bora since his joining the department, his service in all branches of Police work where he had been tried leaves much to be desired and that consistent efforts by his senior officers for improving his work has proved abortive and further that despite the above drawbacks the said S.I.'s conduct and integrity has recently been found to be doubtful and the said S.I. has been recently misusing his official position to the detriment of general social well-being and to his personal gain.

The reason for dispensing with enquiry was 'the non-availability of the witnesses on account of the fear of the officer concerned.' This was found by the court as good enough reason for invoking sub-clause (b). The court observed:

> In the instant case as is apparent from the impugned order of dismissal this was the main ground for invoking the said Cl. (b). On the material on record, it is not possible for us to take the view that there was an abuse of power by the disciplinary authority in invoking Cl. (b). The Superintendent of the Police who passed the order of dismissal was the best authority on the spot to assess the situation.... As pointed out in the case of Tulsi Ram Patel, .. in such matters, the Court will not sit in judgment over the relevancy of the reasons given by the disciplinary authority for invoking Cl. (b) like a Court of first appeal and that even in those cases where two views are possible, the Court will decline to interfere.[20]

Thus the post-*Tulsiram* cases, as stated earlier, reaffirmed the dichotomy introduced by the *Tulsiram* ruling which defies a logical understanding of the object of sub-clause (b) of the second proviso to article 311(2). A civil servant is not only denied right to hearing before his dismissal but the effect of the decision is that the government is *prohibited* from observing principles of natural justice even if it wants to be generous with him and hear him. The interpretation of sub-clause (b) to the effect that no rule or law can be validly made obliging the disciplinary authority to give a hearing is perfectly alright, but sub-clause (b) may not be interpreted so as to prohibit the disciplinary authority from observing natural justice in his discretion. The most vulnerable part of the decisions is the dichotomy part,

17. See S.N. Singh, "Administrative Law", XXII *ASIL* 652 at 686 (1986).
18. AIR 1988 SC 2245.
19. For many issues raised in this decision, see S.N. Singh, "Administrative Law", XXIV *ASIL* 487 at 510-502 (1988).
20. *Supra* note 18 at 2249.

i.e. the right to hearing is excluded in the first instance, but it forms an essential requirement at a subsequent stage when the civil servant goes in appeal or files a revision petition. "Will not such enquiry and hearing frustrate the very purpose of dispensing with the same at the initial stage prior to dismissal?[21] A more logical interpretation shall have been that sub-clause (b) takes away the constitutional right of a civil servant to a hearing before removal or dismissal in a departmental proceeding. After all, the civil servant is not without a remedy. The court has already asserted its power of judicial review of the decision of the disciplinary authority to dispense with enquiry. In the *Tulsiram* case, the court had observed:

> If the court finds that the reasons are irrelevant, then the recording of its satisfaction by the disciplinary authority would be an abuse of power conferred upon it by clause (b) and would take the case out of the purview of that clause and the impugned order of penalty would stand invalidated.[22]

To conclude, it is submitted that these cases have introduced a good deal of uncertainty about the law relating to enquiry and hearing and its dispensation under sub-clause (b) of the second proviso to article 311(2). It is hoped that the Supreme Court at the very next opportunity would reconsider the entire law on this subject and clarify the correct constitutional position.[23]

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21. S.N. Singh, *supra* note 17.
22. *Union of India* v. *Tulsiram Patel*, *supra* note 1 at 1481.
23. S.N. Singh, *supra* note 17.

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# THE LOKPAL BILL, 1989

## I INTRODUCTION

THE STATEMENT of the objects and reasons appended to the Lokpal Bill, introduced in the Lok Sabha in December, 1989, is instructive. The Union Law Minister has stated there that he has studied the interim Report of the Administrative Reforms Commission and the four earlier Bills on the subject introduced from time to time in Parliament only to lapse and was pursuaded to believe that corruption at the higher political level needed to be fought. However, what the minister did not state, and which needs to be emphasised, is that the original concept of lokpal has undergone a metamorphosis over the years.

The genesis of this institution in the modern representative democracies can be traced to the Swedish ombudsman established in 1809. The basic idea of the ombudsman is a simple one: He is an official, independent of the administration with power to investigate the citizen's complaints of maladministration.[1] The notion of maladministration incorporates any complaint tainted with (a) nepotism, corruption or bias; (b) failure to observe a sound administrative basis; (c) negligence in carrying out a duty; (d) misuse of discretion; (e) incompetence; (f) loss of documents or papers; (g) tardiness and delay; (h) unjust segregation or discrimination; or (i) any similar matter.[2] The objective behind the appointment of ombudsman was to institute new standards and evolve new and more congenial patterns of administrative behaviour. Of course, this did include doing away with corruption. But corruption was not the most important target. The administration and administrative behaviour as a whole needed to be scrutinised and reformed.

In India, the demand for the creation of an ombudsman-type institution has been gaining ground following the publication of the Whyatt Report in Britain.[3] Attempts in this direction first began in 1966 when the Administrative Reforms Commission (ARC) strongly pleaded in favour of establishing an ombudsman -like body in India to deal with the complaints of the citizens. It had emphasised the view that such an institution would prove to be of immense and lasting utility "for the removal of a prevailing or lingering sense of injustice springing from an administrative act" which is the *sine qua non* of a popular administration.[4] The ARC had three ends in view: Evolution of a suitable grievance procedure for the individuals to invoke the complaints of maladministration; creation of a mechanism which would reduce corruption in the administrative services: and setting up of a mechanism which would take cognizance of complaints of favouritism and nepotism against the central and state ministers.[5] The ARC in its Report had appended a draft Bill which envisaged the lokpal to inquire into the complaints of sustained injustice

1. Peter Cane, *An Introduction to Administrative Law* 261 (1987).
2. D.C.M. Yardley, *Principles of Administrative Law* 225 (1986).
3. *Justice* Report—*the Citizen and the Administration: The Redress of Grievances* (The Whyatt Report, 1961).
4. Administrative Reforms Commission, *Interim Report on Problems of Redress of Citizens' Grievances* 5 (1966).
5. *Ibid.*

in consequence of maladministration and also complaints of personal benefit or gain accruing to a minister or secretary.

Accepting the recommendations of the ARC, the government introduced the Lokpal and LokyuktaBill as in Lok Sabha in 1968. After consideration of the Bill by the Joint Select Committee of Parliament, the Lok Sabha passed the same in 1969. During the pendency of the Bill before Rajya Sabha, the Lok Sabha was dissolved and the Bill lapsed. A similar Bill was again introduced in Lok Sabha in 1971 which also lapsed with the dissolution of Lok Sabha. Significantly, the 1971 Bill envisaged wide powers for the lokpal to enquire into both "grievance" as well as "allegation".[6] These two terms are of crucial importance for they constitute the *raison d' etre* of the lokpal. A "grievance" was defined as "a claim by a person that he had sustained injustice or undue hardship in consequence of maladministration." The term "allegation" was defined to include not only "corruption or lack of integrity" but also abuse of public office to secure gain or to cause harm or hardship to another. It included, no less, actions motivated by "improper" motives.[7] In sum, the lokpal was empowered to investigate a large variety of improper actions even if they did not constitute corruption under the Prevention of Corruption Act, 1947.

The Janata Party, which came to power at the Centre in 1977, introduced another Lokpal Bill in Lok Sabha in July, 1977. The Bill was referred to a Joint Committee for its consideration but the Bill again lapsed with the dissolution of Lok Sabha in 1979. The 1977 Bill omitted altogether maladministration from the purview of the lokpal since a separate machinery was contemplated for the purpose. In the Bill, however, the jurisdiction of the lokpal was proposed to be widened in respect of charge of improper behaviour by defining "misconduct" in the widest terms. To the provisions of the 1971 Bill, in respect of abuse of office and conduct actuated by improper motives, the Bill added two more ingredients,[8] viz., "if he (the public man) directly or indirectly allows his position as such public man to be taken advantage of by any of his relatives or associates and by reason thereof such relative or associate secures any undue gain or favour to himself or to another person or causes harm or undue hardship to another person" (*EXPLANATION* : For the purpose of this clause, 'associate' in relation to a public man includes any person in whom such public man is interested) or if he fails to act in any case otherwise than in accordance with the norms of integrity and conduct which ought to be followed by the class of public men to which he belongs.

The above Bills were followed by the Lokpal Bill, 1985, which restricted itself to merely offences punishable under the Indian Penal Code, 1860, such as bribing and those punishable under the Prevention of Corruption Act, 1947. This Bill drew a violent protest from the opposition members in Parliament whose joint minute of dissent appended to the Report of the Joint Committee of Parliament on Lokpal Bill, 1985 recorded that "of the various versions of the Lokpal Bill...the

6. Lok Sabha Secretariat, *Lokpal* 35 (1965).
7. *Id.* at 36.
8. *Id.* at 34.



1985 Bill seemed to us the most anaemic in content and the most restricted in scope."[9] It was also complained that the standards of good conduct were no less important to governance. In view of stiff opposition and criticism against the Bill, the government withdrew the same on the spacious grounds that it did not cover those very matters of "inefficiency and tardiness" that harrass a citizen. Thus, once again there seems to be all-party support for an extended meaning of misconduct beyond corruption to maladministration. At the bottom of these abortive attempts was the fact that the governments of the day were not half as serious in seeing the ombudsman-type institution actually being set up as they were in professing their commitment to that goal.

## II JURISDICTION OF LOKPAL

The Lokpal Bill, 1989 aims at establishing a standing commission of enquiry against public functionaries on a complaint whose machinery can be set in motion by any citizen regardless of the wishes of the government of the day.[10] The scope of the Bill is, however, restricted only to complaints against public functionaries which includes persons "who hold or has held the office of the Prime Minister, Deputy Prime Minister, Minister, Minister of State or Deputy Minister of the Union."[11] The lokpal's jurisdiction is limited to combat only the problem of corruption at the higher political level abandoning the original exalted objective mooted in the 1960's for providing an effective and impartial machinery to redress administrative wrongs and excesses and eradicate corruption at all levels.

The most significant provision of the present Bill is the inclusion of the Prime Minister within its purview who was excluded under the 1985 Bill. This provision can be considered significant because the Prime Minister, unlike the President, the Vice-President and other constitutional functionaries enjoying special immunity by virtue of their role, is the highest executive of the land and, therefore, any scheme designed to end corruption at the top political level will be rendered virtually meaningless if he were to be placed beyond it. The proposal contained in the Bill also empowers the lokpal to inquire into any act or conduct of any person other than a public functionary in sofar as he considers it necessary for the purpose of his inquiry.[12] The lokpal, however, will have no power to inquire into complaints of corruption against the senior government officers.

9. Among the signatories to the joint minute of dissent were two members of the present Union Cabinet, P. Upendra and K.P. Unnikrishnan, besides L.K. Advani and S. Jaipal Reddy. They recorded:

   > We agree with the view that the Lokpal's jurisdiction should not be restricted to examination only of those complaints which involve alleged corruption, but should also cover complaints about abuse of power, gross-misconduct, maladministration causing harrassment to citizen etc.

   In their view, the lokpal should be "truly an effective institution for redressal of citizens' grievances irrespective of whether they arise out of corruption or maladministration."
10. The Lokpal Bill, 1989, cl. 3(1).
11. *Id.*, cl. 2(g).
12. *Id.*, cl. 8(2).

Corruption in government offices is often the result of collusion between the ministers and officers. It would be desirable that in cases in which officers appear to be guilty of collusion with the public functionary against whom the lokpal has started an inquiry, the lokpal should be empowered to treat the concerned officers also as public functionaries rather than entrusting the case to the vigilance commission.

The Bill has considerably narrowed down the jurisdiction of the lokpal as his jurisdiction is confined merely to charges that may conceivably be covered under the Prevention of Corruption Act, 1988 and not those which are covered under the Indian Penal Code. The lokpal will also not inquire into any matter which has been referred for enquiry under the Commissions of Inquiry Act, 1952 on his recommendation or with his prior concurrence.[13]

There has been no success so for in giving shape to the institution of lokpal at the central level. Successive Bills, each contemplating a lokpal less effective than the one envisaged in the previous Bills, have been introduced but all lapsed. The present Bill is the fifth attempt in that direction. It is not very certain whether it would command sufficient political support and become law. Its final shape is as yet unknown. These questions now assume importance because of developments which have taken place in this country during last few years which have brought home to us, as never before, how huge the problem of corruption at the higher political level has become, and the urgent need for some correctives like the creation of lokpal at the Centre. It would, therefore, be better that the present Bill be passed confining its scope presently to political corruption only and the question of bureaucratic maladministration can wait for some time more till the institution of lokpal gains experience and stability.

## III APPOINTMENT OF LOKPAL

Lokpal Bill, 1989 provides for the establishment of an institution to be known as the lokpal which will consist of Chairman and two other members. Only those who are, or were, judges of the Supreme Court are qualified for the job. Their appointment is to be made by the President in consultation with the Chief Justice of India.[14] Since the legislation seeks to maintain political cleaniness, it would have been better to provide for consultation with the leader of opposition during the process of appointment. This would give the lokpal an image of impartiality and non-partisanship. The purpose would be better served if the lokpal were appointed by the consensus between the ruling party and the opposition. In order to ensure that the lokpal is above suspicion, the Bill lays down that the Chairman and other members will resign or sever his connection with any office or position before

13. *Id.*, cl. 8(3).
14. *Id.*, cl. 3.



entering office as the Chairman or member.[15] The term of office is five years[16] and after the expiry of the term a member is ineligible for further employment to any office of profit under the central or state governments.[17]

The provision contained in the Bill that the Chairman and two members would sit jointly to consider complaints is re-assuring.[18] The salary and other conditions of service will be those of the Chief Justice of India in case of Chairman and those of a judge of the Supreme Court in case of other members. The expenditure on members in respect of salaries, allowances and pensions will be charged on the Consolidated Fund of India. The conditions of service of a member cannot be varied to his disadvantage after his appointment. A member can be removed from his office only if each House of Parliament has voted for his removal on grounds of proved misbehaviour or incapacity, by a two-thirds majority.[19]

## IV STAFF OF LOKPAL

The lokpal will have a secretary and such other staff as the President may determine in consultation with lokpal to assist him in the discharge of his functions. For the proper and effective exercise of his functions, the lokpal is authorised to secure the services of (i) any officer or employee or investigating agency of the central or state government with the concurrence of that government, or (ii) any other person or agency.[20] The terms and conditions of officers and employees are to be determined by the President after consultation with the lokpal. The officers, employees and agencies shall be subject to the exclusive jurisdiction, control and direction of the lokpal.[21]

The lokpal may delegate, by order in writing, any of his powers and duties to the officers working under him except the following powers: To exempt a complainant from making a deposit of Rs. 1,000/-; to dismiss a complaint, to close cases and to make reports after inquiry; to try cases summarily; to take action against disclosure of information and to take action against false complaints.[22]

It is imperative that the lokpal be assisted by an independent investigating agency which is under his exclusive control. When officers join a post on deputation, there is no sense of belonging. Moreover, the government servants' career is in the hands of secretaries and ministers and no servant can venture to incur the wrath of a secretary or the minister. It can, therefore, be suggested that an independent investigation cell be created for the lokpal under his exclusive control. Such a provision is fundamental for the proper and efficient working of the institution of lokpal.

15. *Id.*, cl. 4.
16. *Id.*, cl. 5(1) (3).
17. *Id.*, cl. 5(3).
18. *Id.*, cl. 12(2).
19. *Id.*, cl. 6(1).
20. *Id.*, cl. 7(2).
21. *Id.*, cl. 7(3).
22. *Id.*, cl. 29.

## V PROCEDURE FOR COMPLAINT

A complaint may be made to the lokpal by any person other than a public servant within a period of five years from the date of commission of the alleged offence. The complaint must be made in the prescribed form and must be accompanied by affidavit and a deposit of Rs. 1,000/- with such authority as may be prescribed. It is open to the lokpal to exempt a complainant from making the deposit for a sufficient cause to be recorded in writing. Letters from persons in jail or some other places of protective custody may be deemed as complaints by the lokpal if he is satisfied that it is necessary to do so. The President may, by order in writing, require the lokpal to inquire into any allegation (in respect of which a complaint may be made) in respect of a public functionary and the lokpal has to comply with such an order. In such cases, the lokpal is endowed with the same functions as he would exercise in the case of an inquiry made on a complaint.[23]

### (a) Preliminary Inquiry

The lokpal will make a preliminary scrutiny of a complaint to see if there is a genuine and proper complaint and whether the same is made in the proper form and within the prescribed period of five years. He may dismiss the complaint if he feels that the same was frivolous or vexatious or not made in good faith or did not disclose sufficient grounds for inquiry.[24] He may at the preliminary stage refer the complaint to the public functionary against whom the complaint was made for his comments. Whenever he rejects the complaint, he has to record reasons for the same and communicate the reasons to the complainant and the competent authority. This is an essential requirement in the interest of justice seen to be done. In case of dismissal of a complaint on the ground of being frivolous or vexatious or not made in good faith, the amount of security deposit stands forfeited to the central government. If the lokpal so directs in writing, the amount may be utilised for compensating the public functionary complained against. In all other cases, the security deposit is to be refunded to the complainant.[25]

The lokpal is debarred from inquiring into any matter or concerning a person "if he has any bias in respect of such matter or person" and if any dispute arises in this behalf, the President shall decide the dispute according to the opinion received from the Chief Justice of India in this regard.[26]

### (b) Procedure for Investigation

After preliminary scrutiny, if the lokpal enters the detailed inquiry, it would be in the nature of judicial proceedings which are to be conducted in camera. The lokpal is required to send a copy of the complaint to the concerned public functionary. He has to ensure proper custody of the documents relevant for the inquiry. The public functionary is to be given an opportunity to represent his case.

23. *Id.*, cl. 25.
24. *Id.*, cl. 10 and 11.
25. *Id.*, cl. 26.
26. *Id.*, cl. 9(3).



Keeping in view the fundamentals of procedural fairness, the lokpal may adopt a procedure appropriate in the circumstances of the case for conducting the inquiry.[27] The lokpal is empowered to issue, in certain circumstances, directions for deferring or suspending investigation into an offence by passing a reasoned order. The period so authorised has to be excluded from the period of limitation for taking cognizance of such an offence.[28]

### (c) Evidence

The lokpal may, for the purpose of any inquiry or investigation, require any public servant or any other person to furnish such information as he deems necessary. He has all the powers of a civil court while trying a suit under the Code of Civil Procedure, 1908, like summoning of witnesses and records, issuing orders for the seizure of documents, etc. Being judicial proceedings, the government and its officers cannot withhold any document claiming privilege under any law. There is, however, an exception with respect to documents (i) as might prejudice the security or defence or international relations, of India (including India's relations with the government of any other country or with any international organisation), or the investigation or detection of crimes, or (ii) as might involve the disclosure of proceedings of the cabinet of the union government or of any committee of such cabinet. In such cases, a secretary to the Government of India can certify that the information requested fell within the specified categories and such a certificate has been made binding and conclusive.[29] The lokpal may, however, call for any further information or portion of a document of the nature specified in clause 14(4) (a) to be disclosed in private for its scrutiny of the document itself after a certificate had been issed by the competent authority. If after perusal, the lokpal is satisfied that such a certificate ought not to have been issued, he has the power to declare the certificate to be of no effect.

## VI SUBMISSION OF REPORT

At the end of the inquriy, if the lokpal holds that all or any of the allegations have been substantiated either wholly or partly, he may communicate his findings and recommendations to the competent authority by submitting his report in writing and intimate the complainant and the public functionary concerned about his having made such a report. In case of complaints regarding ministers, the competent authority is the Prime Minister who has to inform the lokpal about the action taken or proposed to be taken by him on the report within three months. In case of Prime Minister, the Speaker of Lok Sabha is required to present the lokpal's findings to the Parliament within the same period.[30] Unless all the democratic norms break down completely, it is quite inconceivable that a Prime Minister would continue to repose his confidence in a minister found guilty of corruption by the lokpal or the

27. *Id.*, cl. 12.
28. *Id.*, cl. 13(7).
29. *Id.*, cl. 14.
30. *Id.*, cl. 16.

Parliament defending a corrupt Prime Minister. It is expected that a corrupt minister or Prime Minister would not only lose his job but also face criminal prosecution. The criminal prosecution would have to be launched in the court of special judge. The task of presenting the prosecution case would be on the public prosecutor appointed by the government. Such a prosecution may not command the confidence of the public and, therefore, it would be desirable if the lokpal has its own prosecution machinery.

## VII INTENTIONAL INSULT AND INTERRUPTION

The Bill contains penal provision for intentional insult or interference with the work of lokpal. Whoever intentionally offers any insult or causes interference with the work of lokpal or brings him into disrepute shall be punishable with simple imprisonment extending upto six months or with fine or with both. However, no complaint in respect of such offence can be made except with the previous sanction of the lokpal. Likewise, if a person is thought to have given false evidence, the lokpal may try him summarily for giving false evidence, fabricating evidence,etc.and award a sentence of imprisonment extending upto three months or fine upto Rs.500/- or both. The Bill also contains provision for the trial of direct contempt of lokpal. In such a proceeding, the lokpal acts as the complainant, prosecutor and the judge-the triple functions abhorent to all systems of civilized jurisprudence. In order to safeguard the interest of the person dealt with in a summary manner, the provisions contained in the Bill must be strictly complied with. In every case tried by the lokpal, he is required to record the facts constituting the offence and the statement, if any, made by the offender as well as the finding and the sentence. It also provides that a person convicted under the provision may prefer an appeal to the Supreme Court.[31]

An even more curious and potentially far more significant provision is contained in clause 21 of the Bill which makes it an offence liable to summary trial by the lokpal to print and publish information regarding a complaint or an inquiry before the inquiry has reached a definite stage. The penalty after such conviction is imprisonment for six months or fine of Rs. 10,000/-. Any person convicted under this provision may prefer an appeal to the Supreme Court. It is true that the publicity of unsubstantiated charges has the effect of ruining the career of politicians which cannot be undone by subsequent exoneration by the lokpal. At the same time, it must be emphasised that the Bill contains a provision which bars subsequent criminal trial on the same grounds. A shrewed minister can see to it that weak charges are made against him before the lokpal which go unsubstantiated and he never faces the glare of publicity. He can thus escape all harrassment of criminal trial as well as publicity.

## VIII PROTECTION OF ACTION TAKEN IN GOOD FAITH

The protection conferred on the lokpal and other officers, employees or agencies associated with the functioning of lokpal extends to civil suits, prosecution



and other legal proceedings in respect of anything done in good faith. The proceedings or decisions of the lokpal cannot be challenged, reviewed, quashed or called in question in any court.[32] Though *prima facie* an impression can be formed that the provision of protection ousts the jurisdiction of the courts but the attitude of the courts evident from a long series of cases leaves no doubt that the power of judicial review exercisable by the higher courts (Supreme Court and High Courts) is very wide and this power is a basic feature of the Constitution of India which cannot be abrogated. This power can, therefore, be exercisable by the court in appropriate cases notwithstanding the existence of such a provision, particularly on the point of jurisdiction.

## IX COMPENSATION TO COMPLAINANT

If the lokpal is satisfied that the allegations have been wholly or partly substantiated and taking into account the expenses incurred by the complainant in regard to the inquiry he deserves to be compensated, the lokpal has power to determine the amount of compensation and the same is payable to him by the central government.[33]

## X CONCLUSION

The Bill does not satisfy the acceptable norms of an ombudsman in the sense that public grievances have been wholly kept out of its purview and there is over-emphasis on corruption alone in such a manner which would suit the corrupt ministers. Unfortunately, the corrupt secretaries do not at all figure in the Bill. This lacunae has to be plugged at some stage.

The lokpal, when constituted, has to be given complete independence and autonomy in order to be able to perform his delicate task without any interference or influence from the individuals, agencies or even the government. It would need independent professional investigative and prosecuting machinery which should be under the exclusive control of lokpal and free from government and ministerial backlash. There would be no point in having a lokpal if no action is contemplated within a time frame that ensures justice against corruption.

If the Lokpal Bill, 1989 is passed with the modifications suggested above, it would go a long way in combating corruption at the higher political level.

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32. *Id.*, cl. 28.
33. *Id.*, cl. 27.

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# DOCTRINE OF BASIC STRUCTURE AND AMENDABILITY OF FUNDAMENTAL RIGHTS: A CLOSER LOOK AT THE OPINION OF JUSTICE KHANNA IN THE *KESAVANANDA BHARATI* CASE

IT IS a matter of common knowledge for the students and scholars of constitutional law that the question whether or not the fundamental rights are amendable under article 368 of the Constitution of India would depend upon the scope of the doctrine of basic structure as expounded by the Supreme Court in *Kesavananda Bharati* v. *State of Kerala*.[1] While the decision in *L. C. Golak Nath* v. *State of Punjab*[2] that the fundamental rights guaranteed in Part III of the Constitution were beyond the pale of the amendatory power of Parliament, the decision in the *Kesavananda Bharati* case stated that every provision of the Constitution was amendable subject to the condition that the amendatory power should be so exercised as not to destroy the basic structure or framework of the Constitution. While the doctrine of basic structure has come to stay as an integral part of the constitutional jurisprudence in India,[3] it is not quite clear as to whether the amendment of fundamental rights (other than the right to property) by way of abrogation or extinguishment would amount to the destruction of the basic structure of the Constitution. This would obviously depend upon the exact scope of the doctrine of basic structure. In other words, the crucial question is: Does the doctrine of basic structure as propounded by the Supreme Court in the *Kesavananda Bharati* case comprehend within its scope the fundamental rights? To put it differently, do the fundamental rights form part of the doctrine of basic structure? This important question has engaged the attention of the Supreme Court in a few cases since its decision in the *Kesavananda Bharati* case. While the majority of the judges in *Indira Gandhi* v. *Raj Narain*[4] held that article 14 of the Constitution was not a part of the basic structure, the majority as well as

1. AIR 1973 SC 1461. Hereinafter referred to as the *Kesavananda Bharati* case.
2. AIR 1967 SC 1643. Hereinafter referred to as the *Golak Nath* case.
3. There is a plethora of literature on the scope of the amending power of Parliament and the doctrine of basic structure enunciated by the Supreme Court in the *Kesavananda Bharati* case. For example, see P.K. Tripathi, *Some Insights Into Fundamental Rights* 1-44 (1972); P.K. Tripathi, "*Kesavananda Bharati* v. *State of Kerala*: Who Wins?" (1974) 1 *SCC (Jour)* 3-43; D. Conrad, "Limitation of Amendment Procedures and the Constituent Power", XV-XVI *Ind. Year Book Int'l Affairs* 347-430 (1970); D. Conrad, "Constituent Power, Amendment and Basic Structure of the Constitution: A Critical Reconsideration", 6&7 *Del.L.Rev.* 1-23 (1977-1978); Upendra Baxi, "The Constitutional Quicksands of Kesavananda Bharati and the Twenty-Fifth Amendment", (1974) 1 *SCC (Jour)* 45; Upendra Baxi, "Some Reflections on the Nature of Constituent Power", A. Lakshminath, "Justiciability of Constitutional Amendments", Rajeev Dhavan, "The Basic Structure Doctrine - A Footnote Comment", S.P. Sathe, "Limitations on Constitutional Amendment: Basic Structure Principle Re-Examined," Madhavan Pillai, "Amendmendability of Fundamental Rights under the Constitution of India" in Rajeev Dhavan and Alice Jacob (eds.), the *Indian Constitution - Trends and Issues* (1978).
4. AIR 1975 SC 2299, per A.N. Ray CJ and Mathew and Beg JJ at 2335, 2385 and 2416 respectively. Chandrachud and Khanna JJ expressed a contrary view at 2469 and 2369 respectively. This case is popularly known as the *Election* case.



the minority judgments in *Minerva Mills* v. *Union of India*,[5] expressed the view that articles 14 and 19 were part of the basic structure of the Constitution.[6] The logic of the latter view would and should necessarily mean that all the fundamental rights are an integral part of the doctrine of basic structure. Obviously, the thesis that fundamental rights are a part of the basic structure of the Constitution could be based only on the edifice of the *ratio* laid down in the *Kesavananda Bharati* case for it is that decision which has ushered in that doctrine on the Indian constitutional scene. It may also be mentioned that in the *Kesavananda Bharati* case, Khanna J's. opinion played a crucial and decisive role in the enunciation of that doctrine and, therefore, it was his opinion that must have shaped decisively its contours. In this context, the main question is: Does Khanna J's. opinion really project the view that the fundamental rights (with the exception of the right to property) are a part of the doctrine of basic structure and thus unamendable? Any search for a meaningful answer to this important question would require a closer look at, and analysis of, Khanna J's. opinion in the *Kesavananda Bharati* case. Therefore, it would be appropriate to start with the *ratio* of the majority decision in that case.

## THE KESAVANANDA BHARATI RATIO AND THE ISSUE OF AMENDABILITY OF FUNDAMENTAL RIGHTS

It may be appreciated that in the historic *Kesavananda Bharati* case, the Supreme Court, for the first time, declared by a majority of 7 judges[7] to 6[8] that the amendatory power of Parliament under article 368 was subject to the over-riding limitation that the power cannot be so exercised as to destroy the basic structure or framework of the Constitution. It is within the framework of this *ratio* that the court had to examine and decide, among other things, the validity of section 3 of the Constitution (Twenty-fifth Amendment) Act, 1971 which introduced article 31C[9] in the Constitution. Since the amendment in effect abrogated the fundamental rights

5. AIR 1980 SC 1789.
6. In the *Minerva Mills* case, id., section 4 of the Constitution (Forty-second Amendment) Act, 1976, which sought to amend article 31C was declared invalid on the ground that it was violative of the basic structure of the Constitution. However, in *Sanjeev Coke Mfg. Co.* v. *M/s Bharat Coking Coal Ltd.*, AIR 1983 SC 239, Chinnappa Reddy J refused to follow the *ratio* of the *Minerva Mills* and upheld the validity of section 4 of the Constitution (Forty-second Amendment) Act, 1976. He followed the logic of *Kesavananda Bharati* case to uphold the first part of the amended article 31C of the Constitution.
7. Sikri CJ and Shelat, Grover, Hegde, Mukherjea, Jaganmohan Reddy and Khanna JJ subscribed to the enunciation of the doctrine of basic structure: *supra* note 1 at 1535, 1603-1604, 1628, 1776 and 1859-60 respectively.
8. A.N. Ray, Palekar, Mathew, Beg, Dwivedi and Chandrachud JJ held the view that the power of amendment was, in a way, unlimited and absolute.
9. The relevant part of article 31C as introduced by the Constitution (Twenty-fifth Amendment) Act, 1971 read:

> Notwithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing the principles specified in clause (b) or clause (c) of article 39 shall be deemed to be void on the ground that it is inconsistent with, or takes away, or abridges, any of the rights conferred by Article 14, Article 19, or Article 31. . . .

guaranteed in articles 14, 19[10] and 31[11] of the Constitution, it became necessary to decide whether abrogation of fundamental rights guaranteed under those provisions amounted to the destruction of the basic structure of the Constitution. In other words, it became necessary to decide the question whether the fundamental rights guaranteed by articles 14, 19 and 31 formed a part of the basic structure or framework of the Constitution. The court, by a majority of seven judges to six, answered the above question in the negative.[12]

It may be noted that of the 13 judges who decided the *Kesavananda Bharati* case, Sikri, CJ and Shelat, Grover, Hegde, Mukherjea and Jaganmohan Reddy, JJ were of the opinion that fundamental rights in general and those guaranteed by articles 14, 19 and 31 of the Constitution in particular were a part of the basic structure of the Constitution. Therefore, they held that section 3 of the Constitution (Twenty-fifth Amendment) Act, 1971, which introduced article 31C, abrogated articles 14, 19 and 31 and that it was violative of the basic structure of the Constitution.[13] As against this view, A.N. Ray, Palekar, Mathew, Beg, Dwivedi and Chandrachud , JJ expressed the view that the amendatory power of Parliament as envisaged under the amended article 368[14] was unlimited and absolute and the same could be so exercised as even to abrogate the fundamental rights. Accordingly, they upheld the constitutional validity of article 31C of the Constitution.[15] These 6 judges did not subscribe to the doctrine of basic structure and, therefore, there was no question of their holding that fundamental rights were a part of the basic structure of the Constitution. Interestingly, it was Khanna J's. opinion that proved decisive on the issue of the constitutional validity of article 31C. It may be appreciated that while Khanna J joined the protagonists of the doctrine of basic structure on the Bench which decided the *Kesavananda Bharati* case, he did not go along with them in their condemnation of article 31C. Obviously, his decision to uphold the validity of the provision must have been based upon the basic premise that the fundamental rights guaranteed by articles 14, 19 and 31, which article 31C sought to abrogate, were not a part of the basic structure of the Constitution.

10. Clause (f) of article 19 (1) was deleted by the Constitution (Forty-fourth Amendment) Act, 1978.
11. This provision was deleted by the Constitution (Forty-fourth Amendment) Act, 1978. By the same amendment, the right to property, which was guaranteed under article 31, has been converted into a constitutionally sanctified statutory right under article 300A.
12. *Supra* notes 7 and 8.
13. *Supra* note 1 at 1563, 1610, 1648 and 1775, respectively.
14. The relevant part of the unamended article 368 read:

> An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two- thirds of the members of that House present and voting, it shall be presented to the President for his assent and upon such assent being given to the Bill, the Constitution shall stand amended in accordance with the terms of the Bill. . . . .

Article 368 (1) as amended by the Constitution (Twenty-fourth Amendment) Act, 1971 reads:

> Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article. . : .

15. *Supra* note 1 at 1718, 1828, 1961-62, 1984, 2015 and 2055, respectively.



As regards the wider question whether the fundamental rights were a part of the basic structure enunciated by the Supreme Court in the *Kesavananda Bharati* case, it is somewhat difficult to discern a clear-cut projection of this view from Khanna J's opinion. This is the reason for the diversity of views that have been expressed on the import of his opinion.[16] However, there are quite a few pointers in his opinion which overwhelmingly support the view that the learned judge did not believe in the unamendability of the fundamental rights.

## KHANNA J'S OPINION AND AMENDABILITY OF FUNDAMENTAL RIGHTS

Of the several clues in his opinion, the first and foremost is that it starts with the basic assumption that the abrogation or extinguishment of fundamental rights could be effected by the exercise of amendatory power of Parliament under article 368 of the Constitution.[17] According to him, the amendatory power of Parliament was wide enough to comprehend the power even to abrogate or extinguish fundamental rights. This is evident from his following observation:

> Although, in my opinion, the language of Art. 368 is clear and contains no limitation on the power to make amendment so as to take away or abridge fundamental rights, even if two interpretations were possible, *one according to which the abridgment or extinguishment of fundamental rights is permissible in accordance with the procedure prescribed by Art. 368 and the other according to which the only way of bringing about such a result is an extra-constitutional method like revolution, the Court, in my opinion, should be in favour of the first interpretation...The mechanics of the amendment of the Constitution, including those relating to extinguishment or abridgement of fundamental rights, in my opinion, are contained in the Constitution itself and it is not necessary to have recourse to a revolution or other extra-constitutional methods to achieve that object* (emphasis added).[18]

Obviously, the learned judge was of the view that if the power to abrogate and extinguish the obstructive fundamental rights was denied to Parliament, the whole Constitution would perish in an extra-constitutional violent revolution. This apprehension prompted him to hold the view that the "mechanics of the amendment of the Constitution, including those relating to extinguishment or abridgement of fundamental rights" were all embodied in article 368 of the Constitution.[19]

To Khanna J, the word "abridgement" conveyed the same meaning as the expression "abrogation" or "extinguishment". Rejecting the argument of the petitioners that if article 368 was held to contain the power to take away or abridge

16. See *Indira Gandhi* v. *Raj Narain*, *supra* note 4 at 2461, 2465 and 2369 and *Minerva Mills* v. *Union of India*, *supra* note 5 at 1818-19. See also P.K. Tripathi, *"Kesavananda Bharti* v. *State of Kerala*: Who Wins?", *supra* noe 3 and H.M. Seervai, *Constitutional Law of India*, vol. II, pp. 1554-55 (1976).
17. *Supra* note 1 at 1850-1851, 1852 and 1855-58.
18. *Id* at 1850-51.
19. *Id.* at 1850-51, 1857 and 1903.

fundamental rights, it could, and perhaps would, be used by Parliament for the repeal of all the provisions guaranteeing fundamental rights, the learned judge observed:

> [H]is argument, in my opinion, is essentially an argument of fear and distrust in the majority of representatives of the people...I find it difficult to deny to the Parliament the power to amend the Constitution so as to take away or abridge fundamental rights by complying with the procedure of Article 368 because of any such supposed fear or possibility of the abuse of power.[20]

He was of the opinion that the mere possibility of abuse of power by Parliament was no ground for its denial to Parliament if the same was constitutionally vested in it under article 368 of the Constitution.[21] He was firmly convinced that the power to take away, abrogate or abridge fundamental rights was constitutionally vested in Parliament.[22] According to him, the best safeguard against the abuse of power was public opinion. He felt that if an atmosphere was created wherein the cherished constitutional values of liberty and freedom would lose their significance in the eyes of the "people and their representatives" and if they chose to do away with these values by an amendment of the Constitution, a restricted interpretation of article 368 would be of no avail.[23] He compared the amendatory power of Parliament to the power of the government and Parliament to wage war with all its disastrous consequences. He opined that if the government and Parliament could be trusted to exercise the power to wage war with reasonable care and in the national interest, it was anomalous to have an approach of distrust to deny Parliament the power to amend fundamental rights so as to abrogate or extinguish them.[24] Khanna J was of the firm belief that Parliament would never attempt to do away with all the cherished fundamental rights.[25] His belief was based upon the nation's experience of the first 17 years of the working of the Constitution. In his view, if Parliament, despite possessing the power to abrogate fundamental rights, did not choose to exercise that power in the first 17 years of the nation's life, there was no reason why it should be assumed or apprehended that Parliament would acquire a sudden aversion to, and dislike for, the fundamental rights and remove them from the Constitution.[26] In this context, he observed:

> There is a vital distinction, in my opinion, between the vesting of power, the exercise of the power and the manner of its exercise. What we are concerned with is as to whether on the true construction of article 368, the Parliament has or has not the power to amend the

20. *Id.* at 1855.
21. *Id.* at 1856.
22. *Ibid.*
23. *Id.* at 1857.
24. *Ibid.*
25. *Id.* at 1857-58.
26. *Ibid.* The enactment of the Constitution (Thirty-ninth Amendment) Act, 1975 belied this hope. This is, however, besides the point.



> Constitution so as to take away or abridge fundamental rights. So far as this question is concerned, the answer, in my opinion, should be in the affirmative, as long as the basic structure of the Constitution is retained.[27]

It appears, from the above observation that Khanna J took the view that Parliament's amending power as embodied in article 368 was wide enough to embrace the power to abrogate fundamental rights provided that the basic structure of the Constitutions was retained. It may be appreciated that the concept of the basic structure of the Constitution, according to Khanna J, was not intended to refer to, and much less to comprehend, the fundamental rights, for otherwise his view that Parliament could amend the Constitution so as to abrogate fundamental rights "so long as the basic structure of the Constitution is retained" would amount to contradiction in terms. This kind of contradiction certainly cannot be attributed to him. Therefore, what he meant was that so long as the basic structure of the Constitution was not touched, any provision of the Constitution including those guaranteeing fundamental rights could be abrogated or extinguished by the exercise of the amendatory power under article 368.

But the crucial question is: What did Khanna J mean by the expression "basic structure or framework of the Constitution"? In other words, did he intend this expression to refer to, and comprehend, fundamental rights also ?

## THE DOCTRINE OF BASIC STRUCTURE: KHANNA J'S PERCEPTION

At this stage, it is necessary to appreciate that Khanna J enunciated the doctrine of basic structure in the context of his attempt to answer the question whether or not the power to amend the Constitution under article 368 included the power to completely abrogate the existing Constitution and to replace it with a new one.[28] The learned judge answered the above question in the negative as he was of the view that the word "amendment" postulated that the old Constitution survived without the loss of its identity and continued to operate with the alterations effected. He held the view that the old Constitution could not be destroyed or done away with by the exercise of amendatory power as embodied in article 368 of the Constitution as, according to him, the power was limited by the requirement of the "retention of the old Constitution"[29] which was the same thing as retention of the basic structure or framework of the Constitution which was, in turn, synonymous with the "foundation or the basic institutional pattern." To quote the learned judge:

27. *Ibid* and 1903-1904. Overruling the *Golak Nath ratio* that Parliament did not have the power to amend any of the provisions of Part III of the Constitution so as to take away or abridge fundamental rights, Khanna J observed:

    > Fundamental rights contained in Part III of our Constitution can, in my opinion, be abridged or taken away in compliance with the procedure prescribed by Art. 368, as long as the basic structure of the Constitution remains uneffected:

    *id.* at 1890.
28. *Id.* at 1859.
29. *Id.* at 1860.

> A mere retention of some provisions of the old constitution even though the basic structure or framework of the constitution has been destroyed would not amount to the retention of the old constitution. Although it is permissible under the power of amendment to effect changes, howsoever important, and to adopt the system to the requirements of changing conditions, *it is not permissible to touch the foundation or to alter basic institutional pattern.* The words "amendment of the constitution" with all their wide sweep and amplitude cannot have the effect of destroying or abrogating the basic structure or framework of the constitution (emphasis added).[30]

Khanna J gave a few examples of the basic institutional pattern which could not be touched by amendment under article 368. Thus, the democratic form of government could not be changed into dictatorship or hereditary monarchy. Likewise, neither Lok Sabha nor Rajya Sabha could be abolished. Similarly, secular character of the state could not be done away with.[31] It is no doubt true that in the context of his mention of secular character as an example of the "basic institutional pattern", the learned judge stated that no amendment could be constitutionally permissible to effect discrimination among citizens on the ground of religion only.[32] It is, however, submitted that by this statement the learned judge did not mean to refer to any specific fundamental right guaranteed by Part III of the Constitution. He mentioned the requirement of non-discrimination on the ground of religion as an inferential consequence of the general secular character of the state.[33] It is, therefore, submitted that Khanna J was of the opinion that "subject to the retention of the basic structure or framework of the Constitution...the power of amendment is plenary and would include within itself the power to add, alter or repeal various articles including those relating to fundamental rights."[34]

Another pointer in Khanna J's judgment in the *Kesavananda Bharati* case is that he made a clear-cut distinction between "fundamental rights" guaranteed in Part III of the Constitution and the "essential features" of the Constitution and treated them as distnict concepts. This is clear from his own summation:

> The power of amendment under Art. 368 does not include the power to abrogate the Constitution nor does it include the power to alter the basic structure or framework of the Constitution. Subject to the retention of the basic structure or framework of the Constitution, the power of amendment is plenary and includes within itself the power to amend the various articles of the Constitution, *including those relating to fundamental rights as well as those which may be said to relate to essential features* (emphasis added).[35]

30. *Ibid.* (emphasis added).
31. *Ibid.*
32. *Ibid.*
33. P.K. Tripathi, *supra* note 3. It may be noted that at the time when the *Kesavananda Bharati* case was decided, the word "secular" did not find any mention in the Preamble to the Constitution. This word was introduced only by the Constitution (Forty-second Amendment) Act, 1976.
34. *Supra* note 1 at 1861.



Further, according to Khanna J, only those "essential features" of the Constitution which pertained to the basic structure or framework of the Constitution that were beyond the reach of the power of amendment under article 368. This is borne out by his observation:

> It is then argued on behalf of the petitioners that essential features of the Constitution cannot be changed as a result of amendment. So far as the expression "essential features" means the basic structure or framework of the Constitution, I have already dealt with the question as to whether the power to amend the Constitution would include within itself the power to change the basic structure or framework of the Constitution. *Apart from that, all provisions of the Constitution are subject to amendatory process and cannot claim exemption from that process by being described essential features* (emphasis added).[36]

As evident from the above observation, Khanna J's understanding of the concept of "essential features" was very narrow as it was meant to be confined only to the "basic structure or framework of the Constitution." It may also be noted that he had rejected the arguments based upon the theory of natural rights and human rights.[37] He was not impressed by the argument which sought to over-emphasise the importance of fundamental rights for, in his opinion, there was no absolute standard to determine as to what constituted a fundamental right and, therefore, a right which was considered to be fundamental in some countries was not so considered in other countries.[38] He was also not impressed by the argument that if fundamental rights were allowed to be abrogated or taken away by amendment, it would have the effect of denuding human beings of basic dignity and would result in the extinguishment of essential values of life.[39] That is the reason why he did not make any distinction between the constitutional provisions dealing with fundamental rights and other provisions except those dealing with the basic structure or framework. He noted:

> The word "amendment" in Article 368 must carry the same meaning whether the amendment relates to taking away or abridging fundamental rights in Part III of the Constitution or whether it pertains to some other provision outside Part III of the Constitution. No serious objection is taken to repeal, addition or alteration of provisions of the Constitution other than those in Part III under the power of amendment conferred by Article 368. The same approach, in my opinion, should hold good when we deal with amendment relating to fundamental rights contained in Part III of the Constitution. It would be

35. *Id.* at 1903-04 (emphasis added).
36. *Id.* at 1872 (emphasis added)
37. *Id.* at 1871 and 1875.
38. *Id.* at 1875.
39. *Ibid.*

> impermissible to differentiate between the scope and width of power of amendment when it deals with fundamental rights and the scope and width of that power when it deals with provisions not concerned with fundamental rights.[40]

The foregoing analysis of Khanna J's. opinion shows that at the time when he delivered his judgment in the *Kesavananda Bharati* case, his conception of the doctrine of basic structure or framework of the Constitution was not broad enough to comprehend the fundamental rights guaranteed in Part III of the Constitution. To him, the doctrine of basic structure only meant the basic institutional pattern or the broad outlines of the Constitution. This is evident from his rejection of the argument that the right to property was a part of the basic structure of the Constitution. In this context, he observed:

> So far as the question is concerned as to whether the right to property can be said to pertain to basic structure or framework of the Constitution, the answer, in my opinion, should plainly be in the negative. Basic structure or framework indicates the broad outlines of the Constitution, while the right to property is a matter of detail.[41]

It is submitted that by analogy the same logic was intended to be applicable even to other fundamental rights guaranteed in Part III. If the right to property was not considered to be part of the basic structure because of its detailed nature and specificity, the other fundamental rights, for the same reason, were not meant to be a part of the basic structure. The reason why the learned judge singled out the right to property for discussion in the context of the enunciation of his conception of the doctrine of the basic structure was the fact that the impugned constitutional amendments were held to be violative of the right to property which was claimed to be a part of the basic structure.

At this stage, it would be appropriate to state the conclusions of the foregoing analysis of Khanna J's. opinion:

(i) Khanna J was of the opinion that the doctrine of basic structure or framework of the Constitution was very narrow and that it referred to, and comprehended, only the institutional patterns or the broad outlines of the Constitution.

(ii) In the learned judge's opinion, the concept of basic structure was not meant to refer to specific rights which were detailed and guaranteed in Part III of the Constitution.

(iii) Similarly, to him, the concept of "basic features" did not envisage fundamental rights.

While this is the correct import of the opinion of Khanna J in the *Kesavananda Bharati* case with regard to the contours of the doctrine of basic structure, it is really interesting although unfortunate that his opinion has been

40. *Id.* at 1862.
41. *Id.* at 1881.



misunderstood and misinterpreted by some of the judges in the subsequent decisions. Similarly, this misinterpretation of his opinion has come to be accepted as the main *forte* of the misunderstood doctrine of basic structure.

It is interesting to note that Khanna J himself had the opportunity in the *Election* case[42] to interpret and appreciate his own opinion in the *Kesavananda Bharati* case. Rejecting the argument that his opinion in that case was supportive of the view that fundamental rights could be abrogated or taken away by an amendment passed under article 368 of the Constitution, the learned judge observed:

> I find it difficult to read anything in that judgment to justify such a conclusion. What has been laid down in that judgment is that no article of the Constitution is immune from the amendatory process because of the fact that it relates to a fundamental right and is contained in Part III of the Constitution... *The limitation inherent in the word "amendment" according to which it is not permissible by amendment of the Constitution to change the basic structure of the Constitution was to operate equally on articles* pertaining to fundamental rights as on other articles not pertaining to those rights (emphasis added).[43]

It may be submitted that although the opinion of Khanna J in the *Kesavananda Bharati* case was of crucial significance not only for the judicial acceptance of the doctrine of basic structure but also for its scope and content, his interpretation or clarification of that opinion in the *Election* case could claim no preference or weightage over the interpretations and understandings of his brother judges[44] who constituted the Bench in the same case. In such an eventuality, the rule of majority should prevail and should become the *ratio* of the case.[45] Interestingly, of the five judges who constituted the Bench in the *Election* case, only four[46] adverted their attention to this issue. And of the four judges, three judges expressed a view which was contrary to that of Khanna J.

Thus, Chandrachud J (as he then was), after examining Khanna J's. opinion in the *Kesavananda Bharati* case, stated that "Khanna, J. held that fundamental rights are not a Part of the basic structure and therefore they can be abrogated like many other provisions."[47] Mathew J confined his observation to

42. *Supra* note 4.
43. *Id.* at 2369.
44. A.N. Ray CJ and Khanna, Methew, Beg and Chandrachud JJ constituted the Bench that decided the *Election* case.
45. H.M. Seervai, however, takes a contrary view. He observes:
> It is possible to read Khanna, J's judgment to mean that he held that fundamental rights were not a part of the basic structure. .... However, the question cannot be answered merely by reference to *Kesavananda's* case, for in the *Election* case, he interpreted his own judgment in *Kesavananda's* case and he referred to several passages of that judgment to show that he had expressly made the power of amendment subject to the doctrine of basic structure:

H.M. Seervai, *Constitutional of India*, vol. II, *supra* note 16 at 1554-55.
46. Beg J (as he then was) did not discuss this issue.
47. *Supra* note 4 at 2465 and 2461.

article 14 which, according to him, was not held by Khanna J to be a part of the basic structure.[48] His opinion in the *Election* case was silent on the issue of Khanna J's view on the amendability of other fundamental rights. Ray CJ was of the opinion that:

> [T]he majority view in *Kesavananda Bharati's* case...is that the 29th Amendment which put the two statutes in the Ninth Schedule and Article 31B is not open to challenge on the ground of either damage to or destruction of basic features, basic structure or basic framework or on the ground of violation of fundamental rights.[49]

The foregoing analysis of the various opinions delivered in the *Election* case would indicate that Khanna J's. interpretation of his own opinion in the *Kesavananda Bharati* case was not shared by any of his brother judges and that, therefore, it could not claim any preferential treatment. On the contrary, the opinion of majority of the judges in the *Election* case would indicate in effect that Khanna J's. opinion in the *Kesavananda Bharati* case was supportive of the view that fundamental rights were not a part of the basic structure.

Again, in the *Minerva Mills* case[50] Chandrachud CJ, the chief architect of the majority judgment, though purported to decide the validity of the impugned article 31C in the light of the *ratio* laid down in the *Kesavananda Bharati* case, but, in reality, he did not follow and apply that *ratio*. It may be recalled that the *ratio* of the *Kesavananda Bharati* case in respect of the amendability of the fundamental rights was the same as the opinion of Khanna J in that case. It is amazing that Chandrachud CJ disowned his earlier understanding[51] of Khanna J's. view with regard to the amendability of fundamental rights which he expressed in the *Kesavananda Bharati* case. Accepting the argument that the constitutional balance and harmony between the fundamental rights and directive principles that existed prior to the Constitution (Forty-second Amendment) Act, 1976 was a part of the basic structure of the Constitution, the learned Chief Justice observed:

> [T] he Indian Constitution is founded on the bedrock of the balance between Parts III and IV. To give absolute primacy to one over the other is to disturb the harmony of the Constitution. This harmony and balance between fundamental rights and directive principles is an essential feature of the basic structure of the Constitution....Anything that disturbs the balance between the two parts will *ipso facto* destroy an essential element of the basic structure of our Constitution.[52]

48. *Id.* at 2383.
49. *Id.* at 2335.
50. *Supra* note 5. In this case, the constitutional validity of the amended article 31C was questioned in the context of a challenge to nationalisation of the Minerva Mills Ltd., a private textile undertaking situated in the State of Karnataka, under the Sick Textile Undertakings (Nationalisation) Act, 1974. The amended article 31C sought to accord overriding effect to laws aimed at the implementation of all the directive principles over articles 14, 19 and 31.
51. *Supra* note 4.
52. *Supra* note 5 at 1806-07.



Similarly, Bhagwati J (as he then was), who dissented from the majority judgment, was also not prepared to attribute to Khanna J (in the *Kesavananda Bharati* case) the view that fundamental rights were outside the pale of the doctrine of basic structure of the Constitution. While expressing the view that if Khanna J was of the opinion that fundamental rights did not form part of the basic structure of the Constitution and that, therefore, they could be abrogated by Parliament in exercise of its amendatory power, where was the need for him to expressly consider the question whether or not the right to property formed a part of the basic structure of the Constitution, the learned judge declared:

> The very fact that Khanna, J. proceeded to consider this question shows beyond doubt that he did not hold that fundamental rights were not a part of the basic structure. The only limited conclusion reached by him was that the right to property did not form part of the basic structure, but so far as other fundamental rights were concerned, he left the question open.[53]

It is submitted that it is true that Khanna J singled out the right to property to state that it did not form a part of the basic structure of the Constitution,[54] but the context in which he made this statement should be appreciated. He made this statement in the context of an argument that the Preamble to the Constitution would control the power of amendment and the same was beyond the reach of amendatory power of Parliament.[55] Rejecting this argument, Khanna, J opined that the Preamble was a part of the Constitution and that its provisions other than those relating to the basic structure or framework were as much subject to the amendatory process as any other part of the Constitution.[56] In the same context, he stated that one of the preambulary goals of the Constitution was to bring about the much needed socio-economic regeneration and that in order to achieve this, the state might have to adopt certain socio-economic measures which might impinge upon the property rights of individuals. Adverting his attention to the conflict between the objective of socio-economic justice as envisaged in the Preamble and the right to property which was sought to be affected by some of the impugned constitutional amendments, the learned judge observed:

> In this respect I find that although it (Preamble) gives a prominent place to securing the objective of social, economic and political justice to the citizens, there is nothing in it which gives primacy to claims of individual right to property over the claims of social, economic and political justice. There is, as a matter of fact, no clause or indication in the Preamble which stands in the way of abridgement of right to property for securing social, economic and political justice.[57]

53. *Id.* at 1819. For similer observation of Khanna J on his own opinion in the *Kesavananda Bharati* case, see the *Election* case, *supra* note 4 at 2370.
54. *See* the quotation accompanying *supra* note 41
55. *Supra* note 1 at 1875.
56. *Id.* at 1875-76.
57. *Id.* at 1878.

It is submitted that Bhagwati J's view that Khanna J left open the wider issue of the abrogation or extinguishment of the "other fundamental rights" in *Kesavananda Bharati* case is not at all pursuasive, for he conveniently ignored a crucial and clear passage in his opinion which unequivocally declared that "the abridgement or extinguishment of the fundamental rights is permissible in accordance with the procedure prescribed by article 368." It is interesting to note that despite his unconvincing gloss over the opinion of Khanna J in the *Kesavananda Bharati* case, Bhagwati J unpheld the validity of the amended article 31C on two counts,[58] one of them being the logic involved in the upholding of the unamended article 31C of the Constitution. In his view, if the abrogation or exclusion of the fundamental rights embodied in articles 14 and 19 of the Constitution could be constitutionally made for giving effect to the directive principles set out in article 39(b) and (c), there was no reason why these rights could not be abrogated or excluded for giving effect to the other directive principles which stand on the same footing.[59]

It is submitted that Bhagwati J, like Chandrachud CJ, failed to appreciate the real import of Khanna J's opinion in the *Kesavananda Bharati* case. This failure forced him to undertake the questionable and unconvincing projection of his conception of the scheme of constitutional balance and harmony between the fundamental rights and directive principles. It may be appreciated that if the constitution-makers did not envisage a conflict between the fundamental rights and directive principles it was because they intended the latter to be implemented within the framework of the former. This intention finds its express reflection in the import

58. *Supra* note 5 at 1847 and 1851. The other count on which he upheld the amended article 31C was that the constitution-makers intended fundamental rights to operate within the framework of the socio-economic structure envisaged in Part IV as they felt that only then the fundamental rights could be enjoyed and exercised by all and that a proper balance and harmony between them and the directive principles could be secured and maintained. To him it was a misconception to view fundamental rights as superior to directive principles and to insist that the latter should be implemented only within the framework of the fundamental rights. He was of the opinion that both were fundamental and that the constitution-makers never envisaged any conflict between the constitutional obligation with respect to the fundamental rights and the constitutional mandate in regard to the directive principles. Therefore, they did not think it necessary to provide for any provision for meeting any possible conflicts that might arise between these two parts. According to him, in the absence of any provision, the Parliament could evolve some *modus operandi* for eliminating the possibility of any future conflict between them (at 1847 and 1851). Parliament did this by amending article 31C which sought to give primacy to the directive principles over fundamental rights. He opined that the amended article 31C, far from damaging the basic structure of the Constitution, strengthened and re-enforced it by giving fundamental importance to the rights of the vast majority of the members of the community as against the rights of a few individuals (at 1853). He was also at pains to show that what the amended article 31C sought to do was only to codify the then existing judicial practice of upholding the programmes of legislative implementation of the directive principles by harmonising their claims with those of the fundamental rights (at 1850).

59. *Id.* at 1854. It is submitted that the fundamental rights guaranteed in Part III and the directive principles embodied in Part IV of the Constitution do not stand on the same footing. This is evident from the contemporary demand for the elevation of the right to work presently embodied under the directive principles contained in article 41 to the status of a fundamental right.



of article 13 (2)[60] read with the first part of article 37[61] of the Constitution. To say that both the fundamental rights and the directive principles are equally fundamental is to ignore this import. The main reason for upholding the unamended article 31C in the *Kesavananda Bharati* case, it is submitted, was that articles 14, 19 and 31 were not considered to be a part of the doctrine of the basic structure and that therefore they could be constitutionally abrogated or extinguished by the exercise of the amendatory power as envisaged under article 368. This view, it may be recalled, has its sole source and foundation in Khanna J's. opinion in the *Kesavananda Bharati* case which clinched the issue resulting in the emergence of the doctrine of basic structure.

In conclusion, it is submitted that it is time to put an end to the perpetuation of this misinterpretation of Khanna J's. opinion in the *Kesavananda Bharati* case. This becomes all the more necessary because of the constitutional mandate embodied in article 141 of the Constitution which declares that the law declared by the Supreme Court shall be binding on all courts in the country. It may be noted that an unsuccessful attempt was made in 1975 by the then Attorney General of India to have the soundness of the doctrine of basic structure reviewed and reconsidered by the apex court.[62] Although it may be too late in the day to question the validity of the doctrine of the basic structure, yet a clarification as to whether the fundamental rights were really meant to be a part of the basic structure as propounded in the *Kesavananda Bharati* case is absolutely necessary. Therefore, the Supreme Court should have an earliest opportunity to have a closer look at Khanna J's. opinion. It is hoped that such an opportunity will soon be provided to the court when Parliament enacts the Constitution (Sixty-sixth Amendment) Bill, 1990 for the inclusion of many land reforms enactments in the ninth schedule to the Constitution in order to give them immunity under article 31B from challenge on the ground of violation of fundamental rights. Since this can be effected only by an amendment of the schedule, such an amendment might be questioned on the altar of the *Waman Rao* case[63] which ruled that all laws which would be included in the ninth schedule on or after the date of the decision in the *Kesavananda Bharati* case (i.e. after 23.4.1973) would not be immune from constitutional challenge on the ground of violation of any of the fundamental rights guaranteed by Part III of the Constitution.[64]

B. ERRABBI*

60. Article 13(2) reads:

    The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

61. Article 37 reads :

    *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 (emphasis added).

62. The then Chief Justice issued a written order on 20.1.1975 to reconsider the decision of the Supreme Court in the *Kesavananda Bharati* case by a Full Bench. However, on the third day of the hearing, he dissolved the Full Bench and directed that the pending matter from Andhra Pradesh would first be heard by the Constitution Bench and that a Full Bench would sit only if the Constitution Bench were of such opinion after hearing.

63. *Waman Rao* v. *Union of India*, AIR 1981 SC 271.

64. *Id.*, per Chandrachud CJ at 291 and 294-95 and Bhagwati J at 295.

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# WHY NOT ABROGATE ARTICLE 370 ?

THERE IS a school of thought which believes that article 370[1] in the Constitution

1. Article 370 reads :

*370. **Temporary provisions with respect to the State of Jammu and Kashmir.**—(1) Notwithstanding anything in this Constitution,—

(a) the provisions of article 238 shall not apply in relation to the State of Jammu and Kashmir ;

(b) the power of Parliament to make laws for the said State shall be limited to—

(i) those matters in the Union List and the Concurrent List which, in consultation with the Government of the State, are declared by the President to correspond to matters specified in the Instrument of Accession governing the accession of the State to the Dominion of India as the matters with respect to which Dominion Legislature may make laws for that State ; and

(ii) such other matters, in the said Lists as, with the concurrence of the Government of the State, the President may by order specify.

*Explanation*, For the purposes of this article, the Government of the State means the person for the time being recognised by the President as the Maharaja of Jammu and Kashmir acting on the advice of the Council of Ministers for the time being in office under the Maharaja's Proclamation dated the fifth day of March, 1948 :

(c) the provisions of article 1 and of this article shall apply in relation to that State ;

(d) such of the other provisions of this Constitution shall apply in relation to that State subject to such exceptions and modifications as the President may by order specify :

Provided that no such order which relates to the matters specified in the Instrument of Accession of the State referred to in paragraph (i) of sub-clause (b) shall be issued except in consultaiton with the Government of the State :

Provided further that no such order which relates to matters other than those referred to in the last preceding proviso shall be issued except with the concurrence of that Government.

(2) If the concurrence of the Government of the State referred to in paragraph (ii) of sub-clause (b) of clause (1) in the second proviso to sub-clause (d) of that clause be given before the Constituent Assembly for the purpose of framing the Constitution of the State is convened, it shall be placed before such Assembly for such decision as it may take thereon.

(3) Notwithstanding anything in the foregoing provisions of this article, the President may, by public notification, declare that this article shall cease to be operative or shall be operative only with such exceptions and modifications and from such date as he may specify :

Provided that the recommendation of the Constituent Assembly of the State referred to in clause (2) shall be necessary before the President issues such a notification.

*In exercise of the powers conferred by this article the President, on the recommendation of the Consituent Assembly of the State of Jammu and Kashmir, declared that, as from the 17th day of November, 1952, the said art. 370 shall be operative with the modification that for the *Explanation* in cl. (1) thereof, the following *Explanation* is *substituted* namely :

*Explanation.*—For the purposes of this article, the Government of the State means the person for the time being recognised by the President on the recommendation of the LegislativeAssembly of the State as the **Sadar-i-Riyasat of Jammu and Kashmir, acting on the advice of the Council of Ministers of the State for the time being in office." (Ministry of Law Order NO. C.O. 44, dated the 15th November, 1952).

**Now "Governor".



of India is so sacrosanct that the Constitution must respect the separate status of the State of Jammu and Kashmir even if that might lead to the disintegration of the Indian nation. Indian nation at present is passing through a critical phase when its existence and integrity is being questioned. The secessionist and terrorist onslaught is so overbearing that every Indian is having a second thought about the strength and efficacy of our institutions, be they constitutional, legal or otherwise. The worst side of the gloom is that people have started suspecting each other and have virtually been reduced to the status of refugees in their own country. Article 370 is one of such unfortunate articles in the constitutional scheme of things that it ought to be abrogated forthwith as it has the potential of creating more misunderstanding than what it has done so far in the last forty years of our Republic in general and the State of Jammu and Kashmir in particular.

## I WHAT IS SPECIAL ABOUT ARTICLE 370

When India achieved independence, J and K State was an Indian state ruled by a hereditary Maharaja and it acceded to the Indian Union like any other Princely State by executing an instrument of accession. J and K was included as a Part B State in the First Schedule to the Constitution. However, the then article 238 of the Constitution was not applied to the State of J and K, instead separate temporary provisions were made for the State under the temporary general frame-work of article 370. The Instrument of Accession dated 27-10-1947 between the then Maharaja of J and K and the Union of India was subsequently ratified by the Constituent Assembly of J and K in 1954 wherein the future relationship of J and K with India was drawn threadbare. In pursuance of the Constitution (Application to Jammu and Kashmir) Order, 1954,[2] the jurisdiction of Union of India has been extended to all Union subjects under the Constitution of India (subject to certain alterations), instead of only the three subjects of defence, foreign affairs and communication with respect to which the State had initially acceded to the Indian Union. The above Order deals with the entire constitutional position of the State within the framework of the Constitution of India, excepting only the Constitution of the state government framed in 1956 which came into force on 26th January, 1957 to regulate matters of internal administration.

The Constitution of J and K neither stands on its own, nor does it have a legal status superior to, or separate from, the Constitution of India, it is rather a creature of the Constitution of India and slight exceptions or alterations conceived in the J and K Constitution are expressly allowed by the Constitution of India by the Constitution (Application to Jammu and Kashmir) Second Amendment Order, 1958. There have been subsequent amendments and changes in the legal relationship between the J and K State and the Union of India to such an extent that no article of the Constitution of J and K is at variance with the Constitution of the Union of India.

2. *See* the Constitution (Application to Jammu and Kashmir) Order, 1954, published with the Ministry of Law Notification No. S.R. 1610, dated the 14th May, 1954, *Gazette of India, Extraordinary*, Part II, sec. 3, p. 821, as amended from time to time.

Union of India is a Union of States under article 1 of the Constitution of India and J and K forms a part of the territory of India under article 1(3). Neither the Union of India nor the State of J and K can cede away any territory of the State of J and K, rather it is obligatory, legally and otherwise, on the part of the Union of India and the State of J and K to reclaim the territory lost to Pakistan at the time when Maharaja of Kashmir acceded to the Union of India. Similarly, the Union of India is duty bound to defend every inch of the territory of J and K State as well as other territory of the Union of India.

Not only the people residing in the State of J and K are citizens of India but also those who have migrated from J and K to Pakistan or are residing in the occupied territory of Kashmir, the only difference being that in the case of first category of people intentions are obvious whereas in the other two categories intentions are to be expressed. There are no separate citizenship laws for the people of J and K; they are governed by the citizenship laws passed by the Parliament from time to time. The fundamental rights conceived in Part III of the Constitution of India and the resultant jurisprudence has always extended to the State of J and K and the judicial system of the State is under the supervision and superintendence of the judicial system of the Union of India. It is possible for the Parliament to diminish, increase or merge the territory of the State of J and K in the same way as it can do in the case of other states with a difference that a prior consent of the state legislature has to be obtained. The provisions of Part XI of the Constitution of the Union of India (i.e. Relations between the Union and the States) apply to the State of J and K with all its essential characteristics and attendant obligations. The legislative powers of Parliament enumerated in the Union List extend to the state, *ipso facto*, and any law passed by the State of J and K of whatever nature and content, if repugnant to the law passed by the Parliament shall, to the extent of such repugnancy, be void. Although Parliament have no power to legislate with respect to the State of J and K in national interest in the manner provided in article 249, yet during a proclamation of emergency under article 352, the legislative power of Parliament in relation to J and K extends automatically to any matter, as in the case of other states in India, and laws of the J and K State, if inconsistent with laws made by Parliament of the Union of India, shall be void to the extent of such repugnancy and inconsistency. Parliament's plenary powers regarding treaties and international agreements under article 256 are subject to the restriction that no decision affecting the disposition of the State of J and K will be made without the concurrence of the government of J and K. Be it noted that all fetters or restrictions placed on the executive anywhere in the Constitution apply equally to the State of J and K.

The most novel and important relationship in addition to obligations of states and Union of India concerning administrative relations (articles 256 and 257), the State of J and K is under further legal obligation that its executive power shall be exercised to *facilitate discharge* by the Union of its duties and responsibilities under the Constitution of India. The State of J and K has to cooperate positively with the Union of India as it has strategic and other serious implications for the Union of India. If so required, the Union of India shall acquire or requisition property within the state on behalf, and at the expense, of the Union of India. Similarly, the State of J and K is under an obligation to transfer any property belonging to the State to the



Union, if required by the latter. From constitutional and legal point of view, article 370 is completely hollow and is not sacrosanct at all. The argument that article 370 guarantees special status to the State of J and K is devoid of any substance. At best, it has been misconstrued for the last four decades for various partisan ends.

## II ARTICLE 370 IN OPERATION

Article 370 falls in Part XXI of the Constitution under the title "Temporary, Transitional and Special Provisions". The Preamble to article 370 also speaks of temporary provisions with respect to the State of J and K and the laws made in the course of last forty years, some of which have been mentioned earlier, have made such inroads in the article that nothing much of it is left intact. Article 370 has been completely overridden by the subsequent instruments of accession as well as extension of laws made by the Union of India so much so that article 370 by itself has become otiose. The argument that article 370 gives a *carte blanche* to the State of J and K not only to subordinate the Independence Act, 1947 but also the Constitution of India is not only erroneous but also mischievous. Article 370 was not, and has never been, conceived of as a permanent phenomenon of the Constitution of India and thus all laws made and extended to the State of J and K by the Union of India cannot be withdrawn or put in abeyance. Article 370 is dead wood and it needs to be chopped off from the Constituition. The earlier it is done, the better it would be for the Indian polity.

The crux of the matter is that article 370 has always been made use of by the political forces in the country throughout the last forty years to the complete detriment and subjugation of the people of J and K. Under the garb of article 370, Sheikh Abdullah converted the Kashmir valley into his personal serfdom. Gulam Mohd. Bakshi who replaced Sheikh Abdullah as the Chief Minister of J and K too made use of the same article 370 for his personal ends and never allowed functional democracy to take roots in the soil of Kashmir. As and when Bakshi was pulled up for his political errands by the Union of India, article 370 was used as a shield for his political adventurism. Under the garb of article 370, no election worth the name was contested honestly and within the constitutional requirements. Bakshi's political adventurism was so great and ominous that he cared the least for the Constitution of India and that of the State of J and K. In order to use article 370 to the best of his advantage, Bakshi declared all permanent residents of the State of J and K as socially and educationally backward except the bare minority of Kashmiri Pandits. This signalled a *death knell* for the secularism of the State of J and K and ultimately insulated the Kashmiri Muslims from the rest of the country. The reservation policy, although primarily aimed at bettering the lot of socially and educationally backward classes was actually made use of by the political powers in such a way that the Muslims started getting discriminated against the Muslims in the valley, the Dogras against the Dogras in Jammu and the Kashmiri Pandits had to fend for themselves.

Likewise, article 370 was used by the political forces for complete balkanisation of the three regions of the State of J and K, viz. the Kashmir valley, Jammu and Ladakh. After the exit of Bakshi and with the installation of Sadiq as the

Chief Minister of the State, article 370 was further exploited towards the disintegration of the State into three hostile regions. Previously, the State was conceived of as one entity and all the officials and other governmental machinary was used to be transferred *inter se* the three regions but by the end of Sadiq's regime the three regions had started coming to loggerheads. Kashmiri Muslims were made to believe that they were not safe in Jammu and the Jammu people were not safe in Kashmir.

During the second stint of Sheikh Abdullah's Chief Ministership, the Kashmiri Muslims were openly encouraged to defy the laws made and extended to the State of J and K, by the Union of India. It is on record that Sheikh Abdullah while in Delhi would pretend to be the most secular whereas in the religious congregations on Fridays in Kashmir he would raise the bogy of article 370. Farookh Abdullah too did not miss any opportunity in taking advantage of article 370 as and when it suited him to remain in power. However, the fact remains that in the process, the people of J and K have been cheated of their due importance in the Union of India by the erstwhile political powers.

Another pitfall of article 370 was that under the garb of special protection, the Muslim religious preachers were specifically invited from Deoband and Aligarh and made incharge of the mosques and other social or religious places in the Kashmir valley. These so-called religious preachers spread all types of cannards and preached fundamentalism of absolute crudity. To cap it, article 370 became a passport for all the incompetent and less meritorious Muslims of the other states especially of the U.P., to join the administration and higher echelons of the Government of J and K State. These so-called secular Muslims left no stone unturned in spreading communal venom during their stay in the Kashmir valley. Because of the shortage of jobs, future prospects and calumny of politicians, the Muslims of the present generation of the State of J and K have fallen an easy prey to secessionist and subversive forces as throughout their career they have been told that they are a separate nation not completely merged with the Union of India.

Article 370 needs to be repealed forthwith for it conceives of double standards. On the one hand, it gives the impression that the J and K State has a special status and is a separate nation, while on the other, the people of Kashmir have been denied the fruits of democracy, socialism and secularism. Article 370 has become a stumbling block for the Kashmiri Muslims to reap the benefit of the fully biostrous Constitution of India. The chauvinists of *status quo* of article 370 are out to harm the people of Kashmir. By virtue of this article, the Muslims of the Kashmir valley have become suspects in the eyes of the rest of India. Geographically, it is the Muslims of the valley alone who hanker around article 370, whereas the people of Jammu never talk about it for the simple reason that the people from the Jammu region are socially, educationally and industrially closely connected and linked with the rest of India. The Buddhists of Ladakh have already been provided with an extraordinary constitutional protection and thus they are least bothered about article 370.



For the healthy development and economic growth of the people of J and K they need industrial, agricultural and entrepreneurial infrastructure. There has been hardly any development in these directions. The reason being that article 370 acts as a damper for industrialists from other parts of the country to invest in the state and the investments made by the government in various public sector undertakings have been completely eaten away by the politicians of the yore. In terms of natural resources, three-forth of the forest cover of Kashmir has already been denuded by the so-called politicians of every hue enriching themselves and filling their coffers to the maximum.

Kashmiris' sense of belonging with the rest of the people of the Union of India has been thwarted by the very article 370 and the politicians under this umbrella have been saying one thing at the level of the Centre and quite different in the closed environs of the valley. Every now and then the politicians have used article 370 as a whipping rod to measure the pliability of the powers at the Centre. It cannot be justified by any stretch of imagination that the State of J and K be given a preferential treatment and its people should not be allowed to share the fruits of political, social and economic development with the rest of the Union of India. The environment created by article 370 has stifled the people of Kashmir too much. Kashmiris have come of age and there is every reason to remove the protective shield from them so that they can compete with the people of the rest of India as co-equals and not inferiors.

### III HOW TO ABROGATE ARTICLE 370 ?

The case for abrogation of article 370 is a historical necessity and a constitutional imperative. There is no legal fetter of whatever kind on the power of the Union Parliament to amend, abrogate and delete any of the articles of the Constitution including article 370. This power of Parliament, however, is subject only to one limitation that such laws should not alter the basic structure of the Constitution as held by the Supreme Court in cases such as *Kesvananda Bharati*,[3] *Minerva Mills*,[4] etc. Article 370 does not purport to strengthen any of the basic features of the Constitution, rather the truth of the matter is that it is a dubious device to thwart any or all the basic structures of the Constitution and can by no stretch of imagination be given the status of one of the basic features of the Constitution. The scheme of article 370 was that initially when a state has acceded, annexed or merged in the Union, it may require some breathing time to completely merge with the rest of the Union of India. It never meant that article 370 will be conferring on the State of J and K a very special status and has a freedom or liberty even to cede away from the Union. Article 370 can never be considered superior or controlling the content of article 368 which contains in it the procedure and power to amend, vary, change or repeal any or all articles of the Constitution including the Chapter on Fundamental Rights. Article 368 stands higher, primordial and industructible article of the

3. *Kesavananda Bharati* v. *State of Kerala*, AIR 1973 SC 1461.
4. *Minerva Mills* v. *Union of India*, AIR 1980 SC 1789.

Constitution. If article 368 is supposed to be subordinate to article 370, then, by a logical interpretation, the Chapter on Fundamental Rights becomes subordinate to article 370, which would not only lead to illogical but absurd results. There is no need to convoke a Constituent Assembly either of the State of J and K or that of the Union of India to abrogate article 370 from the Constitution of India. The article has already impliedly been abrogated by the Constitution (Application to Jammu and Kashmir) Order, 1954.

There is no limitation on the Union Parliament to abrogate article 370. In the normal course of events, the Parliament while amending the lists in the Seventh Schedule needs a ratification of not less than half of the legislatures of the states and under no circumstances it can mean that the consent of the State of J and K is a necessary condition for amending the Seventh Schedule. The State of J and K acceded to the Union of India with full knowledge that it shall be a constituent of the Union and not its colony. Article 370 has been interpreted to convey to the people of the State of J and K, especially the Muslims, that they are not equal partners of development. It has further made the people of J and K dwarfed, exploited and feel insecure in such a way that the politicians have a field day in exploiting them to the best of their advantage.

Let the people of J and K be fully integrated with the rest of the Indians so that they feel a sense of pride, participation and get elevated to a level of freedom and freshness so that they are saved from the political treachery and the existing hotch potch in the State.

## IV DISPASSIONATE VIEW

If a dispassionate view of article 370 is taken and a real assessment is made, the conclusion would be obvious that the Muslims in the valley have been exploited, expropriated and blunted in the course of last forty years. Invariably, without fail, Muslims in the valley have been denied the fullest freedom to develop, thrive and prosper in a competitive and healthy environment. Whenever and wherever the Muslims from Kashmir wanted to compete with the rest of their brethren in the Union of India, every time they were told by the politicians of the yore that they are a class by themselves and have to live on the doles and crumbs given to them by the Union Government. Article 370 further thwarted the proper implementation of rights, duties and obligations of the State *vis-a-vis* the people and the people *inter se*.

The argument that any action taken in pursuance of article 368 shall be null and void is devoid of any substance and shorn of political reality as the region of Jammu has neither to gain nor to lose by the abrogation of article 370. As the things stand today, the people of Ladakh have already been given the status of Scheduled Caste and Scheduled Tribes, there is no reason why only the Kashmiri Muslims should remain scapegoats for all and sundry political adventurism, be that of Congress, National Conference, Janta Dal or the secessionists. Does Mufti Mohd. since the day he became the Union Home Minister have a right to say that article 370



shall not be abrogated? Does he really represent the people of Jammu and Kashmir in any manner? Is he not the representative of the people of Muzaffar Nagar? If article 370 is sacrosanct and an article of faith between the people of Kashmir and the Union of India, how can the writ of Mufti Mohd. extend to the people of J and K ? How was it possible for the Union Government to appoint a separate minister for Kashmir affairs and proclaim the governor's rule there? This was possible only because article 370 is dead, long live article 370 !

Let not the argument for the continuance of article 370 be a guide for the other states, especially the State of Punjab, which can say that the Anandpur Sahib resolution for being true reflection of the democratic decentralisation and the Sikhs do not distinguish between *miri* and *piri* should constitute the basic feature of the Constitution, which is beyond the amendability of the Union Parliament. Such an argument would create havoc to the quality of the Indian Union.

To sum up and in the context of the present day ills facing the nation, it is important and imperative to abrogate article 370 from the Constitution lock, stock and barrel so that we can redeem the pledge given to our countrymen including the people of Jammu and Kashmir.

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# THE RIGHT TO FOOD

WHEN A poor person utters before another *Bhagwan sab ko roti de* (God, give bread to all), his prayer indicates something which is the most vital need of every living individual, viz. food. He may not be knowing that he has a right to food at the national level, indirectly, if not directly at least, which has been incorporated in the Constitution of India as a fundamental right under article 21 and under many other provisions of the Constitution dealing with directive principles of state policy such as articles 38, 39, 41, 43, 47 and 48. He has a right to ask the government what he is praying from God. The poor man is not aware that international law also pleads his case in many instruments, e.g. the Preamble to the Covenant of FAO provides for "... ensuring humanity's freedom from hunger"; the International Convenant on Economic, Social and Cultural Rights incorporates that "the States Parties to the present Covenant recognize the right of everyone to ... adequate food ..." if the country has ratified the Covenant. It is remarkable that he is praying to God to give bread to everyone, and not only to him, or to his family; he is making no distinction between the poor in the East or West, North or South. It is also notable that he is praying only for "bread" (subsistence need) and not for "bread and butter" (adequate food) as the phrase goes in the English language. In his concept of distributive justice and a world order, at least bread must be available to all as that is required for "minimal subsistence" or is the most basic need and he knows well, and rightly so, that today he is living in a world where that is not so.

## I RIGHT TO FOOD IN INTERNATIONAL LAW

The right to food (or adequte food) has been recognized as a human right in a number of instruments within the framework of international law.

**(a) The constitutional responsibilities of FAO**—ensuring humanity's freedom from hunger—are such that the entire programme of that organisation is a contribution to the advancement of certain fundamental human rights and, in particular, the right to food.

### (b) The Universal Declaration of Human Rights (1948)

Article 25(1) lays down : "Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food ..." Many other articles also have a bearing on the point.--Article 3 provides that "everyone has the right to life ... "; Article 22 relates to the realization, through national effort and international cooperation, economic, social and cultural rights.

### (c) The International Covenants on Human Rights

While 'right to food' (or adequate food) is an economic right and directly falls within the purview of the International Covenant on Economic, Social and Cultural Rights, it will amount to negligence to take no notice of some important



provisions of the International Covenant on Civil and Political Rights, specially Article 6 which proclaims that "Every human being has the inherent right to life." In 1982, the Human Rights Committee observed that the expression "inherent right to life" could not properly be interpreted in a restrictive manner and that protection of the right requires States to adopt positive measures rather than merely refraining from certain prescribed measures. P.N. Bhagwati J in *Francis Coralie* v. *Union Territory of Delhi* [1] made similar observations in the following words:

> [T]he right to life enshrined in Article 21 cannot be restricted to mere animal existence. It means something much more than just physical survival.

The Human Rights Committee specially laid down that it would be desirable for state Parties to the Covenant "to take all possible measures to reduce infant mortality and to increase life expectancy especially in adopting measures to eliminate malnutrition ..."[2] It is, however, Article 11 of the International Covenant on Economic, Social and Cultural Rights which is the most important single provision relating to the right to food. It lays down :

> 1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.
>
> 2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:
>
> (a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;
>
> (b)Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distriubtion of world food supplies in relation to need.

FAO in its 1981 report on implementation of the Covenant fully realised the importance of this provision when it observed:

> It is ... widely recognised that by adopting the measures indicated in

1. AIR 1981 SC 746 at 752.
2. *Report of the Human Rights Committee*, GAOR A/37/40, annex. V, paras. 1 and 5 (Supple. 40)

> Art. 11.2 of the Covenant the international community would be in a position to eliminate completely the present state of chronic malnutrition and under nourishment and to mitigate considerably the effects of calamities.[3]

### (d) Other International Instruments

Besides the above provisions, an important step was taken in this direction in 1974 when the World Food Conference adopted the Universal Declaration on the Eradication of Hunger and Malnutrition which proclaims, *inter alia*, that :

> [E]very man, woman and child has the inalienable right to be free from hunger and malnutrition in order to develop fully and maintain their physical and mental faculties. Society today already possesses sufficient resources, organizational ability and technology and hence the competence to achieve this objective. Accordingly, the eradication of hunger is a common objective of all the countries of the international community, especially of the developed countries and others in a position to help.[4]

The Twenty-third Conference of the FAO held in Rome between 9-28 November, 1985, unanimously approved a World Food Security Compact, which calls on all Governments, Non-Governmental Organisations (NGOs) and individuals to commit themselves to the aims of World Food Security, namely that all peoples will have access at all times to the basic food they need. The Compact, which is not legally binding, sets out the moral values and lines of action which should guide Governments, NGOs and individuals in attaining the commonly shared objective of improved world food security and the elimination of hunger and malnutrition.[5]

In 1983, the Commission on Human Rights through the Sub-Commission on Prevention of Discrimination and Protection of Minorities appointed Asbjorn Eide as a Special Rapporteur to make a study on the Right to Adequate Food as a Human Right.

The General Assembly of the United Nations at its Annual meeting in 1985 passed a resolution,[6] which is very important on the issue of 'right to food'. It states:

> The General Assembly recalling the Declaration and the programme of Action on the Establishment of a New International Economic Order, contained in its Res. 3201(S-VI) and 3202 (S-VI) of 1 May, 1974, the Charter of Economic Rights and Duties of States, contained in its Res. 3281 (XXIX) of 12 Dec. 1974, Res. 3362 (S-VII) of 16

3. 1 E/1981/22, para. 2..
4. *Report of the World Food Conference*, Rome, 5-16 Nov. 1974; *Human Rights : A Compilation of International Instruments* (U.N. Publication, Sales No. E. 83 XIV. 1), para. 1, p. 138.
5. G.A. Res. 40/176.
6. G.A. Res. 40/181.



> Sept. 1975 on Development and International Economic Cooperation, and the International Development Strategy for the Third United Nations Development Decade, contained in the annexe to Res. 35/56 of 5 Dec. 1980;
>
> Reaffirms the Universal Declaration on the Eradication of Hunger and Malnutrition adopted by the World Food Conference (1974) stressing the imperative need to keep food and agricultural issue at the centre of global attention;
>
> Streesing the urgent need for the international community in its development efforts to take determined actions towards the elimination, inter alia, of poverty, hunger and malnutrition...
>
> Reaffirming that the right to food is a universal human right which should be guaranteed to all people ...
>
> Reaffirming that urgent action should be taken to increase food production, which is one of the most important elements in meeting the food needs of the developing countries and that, in this regard, sustained efforts at the national, regional and international levels should be pursued and that the national food strategies, plans and programmes of developing countries should play a central role in the process of establishing priorities in coordinating national and international funding and in the application of technology in order to enable them to achieve self-reliance.

Similar stress was laid down on the 'right to food' in the U.N. General Assembly Resolutions 41/191 (Dec., 1986), 42/120 (7th Dec., 1987) on New International Humanitarian Order, 42/121 on International Cooperation in the Humanitarian Field, 43/190 (20th Dec., 1988) on strengthening technical cooperation among developing countries in food and agriculture, General Assembly Resolution 43/191 (20th Dec., 1988) regarding food and agricultural problem reaffirmed that the right to food is a universal human right and welcomed the conclusions and recommendations of the 14th ministerial session of the World Food Council held at Nicosia[7] from 23 to 25 May, 1988 and in particular, the Cyprus Initiative[8] against hunger in the World and called upon the Governments and International and Non-governmental Organisations to assist the World Food Council fully in implementing the Initiative.

From the foregoing survey, it may be concluded that the right to food (or adequate food) is a human right in international law. An argument has been put forth that the right to food is not an individual right but rather a broadly formulated programme for governmental policies in the economic and social fields.[9] But this

7. GAOR 43th session, Supple. No. 19(A/43/19), pt. I.
8. *Id.*, pt. II.
9. E. Vierdag, "The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights", IX *Netherlands Yearbook of Intl. L.* 103 (1978).

criticism ignores the fact that Article 11 of the Covenant, dealing with the right to food, recognizes it as "the right of everyone", and thus it is expressed as a human right pertaining to individuals and not as a broad proposition. The criticism that this right is merely programmatic implies that broad programming for implementing other human rights is not necessary. But this is also not correct. A government has to make a programme for eradicating the evil whether it is hunger, torture or a widespread pattern of disappearances.[10]

It has also been pleaded that economic rights like the 'right to food' are not legally enforceable; their implementation is a matter of politics and not of law and hence not a matter of right.[11] But it is highly questionable, whether an enforceability test can appropriately be applied in order to ascertain whether a right can be deemed to be part of international law.[12] It has been argued that " one cannot simply 'transplant' conceptions and ideas derived from municipal legal systems into international law, because often these are not attuned to the realities of international relations ... It is the exception rather than the rule that norms of international law can be enforced through courts of law".[13]

Realising that food is a basic necessity for survival, and adequate food is a necessity for a satisfactory livelihood, the question is how can the right to food be realized for everyone throughout the world? For this purpose it has been suggested that (i) production should be increased through land settlement and reclamation, soil conservation, irrigation and the introduction of more advanced agricultural technologies including the use of pesticides and of fertilizers, and (ii) family planning and population control should be made more popular. But these alone are not sufficient. A new concept of "food entitlement", has been introduced, which is not a legal but rather a social science concept.[14] It helps to focus on two aspects of the food problem : (a) on the assets controlled by persons seeking to obtain food; and (b) on the availability and cost of food products. It helps to underline the fact that even if food is available and in abundance, such availability does not help those who do not have the necessary assets to command food at the conditions prevailing in the market. However, the relationship between food production, exchange and consumption cannot be captured in a simple formula.

But as lawyers, our primary concern is that the right to food should not remain an empty slogan. For that purpose what is needed is (i) a clearer definition of its material content, (ii) the form of instrument in which it should be formulated,

10. U.N. Dec. E./Cn.4/Sub.2/1984/22, p. 5.
11. Supra note 9.
12. Supra note 10.
13. G.J.H. Van Hoof, "The Legal Nature of the Rights Contained in the International Covenant on Economic, Social and Cultural Rights: A Rebuttal of Some Traditional Views", paper presented at the *Conference on the Right to Food*, Woudschoten, Netherlands, June. 1984, p. 5, quoted in *supra* note 10.
14. U.N. DOC. E/CN.4/Sub.2/1984/22/Add.2.



and (iii) suitable machinery for its implementation.[15] The observations of the International Association of Democratic Lawyers (France) on these issues are very pertinent and worth consideration.[16]

## II THE CONTENT OF THE RIGHT TO FOOD HAVE FOUR DISTINCT ASPECTS

### (a) The Right to Subsistence

The governments of States where part of the population is suffering from scarcity of food, have an obligation to make sure, to the best of their ability, a distribution of the available food resources in such a manner that scarcity may end. At the same time, the States which produce enough food for their own requirements have an obligation to allocate part of their surpluses to feeding population suffering from malnutrition.

### (b) The Right to Specific Technical Assistance

Under this, the industrialized States should contribute to the organization of developing projects adopted to the immediate needs of populations suffering from malnutrition so that the latter become self-reliant and self-sufficient in food production and storage, by transferring suitable technology.

### (c) The Right to Information

This relates to the problem of family planning and birth control and a minimum standard of education is necessary here.

The above three rights can be achieved under the supervision of Inter-governmental and Non-governmental organizations.

### (d) The Right to Structural Reforms

This relates to the problem of agrarian reforms. States suffering from malnutrition are under an obligation to distribute all available land in such a way as to enable the local communities to achieve self-sufficiency in food.

Thus, the right to food (or adequate food) implies rights and obligations for all parties concerned, i.e. States with populations suffering from malnutrition, States with food surpluses, Inter-governmental and non-governmental organizations and the assisted persons themselves.

## III LEGAL INSTRUMENT ENSURING THE RIGHT TO FOOD

The most effective way is to embody the right in a special international

15. U.N. Doc. E/CN.4/Sub.2/1984/22/Add.1, containing reply of the International Association of Democratic Lawyers (France) in response to the letter of November, 1984 by the Special Rapporteur.
16. *Ibid.*

Convention. This, however, may take time and, therefore, in the interim period, the United Nations General Assembly may adopt a normative declaration in consultation with the most closely concerned states including non-governmental organisations.

## IV IMPLEMENTATION OF THE RIGHT TO FOOD

An international supervisory machinery may be instituted for this purpose either within FAO or the United Nations, which may be made responsible for monitoring the application of the Convention or Declaration. The states and the NGOs concerned should be placed under an obligation to report to it regularly on the application of the right to food. Private individuals and NGOs should be entitled to bring problems arising from any failure to apply or any violation of the Convention or Declaration before the domestic courts and tribunals. In other words, either all or part of the substantive provisions of the Convention or Declaration should be directly applicable in the internal legal system.

## V CONCLUSION

While states have recognised that freedom from hunger is a fundamental human right and that everyone has the right to adequate food, chronic hunger and malnutrition represent the most compelling dilemma of our times. Millions continue to go hungry and malnourished. They are clearly deprived of their right to food, with disastrous consequences including the death of millions of children. The conditions facing the rural poor, the landless peasants, the un-employed urban dwellers—the so-called marginalised sectors of the population of the developing countries— are steadily deteriorating.

The human right to food cannot be guaranteed without a significant degree of socialization of food production and distribution at the national and global level. The most important issue is "to specify the internal and external obligations of states" and thereby "to establish a basis on which governments and other actors can be held accountable for the impact of their activities on the realization or non-realization of the right to food." The production of foodgrains has considerably increased at the rate which is by and large slightly higher than that of the population growth. There are no simple solutions to the problem but signs of hope are there. The most important of these is the growing numbers of people who are recognising the reality and nature of inter-dependence among nations.

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# THE TRIAL OF NORIEGA IN UNITED STATES - SOVEREIGN IMMUNITY BARRIER

THE TRIAL of deposed Panamian Dictator Manuel Antonio Noriega in the United States on drug trafficking charges has captured the attention of international lawyers and politicians. Noriega is accused of using his power as the head of Panama's intelligence unit, its military and the entire country to give aid, comfort and shelter to Columbian cocaine traffickers. Noriega allegedly used Panamian soldiers as body-guards for Colombian drug traffickers, allowed military planes and airfields to be used for drug shipments, provided the traffickers with intelligence information about U.S. anti-drug operations and sent armoured cars to transport drug money. The accusations state that by utilising his official position, Noriega and his trusted associates were able to assure drug traffickers that Panamian military, customs and law enforcement personnel would not interfere with their operations in Panama as long as substantial fees were paid to Noriega. The U.S. authorities claim that the money attracted Noriega to drug trafficking. They say that they have identified at least 10 million dollars kept in European banks by Noriega, who rose from a poor family and supplemented his 60,000 dollar annual salary with interests in casinos, liquor stores, news media outlets and banks. Noriega allegedly loved money and luxury and his prime motivation seemed to be money. In April, 1989, the United States imposed a total financial, and nearly a total economic, blockade of Panama. However, the economic sanctions imposed by the United States failed to prevent the drug trafficking activities of Noriega. Finally, the United States launched armed invasion against Panama. The Vatican gave refuge to Noriega in its Panama mission because Noriega reportedly threatened to order massacres. On 3 January 1990, the surrender of Noriega was accomplished by extreme diplomatic pressures from Vatican representatives who even told Noriega that they might move their embassy and leave him alone in the compound surrounded by the U.S. soldiers and an angry populace. On his surrender to U.S. troops, Noriega was flown to Florida where he made a court appearance the following day charged with drug trafficking. On 5 January 1990, Panama's new government passed a decree and dismissed Noriega as Commander-in-Chief of the Panamian defence forces and stripped him of his rank as General. Noriega was also sacked from his post as head of the Panama's defence forces. Noriega episode has led to the emergence of the following international law issues: Firstly, whether the act of the United States consisting of armed invasion of Panama with a view to topple and capture Noriega violates international law, and secondly, whether the Florida court lacks jurisdiction to try Noriega because he was a head of State and, therefore, immune from prosecution. The present study is focussed on the examination of the effect of the rule of sovereign immunity on the jurisdiction of the Florida court to try Noriega.

## I CONCEPT OF SOVEREIGN IMMUNITY

The term 'sovereign immunity' originates from the maxim *par in parem non habet imperium* (equals have no jurisdiction over one another), which in turn is grounded in the principles of independence, sovereign equality and dignity of States. The traditional international law is dominated by the theory of 'absolute sovereign immunity' which entitles a State to invoke jurisdictional immunities irrespective of the nature of its sovereign activities. With the increasing involvement of States in commercial activities, the pressures towards limiting jurisdictional immunities have grown apace. At present, the absolutist approach to jurisdictional immunities stands outdated. A restrictive doctrine has emerged, which denies immunity when a foreign State claims it in regard to an activity or property that is commercial rather than public, that belongs to the sphere of *jus gestionis* rather than to *jus imperii*. The purpose of the restrictive theory of sovereign immunity is to try to accommodate the interest of individuals doing business with foreign governments in having their legal rights determined by the courts with the interest of foreign governments is being free to perform certain political acts without undergoing the embarassment or hindrance of defending the propriety of such acts before foreign courts. The dilemma, however, surrounds the issues: What criteria determine whether the foreign State's activity or property is private rather than public ? Are these criteria of international law ?

## I PRACTICE OF STATES

### (a) United Kingdom

The English courts seem to have developed fancy for the doctrine of absolute immunity. In *Kahan* v. *Federation of Pakistan*,[1] the plaintiff had entered into a contract with the Pakistan Government for the supply of sherman tanks. One clause of the contract empowered the Government to submit to the jurisdiction of the English courts. When the plaintiff instituted proceedings for breach of the contract, the defendants pleaded immunity. For the plaintiff, it was argued (a) that sovereign immunity did not extend to trading contracts and (b) that the contractual clause amounted to a voluntary submission to the jurisdiction of the English courts. The Court of Appeal rejected summarily the first argument. As regards the second argument, it held:

> [O]n 'the authorities.....a mere agreement by a foreign sovereign, such as that contained in the clause of the contract here sued upon, to submit to the jurisdiction of the English courts does not suffice to give those courts jurisdiction..'[1a]

Lord Denning, however, made an earnest endeavour to break the shackles

1. (1951) 2 KB 1003.
1a. *Ibid*



of the absolute theory in *Rahimtoola* v. *Nizam of Hyderabad*.[2] This case concerned a claim to money standing in the account of the Nizam in an English bank which had been transferred without authority into the name of the appellant who was High Commissioner for Pakistan in London at that time. In an action brought by the Nizam, the appellant pleaded sovereign immunity. The House of Lords unanimously upheld the plea. Lord Denning, in his separate opinion, broke out of the confines of English case law on sovereign immunity by stating :

> [I]t seems to me that at the present time sovereign immunity should not depend on whether a foreign Government is impleaded, directly or indirectly, but rather on the nature of the dispute. Not on whether conflicting rights had to be decided, but on the nature of the conflict. Is it properly cognizable by our courts or not? If the dispute brings into question, for instance, the legislation or international transactions of a foreign Government, or the policy of its executive, the court should grant immunity if asked to do so, because it does offend the dignity of a foreign sovereign to have the merits of such a dispute canvassed in the domestic courts of another country; but if the dispute concerns, for instance, the commercial transactions of a foreign Government and it arises properly within the territorial jurisdiction of our courts, there is no ground of immunity.[3]

It is worth noticing that the majority of the Lords in that case dissociated themselves from Lord Denning's bold approach. Inspite of Lord Denning's convincing views, the doctrine of ' absolute sovereign immunity' reigned supremein England.[4] However, Lord Denning further developed the restrictive theory of sovereign immunity and formulated the following four exceptions to the rule of absolute immunity :

(i) A foreign sovereign has no immunity in respect of land situate in England;

(ii) A foreign sovereign has no immunity in respect of trust funds in England or money lodged for the payment of creditors;

(iii) A foreign sovereign had no immunity in respect of debts incurred in England for services rendered to its property in England; and

(iv) A foreign sovereign had no immunity when it enters into a commercial transaction with a trader in England and a dispute arises which is properly within the territorial jurisdiction of the English courts.[5]

The ruling of the Privy Council in the *Philippine Admiral* case[6] represents

2. (1958) AC 379.
3. *Id.* at 422.
4. *Mellinger* v. *New Brunswick Development Corporation*, (1971) 1 WLR 604; *Thai-Europe Tapioca Service* v. *Government of Pakistan*, (1975) WLR 1485.
5. *Thai-Europe Tapioca Service* v. *Government of Pakistan*, *id.* at 1400-01.
6. *Philippine Admiral* v. *Wallem Shipping (Hong Kong) Ltd.*, (1976) 2 WLR 214..

a historic landmark in the development of English law on sovereign immunity. It broke the tradition and embraced the restrictive doctrine of immunity as regards actions *in rem* brought against state-owned vessels engaged in commercial activities. Lord Denning re-affirmed restrictive immunity theory in *Trendtex Corporation* case[7] by holding that the doctrine of sovereign immunity no longer applied to ordinary trading transactions and that the restrictive theory should be regarded as being applicable to actions *in personam* as well as to actions *in rem*. In *Congresodel Partido*,[8] the Court of Appeal was divided. Lord Denning favoured restrictive theory while Lord Waller LJ favoured absolute immunity theory.

The judicial decisions in the United Kingdom disclose that English courts had clung to the rule of sovereign immunity from the jurisdiction long after it had been abandoned in most Western Europeon countries and also in the United States. Lord Chancellor had expressed the view that legislation was required to enable the United Kingdom to ratify the European convention on State Immunity, 1972.[9] Accordingly, State Immunity Act, 1978 was passed in United Kingdom. The Act restates the fundamental rule of jurisdictional immunity subject to various exceptions spelt out in it. In this respect, the Act is somewhat at variance with the European Convention which lists the various categories of cases in which a foreign State should not be entitled to assert jurisdictional immunity and also establishes a residual rule of immunity. The Act founds exceptions to the rule of jurisdictional immunity on the nature of the transaction in which foreign State is involved. The most significant exception relates to the commercial transactions and contractual obligations falling to be performed wholly or partly in the United Kingdom.[10] Other exceptions include contract of employment between a foreign State and an individual;[11] death or personal injury or damage to, or loss of, tangible property caused by an act or omission in the United Kingdom;[12] any interest of a foreign State in, or its possession or use of, immovable property in the United Kingdom; or any obligation of the State arising out of its interest in, or its possession or use of, any such property;[13] patents, trade marks and similarly protected rights belonging to a foreign State, or to an alleged infringement by a foreign State of any patent, trade mark, copyright or other similarly protected right;[14] membership of a foreign State of a corporate or unincorporated body or partnership which has members other than State and which is incorporated or constituted under United Kingdom law or is controlled from, or has its principal place of business in, the United Kingdom;[15] and

7. *Trendtex Trading Corporation Ltd.* v *Central Bank of Nigeria*, (1977) 1 All E R 881 at 890.
8. Appeal from *Congresodel Partido*, (1978) Q B 500.
9. Hansard (House of Lords), Vol. 389 (1977-78), col. 1502.
10. The State Immunities Act, 1978, sec. 3.
11. *Id.* sec. 14.
12. *Id.*, sec. 5.
13. *Id.*, sec. 6.
14. *Id.*, sec. 7.
15. *Id.*, sec. 8.



cases where a foreign State has agreed in writing to submit a dispute to arbitration.[16]

### (b) United States of America

The letter of Acting Legal Adviser, Jack B. Tate, to the Department of Justice, of May 19, 1952 acted as a guiding stone for the American courts. The 'Tate letter' was a statement to the effect that, for the future, the policy of the State Department would be to follow the restrictive immunity theory in considering requests from foreign Governments for a grant of sovereign immunity. Thereafter, restrictive immunity found judicial affirmation in the United States [17]

In 1976, the Foreign Sovereign Immunities Act was passed in the United States. It codifies the international law principle that a foreign State is entitled to immunity only with respect to its public, not with respect to its commercial or private acts. An important feature of the Act is that it vests sovereign immunity decisions exclusively in the courts and eliminates outdated practice of having a political institution, namely, State Department, for deciding many of these questions of law. In other words, the Act secures depoliticization of sovereign immunity decisions by removing from the executive branch to the judiciary the delicate task of determining whether on a particular set of facts, and applying the criteria inherent in the restrictive theory, immunity should be accorded to a foreign State.

The Foreign Sovereign Immunities Act, 1976 embodies rules of State immunities and enumerates exceptions to the rule. These exceptions include waiver of immunity by a foreign State;[18] commercial activity of the foreign State;[19] rights in property situated in the United States[20] and money damages against a foreign State for personal injury or death or damage to, or loss of, property occurring in the United States and caused by the *tortious* act or omission of that foreign State.[21]

### (c) India

In India, there is no separate legislation on jurisdictional immunities of States. However, section 86 of the Code of Civil Procedure, 1908 governs suits against foreign rulers, ambassadors and envoys. It gives expression to the restrictive immunity theory. It does not bar absolutely the suits against foreign government or a trading corporation operated by a foreign government. It makes such suits conditional upon consent which poses problems. The executive, i.e. central government examines the merits of the sovereign immunity. This amounts to executive

16. *Id.*, sec. 9.
17. *Victory Transport Inc.* v. *Comisaria General de Abasteciementes Transportes*, 35 I L R 110 (1964); *Isbrandisen Tankers Inc.* v. *President of India*, 10 I L M 1045 (1971); *Alfred Dunhill of London Inc.* v. *Republic of Cuba*, 15 I L M 735 (1976).
18. The Foreign Severeign Immunities Act, 1976, sec. 1605 (a)(1).
19. *Id.*, sec. 1605 (a) (2).
20. *Id.*, sec. 1605 (a) (4).
21. *Id.*, sec. 1605 (a) (5).

intervention in the judicial domain. The pronouncement on the plea of immunity is a judicial matter and should not be entrusted to the executive. The incompetence of the executive to deal with such judicial matters is fully exposed in *Harbhajan Singh* v. *Union of India.*[22] In this case, an Indian citizen unsuccessfully sought permission from the central government to sue the Algerian embassy for recovery of certain payments due to him for some repair work done by him. The central government had refused permission on the contradictory grounds political expediency and non-existence of a *prima facie* case. The Supreme Court criticized the approach of central government and emphatically stated that the power given to the central government must not be exercised arbitrarily or on whimsical grounds but upon proper reasons and after hearing the applicant. The court pointed out that in respect of a building where a masonary was supervised by a contractor or an architect, how the dignity of a foreign State or relationship between two countries would be jeopardised. The second ground for the refusal of permission was also held to be patently erroneous and contradictory to the first ground. The court opined that the political relationship between the two countries would be better served and the image of a foreign State be better established if citizens' grievances were judicially investigated. Accordingly, the court directed the central government to re-consider the matter.

Another case[23] related to recovery of rent for a house occupied by the ambassador of Afghanistan. The ambassador was given residential premises by a private party under a lease executed on 15 August 1961. The petitioner sought the assistance of the ministry of external affairs for recovering the arrears of rent and for permission to sue the ambassador or his successor. The government refused to accord permission. Aggrieved by the refusal, the petitioner moved the Delhi High Court under article 226 of the Constitution of India for the enforcement of his fundamental right to hold and dispose of property.[24] The High Court took judicial cognizance of the distinction regarding liabilities arising out of sovereign acts of foreign States and liabilities arising out of acts of private or commercial nature. After treating the present act as of a private nature, the High Court directed the central government to accord permission to the petitioner to sue the Afghan ambassador for the recovery of arrears of rent. To frustrate the genuine grievances of the Indian citizens in the name of diplomatic immunities hardly contributes to the dignity of foreign missions.[25] Therefore, the court rightly passed a directive to the government and not merely a pursuasive order of the nature passed by the Supreme Court in the previous case.

22. AIR 1987 SC 9.
23. *Century Twenty-One (P)Ltd.* v. *Union of India*, AIR 1987 Del. 124.
24. At the time of filing of the writ petition, the right to hold and dispose of property was a fundamental right. Subsequently, this provision was deleted by the Constitutional (Forty-fourth Amendment) Act, 1978.
25. K. Narayana Rao, "Foreign Embassies in India: Claims for Recovery of Rents and Repair Charges," 27 IJIL 483 at 486 (1987).



Undoubtedly, the executive should not be entrusted with the judicial task of determining the issue of sovereign immunity. By entrusting this difficult task to the central government, section 86 of the Code follows the old American practice before the Sovereign Immunities Act, 1976 was passed. The American Act entrusts the judiciary with the task of pronouncing on the plea of immunity. Time is ripe for entrusting this task to the judiciary in India also.

## III INTERNATIONAL LAW COMMISSION'S APPROACH

International Law Commission has prepared a draft code on the jurisdictional immunities of States and their property. The principle of sovereign immunity finds expression at the outset, followed by various exceptions. The exceptions include consent of the State;[26] counter claims;[27] commercial activities;[28] contracts of employment;[29] patents, trade marks and intellectual or industrial property;[30] fiscal measures;[31] and participation in companies and other collective bodies.[32] The exception of *tortious* liability needs special emphasis. The general rule of State immunity is not applicable in the field of delict or civil liabilities resulting from an act or omission which has caused personal injury or physical damage to a natural person or damage to, or loss of, tangible property. In this respect, the International Law commission, in its draft article 14, states:

> Unless otherwise agreed between the States concerned, a State cannot invoke immunity from the jurisdiction of the courts of another State in respect of proceedings which relate to compensation for death or inujury to the person or damage to or loss of tangible property if the act or omission which is alleged to be attributable to the state and which caused the death, injury or damage occuring wholly or partly in the territory of the State of the forum, and if the author of the act or omission was present in that territory at the time of the act or omission.

The above-mentioned exceptions are recognised by States in practice. These exceptions have thus crystallized into customery norms of international law and the States are bound by these principles.

## IV CONCLUSIONS

Noriega's drug trafficking activities entail civil and criminal liability.

26. Draft Code of International Law Commission, *Report of the International Law Commission* on the work of its 36th Session (7 May–27 July, 1984), GAOR 39th Session, Supplement No. 10(A/39/10), article 8.
27. Id., article 9.
28. *Id.*, article 12.
29. *Id.*, article 13.
30. *Id.*, article 16.
31. *Id.*, article 17.
32. *Id.*, article 18.

These activities pose a big threat to the lives of the citizens of the United States. The citizens of the United States suffered huge injuries and deaths as a result of drug addiction. The alleged acts were committed in Panama but they affected citizens in the United States. Therefore, the alleged acts of Noriega are deemed to be committed in the United States. Obviously, the drug trafficking activities of Noriega fall within the sphere of *jus gestionis* rather than *jus imperii.* These activities are commercial in nature because the primary motivating force behind these activities was money. Money attracted Noriega to drug trafficking. This is evidenced by the fact that Noreiga kept at least 10 million dollars in European bank and supplemented his 60,000 dollar annual salary with interests in casinos, liquor stores, news media outlets and banks. An X-ray of Noriega's history reveals his tremendous love for money and luxury. Thus, the *tortious*, criminal and commercial activities of Noriega which are deemed to be committed in the United States have caused huge injuries to the citizens of United States. The trial of deposed Panamian dictator Noriega in the United States, therefore, falls outside the barrier of sovereign immunity when tested on the touchstone of the practice of states and emerging international law.

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# LAW OF RETRENCHMENT IN INDIA

## I THE POLICY UNDERLYING RETRENCHMENT LAW

THE INDUSTRIAL Disputes Act, 1947 is a piece of legislation, primarily concerned with providing, under the aegis of the state, machinery for investigation and settlement of industrial disputes but the collective bargaining as a mode of settlement of industrial disputes is conspicuous by its absence. The Act, as it stood up to October, 1953, had no provision for the payment of 'lay-off' or 'retrenchment' compensation to the workmen who were laid off or retrenched in certain contingencies. Though some progressive employers used to pay, and industrial tribunals, when disputes were referred to them, used to award such compensation, yet the situation was far from satisfactory. In the absence of any norms laid down by the law, adjudicators had to take various factors into consideration in awarding compensation and in determining its quantum. The resulting adjudication was, therefore, neither certain nor uniform.

The need for statutory provision became particularly obvious in 1953 when, as a result of accumulated stocks in the textile industry, textile mills were threatened with the consequences of closure of one or more shifts entailing lay-off or retrenchment of a large number of workers employed in that industry. In order, therefore, to avoid industrial unrest in the country, the President of India promulgated the Industrial Disputes (Amendment) Ordinance 1953 with effect from 24 October 1953, making provision for compensation for lay-off or retrenchment, setting a uniform standard for all employers. The Ordinance was replaced by the Industrial Disputes (Amendment) Act, 1953, which came into force retrospectively from 24 October 1953.

These provisions for lay-off or retrenchment compensation were also greatly necessitated by the coming into force of the Constitution of India on 26 January 1950. Part IV of the Constitution, entitled Directive Principles of State Policy, engrafts in it the goals and values to be secured by the Republic of India as a welfare state.[1] Article 41 recognises, *inter alia*, every citizen's right to work. Article 42 enjoins the state to make provisions for securing just and humane conditions of work, while article 43 makes it obligatory for the state, *inter alia*, to secure by suitable legislation or economic organisation or in any other manner to all workers, industrial, agricultural or otherwise, work, a living wage, a condition of work ensuring a descent standard of life and full enjoyment of leisure and social and cultural opportunities. The subject matter of article 46 is the protection of weaker sections of the society, in particular scheduled castes and scheduled tribes, from social injustice and all forms of exploitation and it enjoins the state to promote education and economic interest of these people. Though couched in broad terms,

1. The mandate given in Part IV of the Constitution obligates the state, among other things, to make provision of right to work, humane conditions of work, adequate means of livelihood, living wage, ensuring decent standard of life and enjoyment of leisure, participation of labour in management and public assistance in the event of unemployment.

this article has direct relevance to industrial legislation as the working class generally emanates from this cross-section of the society.[2] In accepting the directive principles, the country is committed morally and ethically to see that the governance of it is carried out with a view to implementing these directive principles in course of time.[3] Though these principles are not justiciable, they are the cornerstone of the legislations in the field of welfare of the working class. Thus the functional focus of the industrial legislation[4] and the social perspective of the Directive Principles of State Policy of the Constitution underscore the importance of two socially vital factors in the understanding and application of industrial jurisprudence in India.[5] The first is that the worker, in cooperation with his employer, has the legal and moral duty to the community of a disciplined contribution to the health and wealth of the nation. The second equally axiomatic consideration is the security of employment as the first requisite of a worker's life. At the commencement of his employment a worker naturally expects and looks forward to security of service spread over a long time. Capital cannot disown its obligation in case it destroys this hope and expectation of a worker by putting him to economic death.[6]

The constitutional values of the right to work and security in the event of unemployment pervade the provisions of retrenchment compensation. The manifest object of the provisions of retrenchment is to so compensate the workman for the loss of employment as to provide him the wherewithal to subsist until he finds fresh employment. Thus, in enacting provisions of retrenchment compensation the legislation provides for compensation to mitigate the suffering, alleviate the agony and soften the blow of hardship caused by the involuntary unemployment forced upon the hapless worker[7] especially in a country where social security measures are conspicuous by their absence.

## II THE GENERAL SCHEME

Section 3 of the Industrial Disputes (Amendment) Act, 1953 has engrafted chapter V-A in the Industrial Disputes Act, 1947. This chapter contains sections 25A to 25J. Section 25F lays down that no workman employed in any industry who has been in continuous service for not less than one year under an employer shall

2. O.P. Malhotra, *The Law of Industrial Disputes*, vol I, p.31 (2nd ed. , 1973).
3. *Report of the National Commission of Labour* 48 (1969).
4. The three central enactments, *viz.* the Trade Unions Act, 1926, the Industrial Employment (Standing Orders) Act, 1946 and the Industrial Disputes Act, 1947 at present regualte industrial relations in India. Their goal is "amelioration of the conditions of labour, tempered by a practical sense of peaceful co-existence to the benefit of both capital and labour—not a neutral position—but restraints on laissez-faire", per K. Iyer J in *Bangalore Water Supply* v. *A. Rajappa*, AIR 1978 SC 548.
5. K. Iyer J in *L. Michael* v. *M/s. Johnson Pump Ltd.*, (1975) 1 SCR 284 states it thus: "Legislation and judicial interpretation have woven this legal fabric." See also Rajeev Dhawan, *The Supreme Court of India: A Socio-legal Critique of its Juristic Technique* 442-47 (1977).
6. *Gujrat Steel Tubes* v. *Gujrat Steel Tubes Mazdoor Sabha*, AIR 1980 SC 1896 (hereinafter referred to as the *Gujrat Steel Tubes* ); see also *Indian Hume Pipe Ltd.* v. *Their Workmen*, AIR 1960 SC 251.
7. *Ibid.*



be retrenched by the employer until—

(a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid, in lieu of such notice, wages for the period of notice;

(b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay for every year of continuous service......,

(c) notice in prescribed manner is served on the appropriate government.

In other words, section 25F lays down conditions precedent for valid retrenchment of a workman. However, the Supreme Court has held that only clauses (a) and (b) of section 25F are conditions precedent for effecting a valid retrenchment.[8] Where an employer retrenches his workman without complying with the requirements of clauses (a) and (b) of section 25F, the retrenchment will be no retrenchment in the eyes of law and the workman will be entitled to the continuity of service. The industrial adjudication has in such cases generally granted reinstatement of workers with continuity of service and in a few cases reasonable compensation in lieu of reinstatement.

Section 25G prescribes the procedure for retrenchment and gives legislative recognition to the well-recognized principle of retrenchment in industrial law, i.e. 'last come, first go'. Section 25H casts a duty on the employer who has retrenched certain workmen and subsequently has occasion to re-employ any person, to give opportunity to the retrenched workmen to offer themselves for re-employment. Section 25J makes provisions of chapter V-A (dealing with retrenchment and lay-off) override any other law, including standing orders made under the Industrial Employment (Standing Orders) Act, 1946.

The Industrial Disputes (Amendment) Act, 1976 added chapter V-B in the Industrial Disputes Act, 1947 for making special provisions relating to lay-off, retrenchment and closure in industrial establishments employing three hundred or more workmen on an average per working day for the preceding twelve months.[8a] These special provisions are designed towards putting further restrictions on the employers' right to retrench, lay off or close down an undertaking. The net effect of the amending Acts of 1976 and 1982 is that section 25F applies only to industrial establishments employing less than 100 workmen. Industrial establishments employing 100 or more workmen are now governed by chapter V-B of the Industrial Disputes Act, 1947. Section 25N of this chapter is the corresponding provision for section 25F. Under section 25N, an employer is required to give three months'

8. *Bombay Union of Journalists* v. *State of Bombay*, (1964) I LLJ 351 (SC).
8a. By the Industrial Disputes (Amendment) Act, 1982, section 12 substituted "one hundred" for "three hundred". Under the same amendment, the special provisions envisaged in chapter V-B have been made applicable to industrial establishments employing one hundred or more workmen on an average per working day for the preceding twelve months.

notice or three months wages in lieu of such notice to his workmen, but the quantum of compensation payable remains the same, i.e. 15 days average pay for every year of continuous service. Another significant change introduced by section 25N is that the employer of an establishment employing 300 or more workmen has to seek prior permission of the appropriate government for retrenching his workmen. Non-compliance with any of the conditions laid down in section 25N renders a retrenchment bad in law and the workmen concerned are deemed to be in continuous service of the employer and are entitled to full wages and benefits. In addition, a delinquent employer is liable to punishment under section 25Q. There is no provision in the Act or any other statute which requires an employer proposing retrenchment of his workmen to consult trade unions. But, as stated above, an employer employing 100 or more workmen in his establishment cannot retrench his workers without prior permission of the appropriate government. Failure to do so will render the retrenchment illegal and also make the employer liable for punishment.

## III THE CONCEPT OF RETRENCHMENT

Retrenchment in its ordinary sense connotes discharge of surplus workforce.[9] Workmen may become surplus due to a variety of reasons, e.g. economy, rationalisation of the industry or installation of new labour saving devices. There is no doubt that if the statute provides a dictionary for the words used, one must look into that dictionary first for the interpretation of words used in the statute. The statutory definition may include a meaning different from or in excess of the ordinary acceptance of the word which is subject to definition. Therefore, the first task is to examine the language of the definition and to see if the language merely reiterates the ordinary meaning or adds/includes something more to the ordinary meaning.

Section 2(oo) of the Industrial Disputes Act, 1947 defines 'retrenchment' for the purposes of the Act in the following manner:

> "Retrenchment" means the termination by the employer of the services of a workman for any reason whatsoever otherwise than as a punishment inflicted upon the employee by way of disciplinary action, but does not include:–
>
> (a) voluntary retirement of the workman, or

9. In *Pipriach Sugar Mills Ltd.* v. *Pipriach Sugar Mills Mazdoor Union*, AIR 1957 SC 86 (hereinafter referred to as *Pipriach Sugar Mills*), the Supreme Court observed:

   > [R] etrenchment connotes in its ordinary acceptance that the business itself is continued but that a portion of the staff or the labour force is discharged as surplusage and the termination of service of all the workmen as a result of closure of business cannot, therefore, be described as retrenchment... Retrenchment means, in ordinary parlance, discharge of the surplus, it cannot include discharge on closure of business.

   These observations were made in connection with a case where the closure took place before the incorporation of the definition of retrenchment in section 2(oo) of the Industrial Disputes Act, 1947, thus the court left the question as to the scope of the interpretation of 'retrenchment' undecided.



> (b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or
>
> (bb) termination of the services of the workman as a result of the non-renewal of contract of employment between the employer and the workman concerned on its expiry, or of such contract being terminated under a stipulation in that behalf contained therein:[10] or
>
> (c) termination of the services of a workman on the ground of continued ill-health.

The definition consists of four essential requirements:

(i) there should be termination of the services of a workman;

(ii) such termination should be by the employer;

(iii) such termination may be for any reason whatsoever; and

(iv) such termination should not be by way of punishment imposed through disciplinary action or should not be covered by any of the exceptions contained in section 2(oo).

A look at the definition and the key words 'for any reason whatsoever' brings forth the fact that the definition is wide. Thus, if the definition is looked at unaided and unhampered by precedents, one is at once struck by the remarkably wide language employed, particularly by the use of the words "termination.... for any reason whatsoever". In *Santosh Gupta* v. *State Bank of Patiala*,[11] the main case decided by the Supreme Court on the definition of retrenchment, it was held that the definition of 'retrenchment' in section 2(oo) was not confined to the ordinary meaning of the term, i.e. termination by the employer of the services of a workman on account of labour surplusage but embraced every kind of termination other than those specifically excluded. The decision reached in this case is by no means surprising. It was, in some measure, foreshadowed by the Supreme Court's pronouncements in *State Bank of India* v. *Sundra Money*[12] and *Hindustan Steels Ltd.* v. *The Presiding Officer, Labour Court, Orissa.*[13] Even before the decision of the court in the *Santosh Gupta*, the correctness of the court's approach in the *Sundra Money* and the *Hindustan Steel* towards the definition of retrenchment in the Act

10. This clause has been added by the Industrial Disputes (Amendment) Act, 1984.
11. AIR 1980 SC 1219, (hereinafter referred to as the *Santosh Gupta*). The Bench consisted of K. Iyer and C. Reddy JJ. This decision has been followed in *Mohan Lal* v. *Management of Bharat Electronics Ltd.*, AIR 1981 SC 1253 and other subsequent cases. For the purpose of our discussion, we shall be concentrating on the principles of law laid down in the *Santosh Gupta*, as these principles form the basis of decisions in subsequent cases.
12. AIR 1976 SC 1111 (hereinafter referred to as the *Sundra Money*).
13. AIR 1976 SC 31 (hereinafter referred to as the *Hindustan Steel*); see also *Gujrat Steel Tubes*, *supra* note 6, which is one of the few cases in labour law where there was a difference of opinion among the judges, K. Iyer and Desai JJ constituting the majority, while Koshal J delivered a dissenting judgment.

came to be questioned so much so that the court's approach in these cases has been described as "neither practical nor teleological".[14] It is not surprising that writings questioning the correctness of the court's approach have increased,[15] more so after the decision in the *Santosh Gupta*. The approach of the court in these cases in general, and in the *Santosh Gupta*, in particular, has been criticised on the ground that the concept of labour surplusage is implicit in the scheme of the Act relating to retrenchment and that after these decisions the application of certain provisions of the Act may lead to absurd consequences.[16] Another dimension to the controversy has been added by an observation of Pathak J in *Surendra Kumar Verma* v. *Central Government Industrial Tribunal-cum-Labour Court*:[17]

> I should not be taken to have agreed with the interpretation of section 2(oo) in *Santosh Gupta* v. *State Bank of Patiala*.[18]

The critics of the court's approach agree that if a literal meaning is given to the definition, every case of termination not excluded by section 2(oo) would amount to retrenchment. But their argument is that the court in the past has cut down the amplitude of the definition to harmonise it with the scheme of the Act. Has the court in the past done so? In order to appreciate the issues of conflict arising out of competing interpretations, let us now examine the earlier cases decided by the Supreme Court to know the legal position on the scope of the concept of retrenchment, and to consider the decision in the *Santosh Gupta* vis-a-vis the criticism levelled against it.

The earliest case of the Supreme Court on the subject is *Hariprasad Shivashankar Shukla* v. *A.D. Divelkar*.[19] The question which arose for decision was whether retrenchment in the Act included termination of the services of all workmen in an industry when the industry itself ceased to exist on a *bona fide* closure or discontinuance of his business by the employer. The question was answered by the court in the following words:

> In the absence of any compelling words to indicate that the intention was even to include a bona fide closure of the whole business, it would, we think, be divorcing the expression altogether from the context to give it such a wide meaning.... it would be against the entire

14. Anand Prakash, "Definition of Retrenchment under the Industrial Disputes Act: Recent Pronouncements of the Supreme Court", 19 JILI 84 (1979). The learned author feels that the *Sundra Money* and the *Hindustan Steel* have created complete uncertainty and indefiniteness in the field of labour law.
15. O.P. Malhotra, *The Law of Industrial Disputes*, *supra* note 2 at 321; see also S.C. Srivastava, "Labour Law I", XVI ASIL 104 at 116 (1980).
16. See *supra* notes 14 and 15. The authors feel that these decisions are not consistent with sections 2A, 11A, 25G, 25H, 25N, 25Q and 33(2) of the ID Act, 1947. The purpose of the present study is primarily to examine their criticism and to prove that their fears are not valid.
17. AIR 1981 SC 422.
18. Id. at 427.
19. AIR 1957 SC 121 (hereinafter referred to as the *Shukla*). This case is the same as *Barsi Light Railway Co. Ltd.* v. *K.N. Joglekar*, AIR 1957 SC 121. In fact, both these cases were taken together by the court as both involved a common question of law and were decided by a common judgment. The Bench consisted of S.R. Das, C J and Bhagwati, Venkataramana Iyyer, S.K. Das and Govind Menon JJ; see also *Banaras Ice Factory Ltd.* v. *Their Workmen*, AIR 1957 SC 168.



> scheme of the Act to give the definition clause relating to retrenchment such a meaning as would include within the definition termination of service of all workmen by the employer when the business ceases to exist.[20]

It is true that there are some observations in the *Shukla* case[21] (the same as the *Barsi Light Railway Co. Ltd.*) which, if not properly understood with reference to the question at issue, seemingly support the view that termination of service "for any reason whatsoever" has been held to mean nothing more or nothing less than discharge of a labour force which is surplusage. The employers, in the later cases, have been relying on these observations of the court in the above-stated cases, without appreciating the context in which those observations were made, to stress that 'retrenchment' as envisaged in the Act connotes nothing more than discharge of labour surplusage. Now reference may be made to the context in which those observations were made.

In the *Shukla*, the court in its quest to find whether termination of the services of a workman because of closure or transfer of undertaking was included in the definition of retrenchment under section 2(oo) of the Act confined itself to a limited question as to how far the ordinary meaning of retrenchment fits in with the language used in section 2(oo). It is apposite to refer to observations made by the court in this connection:

> Let us now see how far that meaning (ordinary) fits in with the language used. We have referred earlier to the four essential requirements of the definition, and *the question is, does the ordinary meaning of retrenchment fulfil those requirements? In our opinion it does.* When a portion of staff or labour force is discharged as surplusage in a continuing business there are (a) termination of the services of a workman; (b) by the employer; (c) for any reason whatsoever, and (d) otherwise than by way of disciplinary action (Emphasis added).[22]

It is thus manifestly clear that the court in the *Shukla* instead of determining the ambit of the definition in section 2(oo) was content to find that retrenchment as defined in the Act included the ordinary meaning of retrenchment. The true scope of the term in section 2(oo) was thus left open. The observations of the court on which the critics of the court base their arguments, it is submitted, have to be read in the context above-mentioned. It is unfortunate that the court in the *Santosh Gupta* made no attempt to refer to the above-mentioned context and left scope for its cirtics

20. *Shukla*, *id.* at 127.
21. *Supra* notes 14 and 15. Anand Prakash bases his argument on the observation of the court that: "the legislature in using the expression 'for any reason whatsoever' says in effect, it does not matter why you are discharging the surplus, if the requirements of the definition are fulfilled, then it is retrenchment," while O.P. Malhotra bases his argument on the following observations: "Retrenchment as defined in section 2(oo) and as used in section 25F has no wider meaning than the ordinary accepted connotation of the word...."
22. *Supra* note 20 at 126-27.

to use the *Shukla* to buttress their argument that the *Shukla* had not been adhered to in the later set of cases starting with the *Sundra Money*. It is further submitted that the observations in the *Shukla* that "retrenchment as defined in section 2(oo) and as used in section 25F has no wider meaning than the ordinary accepted connotation of word"[23] was with reference to the issue whether on the closure or transfer of an undertaking termination of service of workmen was retrenchment under the Act though it was not so under the ordinary meaning of the term.

It is pertinent to mention here that soon after the decisions of the Supreme Court in the *Shukla* and a similar set of cases,[24] where it was ruled that retrenchment under the Act did not include termination of services of all workmen on a *bona fide* closure of the industry or on the change of ownership or management of the industry, the Industrial Disputes Act, 1947 was amended in order to provide for the situations which the Supreme Court held were not covered by the term 'retrenchment' in the Act. Parliament, thus, stepped in and inserted sections 25FF and 25FFF providing for payment of compensation to the workmen in the case of 'closure' and 'transfer of undertakings' as if the workman had been retrenched. The effect was that the termination of the services of a workman on the transfer or closure of an undertaking was treated by Parliament as 'deemed retrenchment' for the purposes of notice and compensation, though by virtue of the Supreme Court decisions such cases did not fall within the definition of retrenchment in section 2(oo) of the Act. These amendments became necessary and the Parliament had to step in because the court in the *Shukla* had misconceived the intent of the legislature in enacting section 25F, causing considerable hardship to workmen by denying retrenchment compensation to those whose services were terminated on account of closure or transfer of an undertaking, which defeated the purpose underlying the important provision of retrenchment compensation.

It can, thus, be seen that in the *Shukla* and other cases, the court was not directly asked to pronounce on the scope of retrenchment beyond whether the ordinary meaning of the term was included in section 2(oo). The question of true scope of the expression 'retrenchment' in section 2(oo) was left open. Such an opportunity presented itself only in the subsequent cases starting with the *Sundra Money*. In the *Sundra Money*, the court considered the question whether the provision relating to retrenchment compensation, namely section 25F of the Industrial Disputes Act, 1947 was attracted to a case where the order of appointment carried an automatic cessation of work, the period of employment working itself out by efflux of time, not by active steps on the part of the employer. Would such a case still be covered by the definition of retrenchment under the Act? The court had to answer this issue in the absence of a statutory definition of "termination of service". To these questions, the answer of the court was:

> Termination embraces not merely the act of termination by the employer, but the fact of termination, howsoever produced.... [A]n employer terminates employment not merely by passing an order as the service runs. He can do so by writing a composite order, one giving employment, and the other ending or limiting it. A separate, subsequent determination is not the sole magnetic pull of the provision. A pre-emptive provision to terminate is struck by the same vice as the post-appointment termination. Dexterity of diction cannot defeat the articulated conscience of the provision. [25]

Further, the court proceeded with the definition of 'retrenchment' in the Act. The court stated:

> A break-down of Sec. 2(oo) unmistakably expands the semantics of retrenchment. 'Termination.... for any reason whatsoever' are the key words. Whatever the reason, every termination spells retrenchment.[26]

According to the court, section 2(oo) was "the master of the situation and the court could not truncate its amplitude."[27] It further added that words of multiple import had to be winnowed judicially to suit the social philosophy of the statute, the social philosophy being to protect the weak against the strong.[28] Thus, two propositions of law emerge from the *Sundra Money* case, namely, (i) that termination under section 2(oo) was not confined to cases where an employer by his active step terminated the service by passing an order as the service ran but termination could result even on an automatic cessation of service, the period of employment working itself out by efflux of time, not by active step on the part of the employer, and (ii) termination for any reason whatsoever (not confined to labour surplusage) was also retrenchment. So far as the first proposition of law laid down by the *Sundra Money* is concerned, it has already been annulled by Parliament through the Industrial Disputes (Amendment) Act, 1984. This amendment added clause (bb) in the list of exceptions to section 2(oo), thus taking out cases otherwise brought within the ambit of termination by the *Sundra Money*. Therefore, to that extent, the *Sundra Money* stands overruled. It is submitted that this is a retrograde step and is a clear case where Parliament has succumbed to the employers' pressures. On the question of the scope of 'any reason whatsoever', the *Sundra Money* is good law and to that extent proposition number (ii) formulated above is, even today, a correct statement of law notwithstanding the 1984 amendment.

The matter of definition of 'retrenchment' again came up before the court in the *Hindustan Steel*. The question was whether termination of service by efflux of time was termination of service within section 2(oo) of the Act. The employer here frankly admitted that this case was covered by the decision of the court in the *Sundra Money*. The employer, however, submitted that the *Sundra Money*, which was decided by three judges, was in apparent conflict with an earlier decision of the

23. *Supra* note 9.
24. *Supra* note 19.

25. *Supra* note 12 at 1114-15.
26. *Id.* at 1114.
27. *Id.* at 1115.
28. *Ibid.*

court in the *Shukla*, which was decided by a Bench of five judges, and that the *Sundra Money*, therefore, required reconsideration. A Bench of three judges of the court, consisting of Chandrachud, Goswami and Gupta JJ held, and rightly so, that there was nothing in the *Shukla* which was inconsistent with the decision in the *Sundra Money*. It interpreted the *Shukla* as deciding only this point that termination of services of all workmen on the closure of an undertaking would not amount to retrenchment. The court fully endorsed the findings arrived at in the *Sundra Money* and further observed that on the facts before it, to give effect to the words 'for any reason whatsoever' would be consistent with the scope and purpose of section 25F of the Act and not contrary to the scheme of the Act. Thus, in this case, too, the court restated the two propositions of law laid down in the *Sundra Money*. However, the first proposition, that 'termination' under section 2(oo) includes termination by efflux of time, has now been annulled by the 1984 amendment and, therefore, like the *Sundra Money*, this case too stands to that extent overruled. But on the second proposition that retrenchment was not confined to labour surplusage only, this case like the *Sundra Money* continues to hold field. With regard to proposition (ii) formulated above, it is submitted that it is fallacious to contend that the *Sundra Money* had overruled the *Shukla* [29] and that the court had gone "beyond credible limits"[30]. The fact is that in the *Sundra Money* the quest through 'judicial navigation' for discovering the areas unexplored by the *Shukla* began. Therefore, the question of either overruling the *Shukla* or going beyond credible limits did not arise. The *Shukla*, it may be recalled, only laid down that the ordinary meaning of the term 'retrenchment' was included in the definition of section 2(oo) of the Act. This position had not been contradicted but had rather been reaffirmed by the cases starting with the *Sundra Money*. What the *Sundra Money* and the *Hindustan Steel* hint at is that the ordinary concept is not the only form of retrenchment incorporated in the Act, but covered cases beyond it because of the key words 'for any reason whatsoever' used therein and, in appropriate cases, the court would take its observations in these cases to their logical conclusion. The *Gujrat Steel* [31] and the *Santosh Gupta* [32] provided such opportunities.

In the *Gujrat Steel*, the question of the scope of 'retrenchment' was not the core question before the court. The core question was whether discharge of the workmen was punitive in nature and, therefore, liable to be voided even though drapped in such silken phrases as 'termination *simpliciter*'. After dealing with the anatomy of the order, which the majority opinion treated as dismissal, because sometimes words are designed to conceal deeds by linguistic engineering, the court (majority opinion) turned to the concept of retrenchment holding:

> We are disposed to stand by the view that discharge, even where it is not occasioned by a surplus of hands, will be retrenchment, having regard to the breadth of the definition and its annotation [33]

The court in this case did in fact order payment of retrenchment compensation and one month's notice pay to some of the discharged employees whom it deemed to be in continuous service of the employer till August 3, 1979, the day when the arguments in the instant appeals were concluded in the court. The court also directed that they be paid all terminal benefits plus 75% of the back wages till that date.

In the *Santosh Gupta*, the court, in very clear terms, extended the meaning of 'retrenchment' to cover almost all cases of termination of service because of the width of the definition in the Act. In the instant case, the issue before the court was whether the termination of services of an employee from a bank on the ground that she failed to pass the test which would have confirmed her in her service fell within the definition of 'retrenchment' under the Act. According to the workman, the termination of her services was retrenchment within the meaning of that expression in section 2(oo). It was further contended that since it was retrenchment, it was bad for non-compliance with the provisions of section 25F of the Act. The management stressed its customary and age-old argument that notwithstanding the comprehensive language of the definition of retrenchment in section 2(oo), the expression continues to retain its original meaning which was discharge from service on account of surplusage. Since the termination of service in the instant case was not due to 'labour surplusage', but due to failure of the workman to pass the test which would have enabled her to be confirmed in the service, this was not retrenchment within the meaning of section 2(oo). The court approached the definition of retrenchment in the following manner:

> If the definition of retrenchment is looked at unaided and unhampered by precedents, one is at once struck by the remarkably wide language employed and particularly by the use of words termination... for any reason whatsoever.[34]

The court further observed that due weightage should be given to the words 'for any reason whatsoever' and added:

> If the words 'for any reason whatsoever' are understood to mean what they plainly say, it is difficult to escape the conclusion that the expression retrenchment must include every termination of the service of a workman by the act of the employer. The underlying assumption, of course, is that the undertaking is running as an undertaking and the employer continues as an employer..."[35]

Rajecting the argument of the employer, the court held that if the submission of the employer be treated as correct, then there was no need to define the expression 'retrenchment' in such wide terms. It could not be that "Parliament was

29. *Supra* note 15.
30. *Ibid.*
31. *Supra* note 6.
32. *Supra* note 11.
33. *Supra* note 6 at 1933.
34. *Supra* note 11 at 1220.
35. *Ibid.*

undertaking an exercise in futility to give a long-worded definition merely to say that the expression means what it always meant."[36] The attention of the court was once again drawn to the observations of the Supreme Court in the *Shukla* and the *Barsi Light Railway,* where it had been stated that the legislature, in using the expression 'for any reason whatsoever' says in effect "it does not matter why you are discharging surplus. If the other requirements of the definition are satisfied, then it is retrenchment."[37] The court did not find any inconsistency in the earliest set of cases and the later set of cases, i.e. from the *Shukla* to the *Santosh Gupta.* The court observed that the misunderstanding of the observations in the *Shukla* and the *Barsi Light Railway* and the resulting confusion stems from not appreciating the real question whether the retrenchment includes termination of service on account of closure or transfer of undertaking which was posed and answered by the learned judges. The reference to discharge on account of surplusage there was "illustrative and not exhaustive and by way of contrast with discharge on account of transfer or closure of business."[38]

In giving broader connotation to the term retrenchment, the court also took into account the manifest object of retrenchment compensation which is to so compensate the workman for the loss of employment as to provide him with some wherewithal to subsist until he finds fresh employment. The court in the instant case held that the discharge of an employee from a bank even on the ground that the employee failed to pass the test as required was retrenchment in the Act. Accordingly, the discharge of Santosh Gupta after putting one year of continuous service ('continuous service' as defined in section 25B means 240 days) in the bank on the ground of her failure to pass the confirmation test, without notice and retrenchment compensation, was set aside and her reinstatement ordered with full back wages. The position of law as it emerges from these decisions was summarised by the court thus:

> The expression termination of service for any reason whatsoever now covers every kind of termination of service except those not expressly included in section 25F, or not expressly provided for by other provisions of the Act such as section 25FF and section 25FFF.[39]

In other words, the *Sontosh Gupta* puts the court's seal on the changing concept of retrenchment from 'labour surplusage' to every termination of service of an employee except those expressly excluded. It may be recalled here that by virtue of the 1984 amendment, termination does not now include cases where termination resulted by efflux of time. However, the amendment of 1984 has not in any way diluted the main principle laid down by the *Santosh Gupta* that the scope of section 2 (oo) was not restricted to labour surplusage but extended much beyond the ordinary meaning of the term.

36. *Id.* at 1221.
37. *Supra* note 19.
38. *Supra* note 11 at 1222.
39. *Id.* at 1221.



## IV JUDICIAL APPROACH VIS-A-VIS THE I.D. ACT, 1947

The main criticism[40] against the approach of the court is that if the legislative intent as interpreted by the court was to make retrenchment synonymous with discharge *simpliciter*, absurd consequences in applying the provisions of sections 2A, 11A, 25G, 25H, 25N, 25Q and 33C (2) will follow. These issues require careful consideration. Let us consider these provisions and assess the conflict or inconsistency, if any, between the approach of the court in a later set of cases,[41] more particularly the *Santosh Gupta* and these provisions.

(a) To start with, let us take the provision of section 2A of the Act. This section introduces a legal fiction by treating an individual dispute of a workman with respect to certain matters as an industrial dispute. In other words, it has to be read as an extension of the definition of 'industrial dispute' in section 2 (k). Under this provision, where an employer (i) discharges,[42] (ii) dismisses, or (iii) retrenches or otherwise terminates the service of an individual workman, such dispute shall be deemed to be an industrial dispute even though there is no espousal by his fellow workmen or any trade union composed of them. The criticism appears to be that by giving retrenchment wider meaning, the term 'discharge' in section 2A has become redundant. It is submitted that the *Santosh Gupta* does not give rise to any such absurd situation. Firstly, the term 'dismissal' will continue to cover cases where an employer terminates the services of a delinquent workman. Secondly, the word retrenchment will not cover all cases of discharge, e.g. where the services of an employee are terminated on the ground of continued ill-health, this case will not be covered by the term retrenchment but will be covered by the term discharge. Even after the *Santosh Gupta,* retrenchment does exclude certain cases of discharge as can be seen from the exceptions to section 2 (oo). It is, thus, difficult to see any force in the criticism. Therefore, the words 'discharge' and 'retrenchment' used in section 2A are intended to cover different fields. They are, in fact, designedly added so as to cover their respective fields though there may be cases where the two terms may overlap.

(b) With respect to section 11A, it is difficult to visualise[43] how difficulties will arise. It is to be remembered that the industrial adjudication has exercised the powers conferred under section 11A only where the discharge is *mala fide* and is punitive in nature though draped in such silken phrases as discharge *simpliciter*. The words "Labour Court, Tribunal or National Tribunal may....give such other relief

40. *Supra* notes 14 and 15.
41. *Supra* notes 7, 11, 12 and 13.
42. The Indian law, unlike the UK law, makes a distinction between 'dismissal' and 'discharge'. Whereas the former connotes punitive action against a delinquent employee, the latter is termination of services of the employee by terminating the contract of employment. When an employee is dismissed, he is visited with a stigma and he forfeits his claim to benefits otherwise available on termination of contract of employment.
43. *Supra* note 15. S. C. Srivastava feels that the court's approach in the *Santosh Gupta* will create difficulty in the application of section 11A.

to the workman including the award of lesser punishment in lieu of discharge or dismissal" in section 11A indicate that the adjudicatory authority assumes jurisdiction under section 11A only when the discharge or dismissal is a measure of disciplinary punishment. The section does not come into operation with respect to cases of termination of service by way of discharge *simpliciter* or retrenchment.[44]

Where an employer *bona fide* complies with the standing orders of the establishment and/or provisions relating to retrenchment compensation, it is difficult to see how the court's decision in the *Santosh Gupta* could create difficulties in the application of section 11A. Even if we take the extreme view which, it is submitted, is not justified, that now the effect of the *Santosh Gupta* is that the adjudication machinery is going to exercise, in course of time, powers conferred under section 11A even in cases of retrenchment, it will create no difficulties or hardship whatsoever. After all, even before this case, the industrial adjudication has declared its powers to go into the question as to whether the retrenchment effected was *bona fide*.[45] Thus, if the approach in earlier cases is any guide, it is now well-settled law that the effect of section 11A is to cover those cases only where the management has taken action against an employee by way of punishment and thus dismissed him, in fact in the guise of discharge *simpliciter* or retrenchment.

(c) Now we can consider whether the *Santosh Gupta* renders sections 25G and 25H redundant. Section 25G provides that where the employer decides to retrench an employee he must ordinarily follow the rule of 'last come, first go' in that category to which the employee belongs and section 25H provides, subject to certain conditions, that where any workmen are retrenched and the employer proposes to re-employ, as and when vacancies arise, any persons, he shall give preference to such retrenched employees for re-employment.

A look at sections 25G and 25H shows that these provisions are to be read conjunctively and are intended to be applicable only to one form of retrenchment, i.e. where retrenchment is because of labour surplusage. It is submitted that it will be illogical to contend that sections 25G and 25H have application even to other forms of retrenchment. This could not be the intention of the legislature in laying down the rules in these two sections. What the legislature intended is that the procedure prescribed in these provisions must be adhered to in cases of labour surplusage—a form of retrenchment. Even in such cases the Act does not lay down an inflexible rule.[46] An employer is required to adhere to the rules 'ordinarily', but he can even in labour surplusage cases make departure from this rule on assigning reasons. If it is agreed that these two sections are to be applicable only in cases of labour surplusage, there appears to be no inconsistency between these provisions and the court's approach.

(d) The other ground advanced questioning the correctness of the court's approach is that it creates difficulties when looked at in the light of the provisions

44. *Supra* note 15 at 747. Even judicial decisions support this view: see *Management of State Bank of India* v. *G. D. Jain*, (1979) Lab IC 1041 at 1049 (Del.), per Prakash Narain J.
45. *Workmen of Subong Tea Estate* v. *Subong Tea Estate*, AIR 1964 SC 420, per Gajendragadkar J
46. *Supra* note 17; see *Mohan Lal* v. *Management of Bharat Electronics Ltd.*, *supra* note 11.



of section 25N and section 25Q. These two provisions form part of chapter V-B of the Act, which was added to the original Act by the Industrial Disputes (Amendment) Act, 1976. By engrafting chapter V-B containing sections 25K to 25S, strict fetters have been put on employers effecting lay-off, retrenchment or closure in industrial establishments (defined in section 25L) employing one hundred or more workmen. In view of large-scale lay offs, retrenchments and the closure of big establishments, these provisions were introduced for prior scrutiny of reasons for the proposed actions on the part of the employer, to prevent avoidable hardship to the employees and to maintain a higher tempo of production and a higher level of productivity. However, in *Excel Wear* v. *Union of India*[47] the Supreme Court struck down section 25-O, which imposed restrictions on the employer's right to close down an undertaking, and section 25R in so far as it related to the awarding of punishment for infraction of the provisions of section 25-O, as constitutionally bad and invalid for the violation of the fundamental right to carry on business guaranteed under article 19 (1) (g) of the Constitution of India.

The change effected through the incorporation of section 25N, *inter alia*, is that every employer employing more than 100 workmen has to seek prior permission of the appropriate government for effecting the proposed retrenchment. Failing this, two consequences follow, namely (i) the retrenchment becomes void, and (ii) the employer is liable for penal consequences. The criticism is that if the concept of retrenchment is not confined to labour surplusage but extends also to terminations of the type covered by the *Santosh Gupta*, then these provisions are going to work harshly on employers who may desire to terminate the services of their employees by way of discharge *simpliciter*. This, according to the critics, was not contemplated by the legislature when it amended the Act. It is their argument that it will lead to an absurd situation. When an employer has complied with the provisions of the standing orders of his establishment for effecting discharge *simpliciter*, must he further wait for the permission of the appropriate government?

It may be mentioned here that a Division Bench of the Madras High Court in *K. V. Rajender* v. *Deputy Commissioner of Labour, Madras*,[48] was called upon to decide the constitutional validity of sections 25N and 25Q. The court held that section 25N as a whole and section 25Q in so far as it related to the awarding of punishment for contravention of the provisions of section 25N were *ultra vires* the Constitution. The court in the instant case based its opinion on *Excel Wear*. For our discussion, let us assume that sections 25N and 25Q are valid provisions. Theoretically, the arguments against the court's approach to the two sections do not seem logical. It is within the power of the Parliament to put curbs on the employer's right to 'hire or fire', and if such restrictions can be put on one form of retrenchment, there seems to be no logical reason why such restrictions cannot be imposed on other forms. Mere compliance with the standing orders does not mean that the obligation which emanates from other statutes need not be adhered to. The provisions of the Industrial Employment (Standing Orders) Act, 1946 and the Industrial Disputes

47. (1978) II LLJ 524 (SC), hereinafter referred to as *Excel Wear*.
48. (1980) I LLJ 275.

Act, 1947 have to be construed harmoniously. However, it is not free from doubt whether the provisions of sections 25N and 25Q will not work hard on employers when looked at from the practical working of the provisions, especially when the management's right to organise its business has come to be recognized.

To mitigate the rigours of the law, it is submitted that section 25N, if finally declared constitutional by the court, be amended on the lines of section 33, so as to make it less stringent in cases where retrenchment is not because of labour surplusage. Further, the proposed amendment will make rules 76 and 76A of the Industrial Disputes Central Rules, 1957 more meaningful. But even in the present state, there appears to be no conflict as such between these provisions and the court's approach as long as the restrictions in section 25N and the consequences of non-compliance with them are reasonable restrictions on the right of the employer 'to hire and fire'. It is one thing to say that there is conflict and another thing to say that the existing law will result in hardship. Hard cases do not necessarily make law bad.

(e) The critics feel that the concept of retrenchment as enunciated by the courts would create certain practical problems, as there are bound to be cases where claims would arise for getting a declaration from a court that particular terminations are null and void for non-compliance with the provisions of section 25F or section 25N, although the terminations may have been made much earlier.[49] Further, it has been feared that there being no limitations for raising an industrial dispute or making a claim under section 33C (2), one would expect a plethora of cases being brought up and such situation will not be in the interest of industrial peace.

Let us examine this argument. The whole problem has been that after the *Shukla* case, the court was neither asked nor did it seize any opportunity to pronounce on the true meaning of retrenchment under section 2(oo) of the Act till the later set of cases starting with the *Sundra Money*. Contrary to the general belief, the court, in fact, did not in its earlier decisions including *Shukla* pronounce on the true ambit of section 2 (oo) of the Act. The gap of two decades between *Shukla*, where the court was concerned with a limited question as to whether the ordinary meaning 'fulfils' the requirement of section 2 (oo), and the *Sundra Money* case, where the court started its quest for finding the true ambit of section 2 (oo), made people including lawmen to believe in something which, in fact, is too narrow a view of section 2 (oo). The true interpretation in the *Santosh Gupta* (of course this became clear even in the *Sundra Money*), undoubtedly, may appear to result in hardship in some cases where the dispute may be raised about the termination of the services of workmen after the lapse of a few years. The problem does not lie with the courts' approach in retrenchment cases but somewhere else. Firstly, the Act is conspicuously silent about the time limit within which an industrial dispute may be raised. Need for such a provision is long overdue. The court, in some earlier cases,[50] got an opportunity, though in the absence of legislative provisions, to lay down some

49. *Supra* notes 14 and 15.
50. For example *Wimco* v. *Wimco Workers Union*, AIR 1970 SC 1205



meaningful guidelines but its failure to do so has aggravated this problem. This aspect however cannot be a ground to assail the wider meaning given to the definition as the remedy lies with Parliament in providing a specific provision to remove the uncertainty that exists today. Till Parliament heeds to the need of such a provision, the court can take a lenient view as it has done earlier[51] by not ordering reinstatement but instead order payment of compensation to the aggrieved workman.

## V UNFAIR RETRENCHMENT

Section 25G of the Act prescribes the procedure for retrenchment. It provides that where any workman in an establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workman in that establishment, then, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless, for reasons to be recorded, the employer retrenches any other workman. In other words, this section makes adherence to the well-recognized principle of retrenchment in industrial law, i.e. 'last in, first out'. As submitted earlier, this provision is applicable only to one form of retrenchment, i.e. where retrenchment is because of labour surplusage. The employer is 'ordinarily' expected to adhere to the procedure of 'last in, first out'. The legislature has taken the caution not to make compliance with the procedure a castiorn requirement, as in the course of industrial relations myriads of contingencies arise in different situations[52] The use of the word 'ordinarily' indicates that though the procedure of 'last in, first out' enacted by section 25G should ordinarily be adhered to, where the exigencies of an industry so demand, the procedure can be departed from. The only requirement that the section prescribes in case of departure from this procedure is that the employer should record reasons for the departure. In *Worker of Sudder Workshop of Jorehaut Tea Co. Ltd.* v. *Management*,[53] the Supreme Court held that departure from this rule was permissible only on valid and justifiable reason to be proved by the management. In this case, the management retrenched 23 workmen. Out of these, the services of seven were terminated without following the rule of 'last in, first out'. The industrial tribunal, therefore, set aside the management's order of termination of seven workmen and directed their reinstatement with some back wages. The Supreme Court, in appeal, confirmed the finding of the tribunal and laid down:

> The rule is that the employer shall retrench the workman who came last first, popularly known as "last come, first go". Of course it is not an inflexible rule and extraordinary situation may justify variation....There must be a valid reason for this deviation.[54]

Further, the court added:

> There is none here, nor even alleged, except only plea that the

51. *Supra* note 6.
52. *Supra* note 3 at 771.
53. (1980) II LLJ 124 (SC).
54. *Id*. at 126.

> retrenchment was done in compliance with Section 25G grade-wise....Affirmatively, some valid and justifiable ground must be proved by the management to be exonerated from the 'last come, first go' principle.[55]

A departure from this principle by the employer, the reasons for such departure not being valid and justifiable reason, would make the retrenchment invalid.[56] Once it is found that retrenchment is unjustified and improper, it is for the tribunal to consider as to what relief the retrenched workmen are entitled to. Ordinarily, if a workman has been improperly and illegally retrenched, he is entitled to claim reinstatement, and the fact that in the meanwhile the employer has engaged other workers would not necessarily defeat the claim for reinstatement of the retrenched workmen nor can the fact that protracted litigation in regard to the dispute has inevitably meant delay to defeat such a claim for reinstatement.[57]

## VI CONCLUSIONS

The true scope of the concept of 'retrenchment' under the Industrial Disputes Act, 1947 has been a focal point of controversy for quite some time now. Clearly, the problem arose because, on the one hand, the capital all through clung to the age-old ordinary meaning of the term. On the other hand, the Supreme Court conscious of the change in Indian socio-legal conditions, has been finding it difficult to truncate the remarkably wide language employed in the definition of 'retrenchment' in a social welfare legislation with an economic justice bias. In the *Shukla* case, the court did not go into the wider question of the term but confined itself to the question as to whether the ordinary meaning of the term 'retrenchment' fulfils the requirements of the definition in section 2 (oo) of the Act.

The capital tried to take advantage of certain observations in the *Shukla* case which surely were not to be considered in isolation, but in the context in which they were made. The other unfortunate aspect that has added to this controversy has been the time lag between the *Shukla* case and the later set of cases starting with the *Sundra Money*. It can safely be said that it was only in the later set of cases that the court was called upon to pronounce on the true scope of section 2 (oo) of the Act. The court seized the opportunity and rose to the occasion. Any criticism that the decisions of the court in a later set of cases, particularly in the *Santosh Gupta*, are not in consonance with the provisions of the Act may appear to be plausible, but cannot stand up to close scrutiny as shown earlier. In the absence of a meaningful social security system in India, the court, by delivering justice based on pragmatic humanism to the worker and his family, has followed the right canons of statutory construction. The changing concept of retrenchment as interpreted by the court is an attempt to translate into reality the constitutional values of security in the event of unemployment of a worker for Part IV of the Constitution bespeaks the conscience of the nation including the community of the employers.

55. *Id.* at 126-27.
56. *Ibid.*
57. *Swadesamitran Ltd.* v. *Their Workmen*, (1960) I LLJ 504 (SC).



Like any other branch of law, more so in the area of industrial law, the need of the day is a forward-looking judicial attitude. However, a feature of the judicial process is that judicial opinions keep on moving backward and forward for quite some time on points of law, and propositions of law have a tentative character unless they mature, in course of time, into firmly established principles by constant reiteration and application by the judges.[58] In the area of labour management relations, examples are not wanting to show that courts have moved forward and backward while dealing with vital concepts.[59] It is hoped that the court will not move backward, but would let the concept of retrenchment crystalise by constant reiteration and applications, though the observations of Pathak J in *Surender Kumar Verma*[60] give the impression that some vacillation between backward and forward approach with respect to retrenchment is in the offing. It is learnt that the Supreme Court is already seized with cases where the definition of 'retrenchment' is being reconsidered by a Full Bench of the court. It is apt to draw attention to the Gandhian approach in such a situation. Gandhiji said:

> Whenever you are in doubt, apply the following test: Recall the face of the poorest and the weakest man whom you may have seen and ask yourself, is the step you contemplate going to be of any use to him.[61]

The fact remains that the beneficiaries of the changing concept of retrenchment as conceived by the court are those who are from the many below the destitution line and who are increasingly seeing the Supreme Court as the last resort of the oppressed and the bewildered.[62] It will be a sad day if the concept of retrenchment as perceived in the *Santosh Gupta* is miscarried rather than being allowed to mature over the years.

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58. M. P. Jain "Administrative Law", XVI *ASIL* 361 (1980).
59. The zig-zag course adopted by the court in defining the true ambit of the concept of 'industry' in section 2 (j) of the Industrial Disputes Act, 1947 is the apposite example.
60. *Supra* note 18.
61. The Gandhian approach to such issues has been cited with approval by the majority judgment in the *Gujrat Steel Tubes*, see *supra* note 6.
62. Upendra Baxi, *The Indian Supreme Court and Politics* xi (1980)

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# ANOMALIES IN THE NEGATIVE STATE

HOWEVER DIVERSE in form and different in content, most western political theories have in common their origins in times of political crisis. Plato wrote in response to the internal disintegration of the Athenian *polis*; Augustine to the sack of Rome; Machiavelli to the rise of the Medici; Hobbes to the English civil wars; and the authors of the *Federalist Papers* to the American Revolution. This "intimate relation' between crisis and theory may be viewed as the natural result not merely of the theorist's perception of danger to his political community, but also of his perception of an opportunity for theory to reorder the political world.[1] By any measure of success, however, few theorists have managed to realize this opportunity and most in fact have been reduced to rather pathetic hopes about uniting the political power and philosophy in some Platonic guardian. What is remarkable about the framers of the U.S. Constitution is that they did manage to take a consciously conceived political theory, grounded in their own experience of political crisis and translate it into a ruling ensemble of institutions, laws, political practices and beliefs. The questions to be asked here are: Whether the very novelty of this accomplishment does not contain the seeds of its undoing and whether we are not now seeing first signs of their germination? Or, less cryptically, can a ruling ensemble so consciously and intimately tied to the political experience of one generation be adapted to changing political experience and remain intact? And are we now not beginning to see serious anomalies between the theoretical underpinnings of the U.S. political institutions and the "nature' of contemporary political practice?

While a careful history would have to multiply exceptions and elaborate nuances, it would be fair to say, on the whole, that the framers of the U.S. Constitution conceived of the political community in essentially negative terms. "What is government itself", declared Madison,[2] "but the greatest of all reflections on human nature? If men were angels, no government would be necessary." In other words, for the framers, the political community was not an organic outgrowth of the unity of its members or of their quest for communal fellowship, but rather a deliberately crafted response to their restless, selfseeking natures. It was, in blunt terms, a prophylactic, an association of convenience in which atomistic individuals came together to protect themselves from each other and to provide a minimal framework of national defence and commerce, within which individuals could pursue their own ends.

In accordance with this vision, the U.S. political institutions were organized not to make things happen, but to keep them from happening. By the geographical extension of the republic and the cultivation of interest-based politics, the U.S. society was "broken into so many parts" that the idea of a "national interest"

1 See Sheldon S. Wolin, "Paradigms and Political Theories" in P. King and B.C. Parekh *(eds)*, *Politics and Experience, Essays Presented to Michael Oakeshott* 125-52 at 148 (1968).
2. Madison, *Federalist* 51.



or a "common purpose", which might require the subordination of individuals to corporate needs, could never have any serious content except in times of war. Moreover, just as interests in society were deliberately multiplied to check the excesses of human nature, the power within the government was likewise deliberately fragmented, "first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments."[3]

The great strength of the U.S. system, of course, has been its unprecedented extension and preservation of individual freedom. However much we may admire the liberal values served by the political institutions established by the framers, it can be suggested that the U.S. political practices are increasingly at odds with their negative premises in two significant senses. First, while we have continued to view the exercise of political power with great skepticism, we have nonetheless increasingly turned to government to make things happen. We have asked it to keep the national economy on an even keel, to recompense past social wrongs, to protect the environment and steward the use of the natural resources. Yet, nowhere in the governmental system of fragmented, shared power does the ability exist to pursue these goals in a coherent fashion.

Even if we cannot suppress the inclination of Madison skeptics to thank a benevolent Deity for the lack of this ability, surely we must admit that substantial costs inhere in using a government founded on negative premises to try to accomplish positive goals. Inflation, the decline in productivity caused by incoherent government regulation and the frustration of the important national projects might be cited as examples.

Yet, as important as these anomalies between the institutional expressions of the theory of the framers of the U.S. Constitution and current practices are, much more fundamental ones may well exist. Although this is no place to explore the philosophical bases of the Madisonian view of government, let it be simply suggested that it rests in part on closely linked beliefs about the intractability of human nature and the limits of human knowledge that can be brought to bear on this serious restraint of effective political action.[4] Because of these beliefs, Madison rejected changing human nature to solve the problem of faction as "impracticable"[5] and nowhere gave serious credence to the ancient view of government as a character transforming agency.

What is significant about many modern critics of Madison is that they favour the ancient view precisely because they reject the belief that the knowledge that can be brought to bear on the problem of human nature is necessarily limited. Thus, according to Martin Diamond,[6] Richard Hofstadter detested Madison's theory of government because he believed "modern science" would make it

3. *Ibid.*
4. See Sheldon Wolin's discussion of John Locke in *Politics and Vision: Continuity and Innovation in Western Political Thought* 293-99 (1960).
5. Madison, *Federalist* 10.
6. Martin Diamond, *Ethics and Politics · The American Way* (The moral foundations of the American Republic).

possible "to change the nature of man to conform with a more ideal system." Although this view has hardly gained widespread acceptance in the U.S. government, it can be suggested that it is widely shared by social scientists; that it is one unstated premise underlying our almost mystical belief in the transforming power of government-sponsored education programmes and underlying our willingness to sponsor social research with tax money and that it may well be one source of the law reform effort to "objectify" and "professionalize" parenthood.[7] In any case, this view will certainly remain with us as long as we place an unlimited faith in "modern science" and its every expression in our political life will be anomalous to our negative conception of the state.

If there has been any consistent theme in popular political commentary in recent years, it has been the lack of coherent public philosophies in the U.S. political life. In part, the politics has remained, as Madison intended it, an endless quest by competing groups for "political goodies". Yet it has also become something more than he intended, and the results are often confusing, tragic and comical all at once.[8] Traditional political categories like "liberal" and "conservative" seem devoid of content; the political parties are little more than the remnants of earlier life forms; and the public opinion polls consistently report that the people want less government interference in their lives and lower taxes as well as more government services and greater government efforts to protect worker's safety, enhance the environment and improve education. We have reached a point, in effect, where the Madisonian political paradigm (both theory and ruling ensemble) which posits a negative, limited government no longer accords with the "nature" of the U.S. political experience. The real remaining question is how we can adjust the paradigm so that the anomalous becomes the expected without sacrificing the liberal values the paradigm has done so much to foster.

SHAILENDRA VIKRAM SINGH*

7. See Robert A. Burt, "The Limits of Law in Regulating Health Care Decisions", *Yale Law Report* (Spring, 1978). Also note the approving and Orwellian discussion of this subject in Jerry Debenham and Michael J. Parsons, "The Future of Schools and Families: Three Scenarios and a Recommendation", *Phi Delta Kappan* 443-46 (March, 1988).
8. Consider, for example, how the government's efforts to redress past social wrong to Blacks had turned into a farcical competition among rival groups to cash in on the compensation. See Noel Epstein, "25 Years After *Brown*, A Rivalry for Injustice", *The Washington Post* C1 (May 13, 1979).

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# REPORT OF THE LEGAL AID CLINIC, FACULTY OF LAW, UNIVERSITY OF DELHI (1989 - 90)

THE LEGAL Aid Clinic of the Faculty of Law was revived during 1989-90 by the initiative taken by Professor P.S. Sangal, Dean, Faculty of Law, University of Delhi. He appointed Shri S.P. Singh, Reader, Law Centre I as Convenor and Dy. Director of the Clinic and the following teachers from the three Law Centres of the Faculty as members of the Legal Aid Committee:

1. Dr. Mata Din (Campus Law Centre)
2. Shri U.M. Deshmukh (Campus Law Centre)
3. Shri Sunil Gupta (Campus Law Centre)
4. Shri O.B. Lal (Law Centre II)
5. Shri O.P. Saxena (Law Centre I)
6. Shri D.S. Bedi (Law Centre I)

Shri O.P. Saxena was assigned full-time duty to help the Legal Aid Committee.

In the beginning of the academic session, Dean alongwith a few other teachers of the Faculty of Law had a detailed discussion with Hon'ble Justice Ranganath Misra, Judge, Supreme Court of India and Chairman, Committee on Implementation of Legal Aid Scheme (CILAS) regarding the help which the Legal Aid Clinic needed to undertake various legal aid programmes in Delhi. Subsequently, a meeting was arranged between Dean, Faculty of Law, Shri S.P. Singh, Dy. Director of Legal Aid Clinic and Dr. S.N. Singh with Mr. Ch. Prabhakar Rao, Secretary, CILAS, Mr. R.C. Chopra, Addl. District Judge, Delhi and Secretary, Delhi Legal Aid and Advice Board and Dr. B.N. Mani. In that meeting, detailed discussion was held regarding various programmes which the Clinic had decided to undertake and the programmes suggested at the meeting. Fruitful discussion also took place regarding financial help which the Clinic required for undertaking various programmes.

## LEGAL LITERACY AND ON THE SPOT LEGAL ADVICE CAMP

As a part of its regular activities, the Clinic organised its first Legal Literacy and On the Spot Legal Advice Camp at Village Badli, Delhi on Sunday, the 25th March, 1990. The report on this Camp is as under:–

On March 25, 1990, about 120 students and some teachers of the Faculty of Law under stewardship of Professor P.S. Sangal, Dean of the Faculty, visited the village Badli to make on the spot study of legal problems of the villagers. Students in groups with law teachers visited door to door and acquired first hand information of the problems. In a function held in the M.C.D. Primary School, Badli, Mr. Justice

Avadh Bihari Rohatgi spoke on the law relating to land acquisition and apprised the villagers of their legal rights. Shri R.C. Chopra, A.D.J. & Secretary, Delhi Legal Aid and Advice Board informed the villagers about the Lok Adalat and counselling work undertaken by the Legal Aid Board.

The representatives of villagers drew attention of law teachers and students to the legal problems of the villagers like inadequate compensation in lieu of land acquired, growing pollution and other problems like delay in disposal of the cases. Shri S.P. Singh, Convenor of the Legal Aid Clinic told villagers about the facilities of free legal aid to help poor and needy to get justice. Mr. O.P. Saxena, Advocate and law teacher assured villagers that Legal Aid Clinic will try to help in organizing 'Lok Adalat' for disposal of land acquisition cases.

The students in groups under the respective teacher-in-charges, Dr. Mata Din, Shri O.B. Lal, Shri D.S. Bedi and Shri Sunil Gupta talked to about 200 villagers and prepared records of their legal problems. The village pradhan of Badli village and other prominent villagers expressed thanks to the Law Faculty for this noble work of imparting legal literacy and providing legal advice.

Professor P.S. Sangal, Dean, Faculty of Law announced that lawyers and law teachers will regularly visit various villages, slum areas, J.J. colonies and labour colonies and carry out a survey of the legal problems of the residents of these areas and thereafter legal aid clinic will try to provide solution to legal problems by helping in organizing 'Lok Adalats' and giving legal advice and aid to take up these matters in court. Shri Ch. Prabhakar Rao, Special Secretary, Committee on Implementation of Legal Aid Scheme of the Law Ministry was present in this Camp and went door to door with Professor Sangal in acquainting himself with the problems of the villagers. Shri Rao assured the Law Faculty of full help in organizing such legal aid programmes. Chaudhary Tarif Singh, area M.P., also spoke and congratulated Dr. P.S. Sangal and other Faculty members for taking initiative in imparting legal advice and aid to the villagers in his constituency.

After this successful camp, many specific cases of criminal, civil and matrimonial nature came up for consideration and in these cases proper legal advice was given by Shri O.P. Saxena and others.

S.P. SINGH*

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# RULE OF LAW

### *Proem*

Our present generations are forgetting fast,
All about the glories of our distant past,
When the greatest lawgivers of ancient time,
Wrote not in prose, but in jingling rhyme,
A feat unsurpassed by any Western scholar,
Though today, he plays a role, stellar.
Unlike our lawmaker of the days of yore,
The modern lawgiver is a mere proser.
Though they belong to the same family,
Prose is homely, but poem is comely.
As if, it remains under a deadly curse,
Prose cannot match, the sweetness of verse.
Ancient lawgivers excelled in this sweetness,
To which Smriti texts stand witness.
Following their "footprints on the sands of time",
I have essayed to indite this rhyme,
To egg the future Manus of great India,
On to take up the glorious idea.
Polyphonu prose makes Krishna Iyer tall,
He is closer to Manu, than to Marshall.
Be Manus, Chanakyas or rhyming lawyers,
Revivify the glory of our ancient scholars.

### *Rule of Law through Ages*

The quiddity of Rule of Law is the limitation,
Put on the ruler to base his action,
Not on personal whigmaleerie or prejudice,
But on the objective priniciples of law and justice.
Millennia before this concept grew in the West,
India had fulsome Rule of Law, at its best.
The zenith of Rule Law, was the *Dharma* norm,
To which a king's rule had to conform.
Principle of *Dharma* was a binding lodestar,
According to which, he exercised his power.
The glolden rules of *Dharma*, set limitation,
On the King's power of royal administration.
Containing the best of Law, morality and religion,
*Dharma* was a capsuled, gravid expression.
The term is a model expression in economy,
No single word can explain its polysemy.
*Dharma* is a holophrastic expression,
Enjoining a code of righteous action.

Wider in meaning than only righteousness,
*Dharma* was legally binding in its fulness,
Enforcing *Dharma* was King's primary duty,
Failure to do so proved his iniquity.
As immutable as principles of natural law,
Divinely conceived *Dharma* could have no flaw.
Law is King's command, says the positivist,
But *Dharma* was a command to the King, to enforce it.
Conceived by ancient Indian perspicacity,
*Dharma* proudly proclaims its universality.
Millenniums before grew the modern conceptuality.
Of Western state system, law and morality,
India was ruled and cloyed by *Dharma* sagacity,
Subsuming legality, morality and religiosity.
The legality of morality and morality of legality,
Were fused into the binding single entity.
In the interface of law and morality,
*Dharma* was, and shall remain, an ideality.
Its golden rules obligated one and all,
To discharge all duties,legal and moral.
Promoting dutifulness, it brought accord,
Unlike modern fight–for–right, causing discord.
*De fide Dharma* bore universal, timeless theme,
Showing the best of man and manners for all time.
*Dharma* sustains mankind and everything else,
Modern state and law stand only on its base.
The basic principles of Dharma, surrive yet,
In the legal and moral codes of every state.
Though it is not followed in its entirety,
No state can ignore its salience and sagacity.

### *What is Rule of Law*

When Government governs and rulers rule, by law,
In simplest words, this is Rule of Law.
If rulers rule the roast, by whim or desire,
We ever say that Rule of Law is not there.
Rule of righteousness, the best government ever,
Was the *Rama Rajya* in the days of yore.
The Sun of moral wisdom, rises in the East.
" The best government is that governs the least"
In man's search for jimdandy of administration,
Rule of Law stands as the best innovation.
Rule of Law is the fundamental rule,



For the best governance, it is the best tool.
*A good government should always aim,*
*To make Rule of Law, its name of the game.*
*A good ruler, like a well groomed* bride, s
*Must be dutiful, solicitous and without pride.*
Rulers are ruled by the regimen of Law,
There is no other conclusion, we can draw.
Rulers rule, only by the dictates of Law,
Non-compliance will mark their flaw.
From peon to the P.M. and the President,
Each acts his part as the Law's Agent.
No ruler can act as he wishes,
But only as the Law clearly expresses.
Government of Laws, and not of men,
An official is only Law's cognomen.
He acts as per Law's direction only,
And lawfully cannot act wantonly.
Rulers have to show for every action,
Some legal norm, as its justification.
They have no arbitrary powers to act,
Without conforming to Law, in fact.
So I ween, Law in the real Ruler,
And in accord, acts every state worker.
*As a beau jealously guards his girl-friend,*
*So does Rule of Law, individual rights, defend.*
From the time of Magna Carta to the present,
Rule of Law has grown in its content.
Not only civil and potitical rights to assure,
It now seeks to promote, economic welfare.
Political rulers, lay the policy down,
Bureaucratic rulers, to act them upon.
If from Law, there occurs deviation,
Judicial rulers nullify such action.
Laws are made by the legislative rulers,
Executive rulers act as implementors.
If they bring about any violation,
Judicial rulers cause nullification.
Revealed by word-wars of Lawyers' oratory,
Defects in Law are cured by judicial surgery.
Such is the Majesty of Rule of Law,
That keeps every ruler in awe.
*Rule of Law is a dreadful nemesis,*
*That strikes hard on its anti-thesis.*
*Acts of arbitrariness and discrimination,*
*Cannot survive the judicial examination .*

The Rule of Law has its cornerstone,
In Judicial Review of any state action.
The Rule is fortified by judicial independence,
Without which it will carry no sense.
Equality before Law is largely writ,
When rulers, like the ruled, do submit –
To the jurisdiction of the ordinary Courts,
Being bound by decisions, under the codes.
Not only is no man above the Law,
But every scofflaw comes under its claw.
He cannot escape being brought to justice,
Despite his rank, status or high office.
The Rule of Law does further enjoin,
Not to illegally punish any one,
Unless one is Law's transgressor,
Whose breach is proved by legal procedure.
*A man can be punished for nothing else,*
*Except for a breach of Law or legal process.*
*His guilt must be proved to the hilt,*
*Before he gets lawful punishment for it.*
Whoever takes Law into his own hand,
Shall be punished by the Law of the Land.
Thus the ruled is protected from the ruler,
Who may try to abuse his power.
Press brings to light the Rule's violation,
Before the Supreme Court of Public Opinion.
The accused faces trial by Public Opinion,
Which has its own moral sanction.
As unofficial upholder of Rule of Law,
The Fourth Estate becomes the last straw.

*Constraints on Rule of Law*

The glory of the Law and Justice gets lost,
In the growing delay and rising cost.
The spiralling outgo and procrastination,
On Rule of Law put great limitation.
*The winding channels of costly litigation,*
*Forbid one to seek legal vindication.*
To vindicate his rights, a man must,
Be in a position to pay the cost.
*Caught in the anfractuosity of legal process,*
*The litigant loses his wealth and happiness .*
From court to court, to the High and Supreme,
The suitor spends his money and time.



Like a suitor he tries to woo and win,
Without knowing how and where to begin.
*Law and love have, one thing in common,*
*Only when pursued, they can be won.*
Legal Aid and Public Interest Litigation,
In some way redeem the situation.
Revamp all archaic Law and procedure,
And give justice to all, rich or poor.
Law is no insurance against its violation,
But what it promises is a legal restoration.
In the netherworld of corruption and deceit.
The law suffers both in letter and spirit.
When Law can be invoked to defeat the Law,
That is a fine art of an official outlaw.
They chivvy people by chicanery and pettifoggery,
And cobwebs of jiggery-pokery and skulduggery.
Flimflam, game plan and logistical sophistication,
Are freely used to circumvent legal provision.
Misfeasance, malfeasance and malversation,
Are subtle ways of Law's infraction.
When officials play the jilt towards Law,
It looks like inlaw becoming an outlaw.
Sinister abuse of legal and judicial process,
Defiles and deflowers Law's charm and greatness.
Framing and ensnaring show the negation,
Of the very spirit of the Rule of Law notion.
Honey traps, money traps and range of gimmicks,
Are abused on the loathed ones, as dirty tricks.
A *bete noire* needs foolproof protection,
From the power wielders and their deception.
Pursuing cloak-and-dagger policy and trickery,
Some act, *suaviter in modo fortiter in re.*
When one is tricked into criminality,
There is a failure of Law and morality.
When a pariah is embroiled in maleficence,
We reach vanishing point of jurisprudence.
This smacks of baleful, baneful jimcrowism,
Where one gets punished by others' chauvinism.
When a doctor is remiss on hospital bed,
Only God can save the sick man's head.

*Etiology of Crime*

Mammonmindedness is the root of all evils,
Cupidity is main cause of our ills.

Seduced by the glamour girl of consumerism,
People pursue a course of gamy materialism.
By Charbak rule, the voluptuaries do abide,
When they follow the epicurean as their guide :
"So long as you live, live in glee,
Be a borrower and drink ghee."

Justifying one's graft by that of another,
The jackleg rulers, feel abashed, no more
Caught is elfish, selfish and huggish maelstrom,
Plummeting probity plagues the state system.
While few excel in job, many excel in jobbery,
And many others surpass in *suppressio veri.*
Corruption, like water, flows from top,
All office-heads liable, who are atop.
Under their noses, thrives the devil,
That begets vested interests in the evil.
An office-head is the Captain of a ship of state,
The conduct of his men, he has to regulate.
Ships of state are run by these captains,
Minions just fall in line with their chieftains.
If a captain does not act above board,
His men will deviate, deviagate and defraud.
Unite all such chiefs, against the mischief,
Who, if sincere, can bring all relief.
No piece-meal approach, will yield fruit,
Unless you face the problem, at its root.
When few heads roll, it is no cure,
Because the ailment survives elsewhere.
As one's contagion infects another, nor grows less,
Lawlessness enkindles lawlessness.
We need a moral and spiritual regeneration,
To lift from frailty and morass of malefaction.
Not all officials are venal or corrupt,
World states have not become morally bankrupt.
Judges, fuzzes and all others who are honest,
Must rescue the system by doing their best.
Every office has its own ethos and culture,
That shape the psyche of its holder.
The sublime ambience of juridical objectivity,
Moulds and makes a judge's personality.
Judicial power does not corrupt judicial mind.
An exception to the power of any other kind.
Therein lies Rule of Law's saving grace,
That off-sets the growing executive excess.



Minions must mend minacious mentality,
To win people's love and respectability.

### *Coda*

A dirty head hath, dirtier hands still,
Which can rob, kill or steal.
When head is not pure, limbs act impure,
If mind is clean, lucre cannot lure.
Crimes exist in mind, before they exist in fact,
Religion killed them there, before the act.
Because of present neglect and decline of religion,
We have a rise in crime and corruption.
We pay the price, for our godlessness,
With a moral decay and rising lawlessness.
As punishment does not reform the mind,
No decrease in rates of crime, we find.
Godliness purifies the mind and the soul,
So that one shall commit no crime at all.
In the glorious Ramayan and Mahabharat time,
Very few people dared to commit any crime.
Bound truly by religio-legal *Dharma* norm,
They did, all their duties perform.
*Dharma* was the be-all and end-all of life,
That put paid to all forms of worldly strife.
India is the golden land of spirituality,
Where God materialised to end megacriminality.
*Gita* remains its edifying, undying evidence,
And its sublimity and eternal relevance :
"As and when there is decline of righteousness,
And upswing and upsurge of elfish wrongousness,
To save the virtuous, destroy the vicious and dishonest,
And to retrieve righteousness; secularly, I manifest".
These are the words, which the Almighty said,
And, all unrighteous acts, thereby forbade.
The world can learn from India's spiritualism,
That glorified abnegation and decried hedonism.
One who wants to woo and win bitch goddess,
Must shun running the gamut of sex.
Heady headonism begets AIDS and affluenza,
Unseen in India's world of spiritual extravaganza.
Deadly, deathbearing AIDS is a sinners' illness,
God's wrathful retribution against sexual excess.
Follow the ideals of a saint and his way,
The dreadful, dolesome AIDS shall keep away.

The joy of a swinger from his intromission,
Far poorer than a saint's spiritual frisson.
Continence is life, venery is death,
This is the law of life and health.
Renunciation, abnegation and abstinence,
Replacing venery, incontinence and indulgence,
Are panacea for world's doleful decadence,
That can usher an era of peaceful resurgence.
The Sanskrit texts, a store house of knowledge,
Are mankind's rich and proud heritage.
Gandhi lived and died, as its top true blue,
From whose life, you can take the cue.
Preach Gandhism, by your own practice,
That will ensure Rule of Law and justice.

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# *STUDENTS' SECTION*

## RETROSPECTIVE OPERATION OF SECTION 12B OF MRTP ACT

IT IS a firmly established rule that retrospective effect is not to be given to a statute so as to impair an existing right or obligation except as regards matters of procedure unless that effect cannot be avoided without doing violence to the enactment. An enactment ought to be construed as prospective only when it is expressed in language which is fairly capable of either interpretation. Where, however, a statute is passed with the object of protecting the public against some evil or abuse, it may be allowed to operate retrospectively even if by such operation it will deprive some person or persons of a vested right.[1]

For the retrospective operation of the provisions of an Act, it is not necessary that it must be stated that its provisions would be deemed to have always existed. That is one of the modes and may be an effective mode of providing that the provisions would have retrospective effect. Retrospective effect can also be gathered from the language of the enactment and the object and intent of the legislature in enacting it.[2]

In the light of the above well-settled rule as to the retrospective operation of statutes, this note examines whether section 12B of the Monopolies and Restrictive Trade Practices Act, 1969[3] (MRTP Act) can be considered to have retrospective operation. Section 12B confers power on the Monopolies and Restrictive Trade Practices Commission to award compensation. Sub-section (1) of section 12B reads.

> (1) Where, as a result of the monopolistic, or restrictive, or unfair, trade practice, carried on by any undertaking or any person, any loss or damage is caused to the Central Government, or any state Government, or any trader or class of traders or any consumer, such Government or, as the case may be, trader or class of traders, or consumer, may, without prejudice to the right of such Government, trader or class of traders, or consumer to institute a suit for the recovery of any compensation for the loss or damage so caused, make an application to the Commission for an order for the recovery from that undertaking or owner thereof or, as the case may be, from such a person, of such amount as the Commission may determine, as compensation for the loss or damage so caused.

1. S.G.G. Edgar, *Craies on Statute Law*, 395 (7th ed., 1971).
2. *Sree Bank Ltd.* v. *S.D. Roy & Co.*, AIR 1966 SC 1953.
3. Inserted by MRTP (Amedment) Act, 1984, w.e.f. 1.8.1984.

The reason for introducing section 12B, as observed by the Sachar Committee,[4] on whose recommendations the section was incorporated, is:

> In all the legislations the world over, provision exists enabling an affected party to seek remedy for being compensated for loss or damage suffered by it at the hands of a person who has indulged in prohibited practices. Thus, section 7 of the Sherman Act and section 4 of Clayton Act (USA) provide that any person who has been injured in his business or property by reason of anything forbidden or declared to be unlawful may sue with respect to the amount in controversy and recover three-fold the damages sustained and the costs. Similarly, section 6 of the Federal Act (Switzerland) also provides that any person whose interests are affected by unlawful interference with the competition may request damages for any wrongful act or omission.
>
> Section 6 of the Act against Restraint of Competition (Spain) also provides for a person, who suffers damages by reason of restrictive trade practices that are declard to be prohibited, to recover damages.
>
> Section 25 of the Act concerning Prohibition of Private Monopoly and Maintenance of Fair Trade Act (Japan) makes an entrepreneur, who has employed unfair business practices, to be liable to idemnify the person injured. Section 82 of the Trade Practices Act, 1974 (Australia) as amended upto 1977, also provides that a person who suffers loss or damages by conduct of a person which is in violation of the provisions relating to restrictive trade practices and unfair trade practices may recover the amount of loss or damages by action against that other person.
>
> Similary, the Combines Investigation Act of Canada, being amended by the Compeition Bill, 1977, also provides by section 31.1 the right of any party to recover damages from the person who has indulged in trade practices which are prohibited.

The Sachar Committee further observed :

> The provisions for claiming damages are thus an established principle. It is also logical and equitable to provide that any person who is affected by any prohibited practice should have a remedy to recover damages and compensation from the guilty party.[6]

Taking into the consideration the intention and object which the legislators had in view in incorporating section 12B, the section can be given a retrospective effect. Apart from this, the amendment does not impair any existing right or

4. *Report of the High-Powered Expert Committe on Companies and MRTP Acts* (1978).
5. *Id.*, para 21.35—21.38, p. 273.
6. *Id.*, para 21.40, p. 274.



create any obligation as the trader is already under an obligation to compensate the aggrieved party according to the established principles of law. Section 12B(1) itself makes it clear by express provision that making an application to the commission for an order of compensation is "without prejudice to the right of such Government, trader or class of traders, or consumer to institute a suit for the recovery of any compensation for the loss or damage so caused." The language of the enactment, therefore, is such that favours section 12B to have retrospective effect. Even assuming that section 12B impairs any existing right or creates an obligation, it would still have retrospective effect because, according to the well-settled principles of inerpretation of statutes, if "a statute is passed for the purpose of protecting the public against some evil or abuse, it may be allowed to operate retrospectively although by such operation it will deprive some person or persons of a vested right."[7]

In *R v. Vine*[8] the words "every person convicted of felony shall for ever be disqualified from selling spirits by retail, ... and if any person shall after having been so convicted, take out or have any licence to sell spirits by retail, the same shall be void to all intents and purposes" were applied to a person who had been convicted of felony before the Act was passed though by doing so vested rights were affected. Mellor J observed:

> It appears to me to be the general object of this statute that there should be restraints as to the persons who should be qualified to hold licences, not as a punishment, but for the public good, upon the ground of character.... A man convicted before the Act was passed is quite as much tainted as a man convicted after; and it appears to me not only the possible but the natural interpretation of the section that any one convicted of felony shall be ipso facto disqualified, and the licences, if granted, void.[9]

The above observation of Mellor J can be applied to section 12B of the MRTP Act so as to give it retrospective effect. The object of present Act is beyond doubt. In ascertaining the intention of the legislature, it is certainly relevant to enquire what the Act aimed to achieve. According to Sachar Committee Report, the provision of 12B was to be introduced under the MRTP Act so that it can have salutary effect and that it may prevent the prohibited practice from being repeated. The remedy by way of damages will act as a deterrent to these prohibited practices right from the inception and motivate the producers and suppliers themselves to desist from indulging in such practices. The provision can also be invoked by central and state governments and other authorities for the reasons that the governments like any other person also make mass purchases of goods for their use in hospitals, stores, canteens, messes, etc. If as a result of prohibited practices, the government suffers damage, it is only natural that it should also be in a position to recover

7. S.G.G. Edgar, *Craies on Statute Law*, *supra* note 1.
8. (1875) 10 QB 195.
9. *Id.* at 200-201

damages. Thus, the whole intent and purpose of the provision of section 12B is to achieve the objectives of the MRTP Act with a view to protecting the public and the

In *Sree Bank Ltd.* v. *S.D. Roy & Co.*,[10] the question related to the amendment of the Banking Regulation Act, 1949 in 1953 by which a new section 45-O was introduced. The Supreme Court interpreted that provision by holding the same to have retrospective effect to protect the vested interest of the depositors. Section 45-0 states:

(1) Notwithstanding anything to the contrary contained in the Indian Limitation Act, 1908 or in any other law for the time being in force, in computing the period of limitation prescribed for a suit or application by a banking company which is being wound up, the period commencing from the date of the presentation of the petition for the winding of the banking company shall be excluded.

(2) Notwithstanding anything to the contrary contained in the Indian Limitation Act, 1908 or Section 543 of the Companies Act, 1956 or in any other law for the time being in force, there shall be no period of limitation for the recovery of arrears of calls from any director of a banking company which is being wound up or for the enforcement by the banking company against any of its directors of any claim based on a contract, express or implied; and in repect of all other claims by the banking company against its directors, the period of limitation shall be 12 years from the date of the accrual of such claims or five years from the date of the first appointment of the first liquidator, whichever is longer.

(3) The provisions of this section is so far as they relate to banking companies being wound up, shall also apply to a banking company in respect of which a petition for the winding up has been presented before the commencement of the Banking Companies (Amendment) Act, 1953.

In that case, the appellant bank got a compromise decree against the respondent on May 1, 1947 for the sum of Rs. 31,000, of which Rs. 2,115 were paid by respondent that very day. The decree provided that Rs. 6,885 would to be paid by May 9, 1947 and the balance of Rs. 22,000 in seven annual instalments. The sums of Rs. 6,885 and the first instalment of Rs. 1000 were duly paid by the respondent but he did not pay any other instalment. In the meantime, on May 11, 1948, a winding up petition was presented in consequence of which the appellant bank was wound up by an order dated August 3, 1948. Paragraph 5 of the compromise, which was part of the decree, provided that if the judgment-debtor did not pay any instalment and committed default, then, four months after such default, all the

10. *Supra* note 2.



instalments shall be deemed to be in default and the decree-holder would be entitled to recover the entire amount of the decree by execution proceedings. On August 24, 1957, the appellant presented an application in a tabular form for execution of the decree before the Calcutta High Court. It was stated in the application that the respondent had failed to pay the amount of the decree under execution and that the appellant had been wound-up by an order of the court dated August 3, 1948 on a petition for winding up presented to it on May 11, 1948. It was, therefore, prayed that the High Court liquidator, who was the official receiver of the appellant, be appointed receiver without security and remuneration to collect the amount from the respondent. A prayer was also made for the appointment of an interim receiver. An interim order for appointment of such receiver was made on August 26, 1957, which was confirmed on June 2, 1958. The respondent, thereupon, appealed and the main question to be decided by the court was whether the execution of the decree was barred by limitation. The appellant contended that in view of the provisions contained in section 45-O of the Act, the application was within time.

Sarkar J held that the object of the Act was beyond doubt. It was well known that prior to 1949 in our country, a large number of mushroom banks had come into existence and were in the control of persons not very scrupulous or competent. Many banks came to grief and failed with the result that the depositors largely lost their money. It was with the object of giving relief to those innocent depositors that the original Act of 1949 was amended and section 45-O was added. The whole intention and purpose of that Act was to secure the interests of the depositors. One of the methods by which the object could be achieved clearly was by extending the period of limitation for the enforcement of claims of a bank in liquidation so that more money might be collected for payment to the depositors. He, therefore, thought that the Act was intended to have a retrospective operation.

The retrospective operation of a provision is of course a question of the intention of the legislature to be gathered from the whole statute. Hence, in the light of the principles of interpretation of the statutes, the provision of section 12B, keeping in view the objects and the intention of the legislature and the judicial interpretation, may safely be allowed to operate retrospectively in the larger interests of the public and the state.

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# FROM RETRIBUTION TO RESTITUTION:

## A Note on *Suryamoorthi* Case

FROM HAMMURABIAN civilization to modern civilized world, the criminal justice system has witnessed a movement from retributive justice to restitutive justice. In India, the year 1989 has witnessed in the *Suryamoorthi* case[1] the creation of a precedent that might have significant import for the future sentencing policy. The offence involved in this case was robbery of Rs. 40,000/- which is punishable upto 10 years rigorous imprisonment. But the court, after recording a conviction and giving a pre-sentence hearing in terms of section 235(2)[2] of the Code of Criminal Procedure, 1973 imposed a sentence of fine totalling to Rs. 15,000/- from all the accused, Out of the fine so recovered, the court directed that compensation of Rs. 10,000/- be paid to the victim in lieu of loss of interest on Rs.40,000/- involved in the robbery. An attempt is made in this paper to analyse the nature and rationale of the sentencing.

The present case was of robbery under of the Indian Penal Code, 1860.[3] The prosecution case was that while PW1 and his mother PW2 were travelling with Rs. 73,600/- in cash, accused persons robbed Rs. 40,000/- from the mother when they had alighted to change the bus. Pursuant to the statement given by the accused, Rs. 39,170/- was recovered from their possession. The case was proved against accused No. 1, a policeman, accused No. 4, a companion and accused No. 7, a neighbour of PW1 and PW2, beyond reasonable doubt. After conviction, a pre-sentence hearing under section 235(2) of the Cr. P.C. was provided and an order of punishment was passed after 25 days of the conviction hearing. The Supreme Court directed the : (a) accused No. 1 (the policeman) to pay a fine of Rs. 7,500/- and in default to suffer rigorous imprisonment for 3 years, (b) accused No. 7 to pay a fine of Rs. 5,000/- and in default to suffer rigorous imprisonment for 2 years, (c) accused No. 7 to pay a fine of Rs. 3,000/- and in default to suffer rigorous imprisonment for 1 year. And attractively, out of this fine amount, PW2, the complainant, was to be paid a sum of Rs. 10,000/- to compensate her for the loss of interest suffered by her for the perios of 15 years of trial.

Concentrate on fine mathematically, one year rigorous imprisonment came to be calculated at Rs. 2,500/-. For a layman, this sentencing seems to be funny in the sense that a person who can purchase the imprisonment can be set free in the society from imprisonment. In another sense, if a person wants to have a huge amount of money, he need not apply to any bank for loan because robbery would

1. *Suryamoorthi v. Govindaswamy*, AIR 1989 SC 1410.
2. Section 235(2) of the Code of Criminal Procedure, 1973 reads:

   If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of section 360, hear the accused on the question of sentence, and then pass sentence on him according to law.
3. Section 392 of the Indian Penal Code, 1860 reads:

   Whoever commits robbery shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine; and, if the robbery is committed on the highway between sunset and sunrise, the imprisonment may be extended to fourteen years.



ultimately turn out to be more beneficial than loan, even if he is arrested as he would have to pay merely a nominal interest of $1^2/_3$ per cent per annum as fine. But for the persons involved in the penal system, the sentencing is adequate in the light of philosophical change in the theory of punishment in modern era on the basis of individualization of crime.

## I CHANGE IN THE PHILOSOPHY OF PUNISHMENT

Historically, in primitive society, according to the classical school, punishment was fitted to the crime and the criminal was of no consequence. It was asssumed that every offender committed crime on his free will and was, therefore, normally liable; the considerations of the character and personality of the criminal had no relevance. But in spite of all these, the school recognised that the criminal had a natural right to be humanly treated. The classical school developed into the correctionist school which recognized the fact that in dealing with a criminal, the character of the criminal could not be completely left out of consideration. It maintained that, in the estimation of personal criminal responsibility, age and mental alienation could not be disregarded.

Lombrasso, Ferri and Garefalo, the leading exponents of the positive school, declared that the criminal could not be regarded as a normal person who commits crime simply on account of a perversity. According to them, criminals are of different grades who can gradually be transformed into normal individuals. Hence the idea of retributive justice transformed into reformative justice and the concentration on the crime was withdrawn and attached to the criminal and once the idea was pronounced it developed gradually to the extent that the modern thinkers and criminologists supported the restitution at the place of retribution. And thus attention was drawn to find out the solution of the crime incuring the criminal. William Blackstone in discussing the purpose of punishment rejects the idea of atonement and expiation as not fit for human determination and regards it as a 'precaution against future' offences of the same kind affected in three ways—by amendment of the offender himself; by detering others by the threat of his example from offending in the like way; or by depriving the guilty party of the power to do future mischief. And according to him, if the penalty fails to achieve any of the effects, the terror of his example still remains as a warning to others. Thus the modern penal policy favours greater individualization of punishment with more attention to the need of the offender and involves providing opportunities for reformation of the offender and restitution of the victim's loss. But the practical difficulty is that a wholly reformative or restitutive penal system would not be deterrent for if convicted offenders are dealt with entirely in their best interests (as in this case), the crime might become even a profitable avenue to favoured social treatment. In the present case, the payment of interest, at the rate of $1^2/_3$ per cent per annum as compensatory fine might lead to make robbery a profitable avenue for future criminals and may open a way for the persons in need of money.

Before examining critically the sentencing in the present case, it would be useful to examine the philosophy of pre-sentence hearing for individualization of

or young offenders and not to impose sentences which are too short or too long, to be useful. The philosophy behind the above trend of reducing imprisonment is that the first offender or young offender should not be contaminated with hardened criminals or other prison inmates. Even in the international field, the United Nations Congress[7] urged a reduction in the use of short sentences, especially for trivial offences, on the ground that imprisonment has a disrupting effect on the offenders' employment and family. And keeping this in view, alternatives to imprisonment were found by the organs of the criminal justice system. As alternatives of imprisonment the sentence of fine, probation, suspended sentences, parole, construction of reforming centres, open camps, etc. have assumed more significance. Since penal policy requires that judges should refrain, as often as possible, from passing a sentence of imprisonment, the most common of the alternatives to imprisonment for judges is the imposition of fine as a mode of punishment.

The question, however, arises whether fine as an alternative to imprisonment is always appropriate regardless of the nature of the offence in the circumstances which prevailed in the case in hand? The answer is clearly in the negative because in certain offence which are anti-social and which affect the society and its norms at large, the offender will have to be dealt with severity and infliction of fine in such cases would be most inappropriate. There are still many offenders who are sent to prisons because they have committed serious offences for which no other forms of treatment is available. Because lenient sentencing in serious offences in the form of fines affects the psychology of the society in a negative sense and the people in the society feel easy while committing any offence, t consider offences as bargaining with the courts. Kautilya in his *Arthshastra* has stated: "Punishment if severe, alarms a man; if too mild frustrates him, if properly determined makes man to conform to Dharma," (here Dharma is used in the sense of law). These words are very true to the present day.

We are not advocating a support for retributive justice, but we are against the misuse of restitutive justice. In the case in hand, the fine of Rs. 7,500 imposed on accused No. 1, a policeman, seems to be inadequate in view of the severity and gravity of the offence of robbery. Robbery is not an individual loss only but a social loss, a loss to social norms and social trust. Robbery is not an offence for which fine as an alternative is adequate. The nature of the offence is of great importance which was ignored by the court in the light of the fact that the whole amount had been recovered. Recovery of the amount showed the efficiency of the administration and it could not be considered a circumstance which mitigated the gravity and seriousness of the offence. Fine as a means of compensation as such cannot be criiticised but 'only' fine as the sole punishment for the serious offence of robbery is subject to cirticism. There are many other alternatives to imprisonment open for the accused but the court selected only fine as the easy alternative which does not appear adequate even in the light of 'individualization of punishment' theory.

7. United Nations Congress on the Prevention of Crime and the Treatment of Offenders (1960).



## IV RESTITUTIVE JUSTICE TO THE VICTIM

Gone are the days when the criminal justice system was accused-oriented. Now it is leaning towards a system based on victim-oriented justice and the reformation of the cirminal is tried to be balanced with the restitution of loss to the victim by compensation. Restitution is appreciable and the change in trend is welcome in the sense that the victim can mentally as well as materially be satisfied if the material loss to him is compensated for the payment of liquadated damages. But crime is not a contract between the accused and the victim, the breach of which can be compensated by liquidated damages. The damages resulting from crime cannot be liquidated because the society also suffers some loss which cannot be compensated in monetary terms. And, for compensating the society of that unliqudated damage, the court has to consider something more than mere imposition of fine.

The following observations of the Streatfield Committee[8] in this connection are noteworthy :

> Sentencing used to be a comparatively simple matter. The primary objective was to fix a sentence proportionate to the offenders' culpability, the facts of the offence and the offender's record were the main pieces of information needed by the court....
>
> In addition, the courts have always in mind the need to protect society from the persistent offender, to deter potential offenders and to deter or reform the individual offender.

By far, the main object of the penal system is to achieve success in reducing crime. The courts in sentencing, in addition to other factors, must also take into account the relative effectiveness of the various forms of penal treatment open to them.

In the light of the above discussion, application of restitutive justice in the case in hand which is a burning example of restitution may be analysed. The restitutive justice is a part and parcel of victim-oriented justice. Now the attention of the judge in passing the sentence is moved towards payment of compensation for the loss caused to the victim. And liquidated damages are compensated in terms of money ordered to be paid by the court to PW2 of Rs. 10,000. This payment represented the interest for 15 years on the robbed amount (Rs.40,000).

## V WITHER RESTITUTION

From the facts of the case, it is clear that the amount robbed was saved by the PW2 by way of savings over a period of 10 years and she wanted to purchase some property out of that money. It was admitted by the court that the amount collected by the lady was her hard earned money, but the accident of robbery deprived her not only of the amount but her aspiration to pu.chase some property.

8. Streatfield Committee on the Business of the Criminal Courts (1961)

Further, she was being harrassed by the prolonged and complex procedure of trial and appeal. Besides all these facts, it is clear that if she could have deposited the amount in the bank for a fixed term, the amount could have been doubled or trebled and had she purchased some property the market value of that property could have increased many -fold during 15 years of litigation, Interest, if charged from the accused at the rate of 1 ½ per cent per annum is just negligible and least deterrent, rather attractive for the future potential robbers and evidently unreasonable and in-equitable. Hence, in the real sense, there was merely negligible restitution for the mental and material injury to the victim. Harrassment for 15 years to her was also ignored by the court and no real good was done to the injured party in the name of restitutive justice. The expectation from the court of justice in the mind of PW2 as a common man must have always been some results out of the trial in a substantial measure. Had the person committing crime been punished by any other mode, a mental satisfaction would be derived by the injured party or if the loss resulting from the cirminal wrong was restituted in the real sense, partial materialistic satisfaction may have been gained by the party. But if neither retribution nor restitution was achieved by the prolonged trial and appeal from the court, no hope can be had upon the criminal justice system and the purpose of the establishment of justice system would be defeated by its own norms because every injured person expects some substantial response from the justice system to which the society entrusts the task of giving justice.

It is, therefore, submitted that restitution understood by the highest court of the land is not intended even by the supporters of restitutive justice because for some petty offences, they may support restitution but not for certain types of offences which have attracted and are still attracting a deterrent examplary sentence despite other circumstances concerning the offender even in the era of individualization of punishment. In such offences, we may include the offences such as abuse of a position of trust, sexual offences causing danger to the public norms which deserve a heavy deterrent sentence. It is submitted that if the social effect of the sentencing is ignored while individualising the punishment to cure the criminal, the consequence may be increase in frequency in such offences in the society and the offences may become part of the day-to-day life for future potential criminals. At this stage, we cannot discard the modern theory of reformation and restitution but what we support is that there should be a harmony between retributive (deterrent) theory and restitutive (reformation) theory.

## IV NEED FOR BALANCE BETWEEN RETRIBUTIVE AND RESTITUTIVE JUSTICE

The success of the penal system is based on reduction and prevention of crime and protection of the society. In the era of individualization of punishment, sentencing should keep into consideraion three factors—criminal as an individual, protection of society and prevention of crime. A balance is needed among all these factors. A balance between the accused-oriented and the victim-oriented approach



is needed. In this sense, sentencing is not an easy matter as was considered by the courts since ancient times. Sentencing is an instrument by which modern criminologists want to cure the criminal, to protect the society and to restitute the victim. If restitution is one aim, the nrevention of crime and cure of the criminal are the other important aims of the system.

In the light of the above discussion, it may be observed that sentencing of the case in hand had achieved neither restitution nor prevention of crime nor cure of the criminal. In the name of negligible restitution, the accused of the offence of robbery were set free in the society to create an example of restitutive justice and to inspire potential future criminals to commit robbery, if they are in need of money. It is evident from the decision of this case that neither retribution nor restitution alone can serve the purpose of the penal system in isolation. Depending on the circumstances, we have to make a balance between retribution and restitution. If the circumstances demand an exemplary deterrent effect on the society, the degree of retribution should be more than that of restitution and if it is otherwise, restitution may prevail over retribution.

It is submitted that in the circumstances prevailing in the case in hand, only restitution in the form of petty fine does not serve the purpose of justice, some more punishment or some other alternative of imprisonment should have been imposed to create the exemplary effect on the society to prevent future potential criminals. For instance, demotion in the rank, if the person is a government employee or barring the promotions and such other benefits in service in future, deduction in the salary or any other suitable punishment depending on the circumstances of the case can teach a lesson to the offender and others to create some type of deterrenee. Hence, it is submitted that the inter-dependence of both the theories should be realised because no theory in isolation is perfect and a correct appreciation of the role of pleasure and pain in man's activities should be taken as the basic principle of sentencing. There is no doubt that if retribution is the realisation to the mind of the offender that his bad act deserves punishment, restitution by way of compensation is to return the benefit wrongfully obtained from the victim, so that the motive behind the offence against property is vanished. Thus, by associating the factor of compensation with the instrumentality of punishment of pain in any form, the criminality from minds of the offender and future potential offenders would be dried up. But only restitution of the material gain would not suffice the need of justice because then there would not be realisation in the mind of the offender that his act was bad and he would consider the offences as a bargaining between the aggrieved party and the criminal justice system. A proportionate balance between retribution and restitution is needed on the basis of circumstances so that the restitution to the wrong and the protection of the society can be achieved in future. It is true that in offences against property mere prison sentences cannot deter; mere compensation and atonement cannot restitute but both deterrence and restitution can work for reducing criminality of this type from the society.

## VII IMPORTANCE OF RULE OF LAW

The legal system is based on the predictability of the norms of the system and the rule of law would be disrespected if sentencing becomes such a flexible thing which can take any shape according to the circumstances and the wisdom of the sentencing authority. It is true that severity of punishment is not of much importance for reducing criminality from the society. What is most important is the certainty of some punishment (rather expected punishment). But if there is no standardization of the sentencing instrument, nothing can be said about the result of the criminal trial. Hence, the present case can be criticised on the ground of absolute ignorance of the statutory limits imposed by the Indian Penal Code and the complete ignorance of codified laws may lead to excessive flexibility in the penalizing process. With this precedent, fair practice cannot always be expected from the sentencing authority because after all they are human beings. Malpractices may become a part of life of criminal justice system and justice may be hampered in the extreme circumstances.

It is submitted that some major amendments be made in the I.P.C. and Cr. P.C. to meet the goal of individualization of crime and minimum punishment with some illustrations may be added to clarify the sentencing. Some broad outlines should be given by these codified statutes to the sentencing authorities so that some check and balance on the sentencing judges can be imposed and unguided discretion in their hands can be canalised and controlled. Of course, the judges can use their wisdom but the wisdom should not vary in the sense that the shape of the sentencing should be predictable to some extent. And under the statutory limits, the sentencing process may be guided in the right direction to achieve the real goal of individualization of crime. But always it should be mandatory on the part of the sentencing judges that a balance between the society and the individual should be maintained so that neither the society nor the individual suffers at the cost of one another.

## VIII CONCLUSION AND SUGGESTIONS

The sentencing process is the basis of the penal system. By this process, the purpose of the system should be achieved to the maximum extent. The success of the penal system lies in reducing the criminality in society and in protecting the society from potential future criminals. Admitted that in the modern era, individual has become more important entity than the society. 'Social solidarity' and 'collective conscience' have become out-dated phrases and in the light of the modern philosophy, 'individualization of punishment' is an important phrase to which every organ of the criminal justice system has due respect in mind. Individualization of punishment on the one hand demands the observance of socio-economic conditions of the criminal and, on the other hand, expects sympathy to the criminal as well as to the victim. The accused-oriented justice is moving towards victim-oriented sentencing and this revolution has changed the philosophy of retribution which has been replaced by the philosophy of restitution. Compensation for the victim and alternatives to imprisonment for the accused are the main considerations for the court in passing sentences in this era.



The case in hand is a burning example of restitutive justice whereby granting the victim an amount of Rs. 10,000 as compensation and awarding mere fine as punishment to the convicts for the crime of robbery clearly amounts to giving due weightage to socio-economic circumstances of the convicts. On the one hand, the sentencing is praise-worthy in the light of change in the philosophy of punishment. On the other hand, the sentencing may lead to drastic social consequences and the purpose of reducing criminality from the society may be defeated if this type of sentencing becomes a frequent precedent for the future. Further, a complete ignorance of penal limits may lead to corrupt practices and non-observance of the rule of law may thereby create distrust in sentencing. It seems that the balance between the two philosophies of punishment—retribution and restitution—is not properly maintained and the sentencing in the present case makes crime a contract between the accused and the victim overlooking society outrightly even though it is agreed by every criminologist that crime is a social loss.

Finally, in order to make sentencing a conscious creative exercise, it would be worthwhile to follow some of the undermentioned suggestions:

1. A standardized sentencing process, of course, with some flexibility, be redrawn to aim at protecting the societies, curing the criminals and compensating the victims. Greater emphasis be laid on prevention which is better than cure.

2. The philosophy of retribution and deterrence should not be ignored outrightly in the light of reformative and restitutive attitutde. A balance between retribution and restitution should be maintained in passing sentences in general and in serious offences affecting society at large in particular.

3. The reformative and restitutive approaches should be applied with due care and only in trivial cases to young and first offenders or to women. In all other cases in which examplary deterrence is essential, deterrence be made the rule.

4. Fine is 'an' alternative to imprisonment and not the 'only' alternative. Some new alternatives should be searched out and the existing alternatives should be used according to the needs and circumstances of each case. Fine as a measure of compensation to victim should be imposed with some strict measure of punishment. Only fine for some serious offences may lead to drastic consequences. While imposing fine, the society, the individual, the nature of the case, the consequences in future and the position of the accused in society, should all be taken into consideration. Other alternatives like imprisonment, probation, suspended sentence, etc. should be used frequently and fine should not be imposed in isolation for grave and serious offences.

5. Complete ignorance of codified laws like the I.P.C. and Cr. P.C. should be avoided and a liberal interpretation of the statutory limits can be used for sentencing. Further, the codified laws should be amended to meet the ends of modern philosophy of punishment so that the discretion of the sentencing authority can be guided by statutory limits.

6. It should not be ignored that crime is a social loss which affects the society at large and not only the victim as an individual. So crime should not be

compensated by petty fines only because it is not only monetary loss to the victim but also a social loss to the social norms.

7. While individualising the punishment, the sentencing authority should take into consideration the position of the accused in the society in the sense of public trust is reposed in him. Otherwise, it would be drastic to the society and people will loose confidence in public figures if they are criminals and acquitted on the ground of restitution.

8. If feasible, while sentencing, some experts like sociologists, psychologists and social workers should be consulted by the sentencing authority.

In a nutshell, in the era of modern philosophy of punishment, sentencing is not an easy task. If adequate sentencing can achieve the golden goals of penal system, an inadequate sentencing may ruin the whole structure of the criminal justice system. More emphasis and research is, therefore, needed in the field of sentencing to meet the ends of the modern philosophy of criminology.

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## HUMAN RIGHTS—THE SOUTH ASIAN PERSPECTIVE

HUMAN RIGHTS are fundamental rights, the rights bestowed by nature, the foundation of all rights, which cannot be taken away under any circumstances by any legislation or the act of the government. These are inalienable rights which a person possesses by virtue of being a human being. These rights are inherent for all the individuals irrespective of their caste, creed, nationality, religion or sex. These rights are essential for all the individuals as they are consonant with freedom and dignity and conducive to the moral, social and spiritual welfare. Human rights are based on elementary human needs as imperative. Some of these human needs are connected with physical survival and others for psychic survival and health. These rights provide suitable conditions for the moral and social upliftment of the people. Because of their immense significance, they have been recognised and embodied in the Constitution of all civilised nations. They have also been recognised by the United Nation Charter. On 10th December, 1948, the General Assembly had adopted the Charter of Universal Declaration of Human Rights.

Under the Charter of Universal Declaration of Human Rights, various categories of human rights have been enumerated. The major rights are: Right to life and liberty, right to equality before law and legal remedies, prohibition of torture and inhuman treatment, right to freedom of movement, right to own property, right to social security, right to work, free choice of employment, right to education and various other rights. These rights can broadly be divided into civil, political, social, economic and cultural rights. In the western countries and also in the United States of America, the human rights are being generally confined to civil and political rights, i.e. political disappearances, detention without trial, police torture, etc. The argument is that if there are civil and political right, other rights will be achieved as the political and social system could then be structured in such a way that there will be no violation of other rights. Even United Nation's Committee to monitor and supervise implementation of human rights and the Amnesty International evaluate the state of human rights in a country on the basis of civil and political rights alone. The same thinking had been imported by the intellectuals of the third world. They forget that western countries can talk of civil and political rights alone as they have reached after industrialization a level of socio-economic and legal development where there is abundance of food, presence of social security, medical facilities and there is no problem of housing. To them, talking of basic needs will look absurd as they had already been taken care of. But does that hold good in case of third world countries, especially South-Asia? Shall we talk of political and civil rights alone forgeting the basic needs of the teeming millions ?

More than two-third of the world's population live in the less developed countries. Regardless of their socio-political system, most of the less developed countries have in common a colonial heritage and an under-developed economy, low *per capita* income, low calories intake (1000 calories less than the standard

requirement) and low literacy rates. The forecast for the decade 1990-2000 for less developed and more developed countries regarding average birth rates and rates of annual increase are:

| Year | Birth Rate | Death Rate | Natural Increase |
|---|---|---|---|
| 1990- | 29 | 8 | 21 (less developed) |
| 2000 | 18 | 10 | 8 (more developed) |

The population of the less developed countries will be 5 billion by the turn of the century with 2 billion living in urban areas. In 1980, less developed region constituted over 75 per cent of the total world population. More than 60 per cent of the population of the less developed world live in countries with *per capita* income of less than 100 dollars and most of these countries are concentrated in Asia and Africa. Asia with more than 75 per cent of its population living in countries having *per capita* income below 100 dollars may be considered as the poorest continent. The population of Asia is higher than any other continent. India itself has more population than two continents of Africa and South America put together. In Asia, more than 800 million (40 per cent of the total) live at the margin of existence, 30 per cent of urban and 80 per cent of rural live without safe drinking water, 47 per cent of urban and 87 per cent of rural have no sanitary facilities which result in contamination of food, water and soil causing epidemics and havoc on the population. 30,000 children in Asia die every day and 14 per cent of the children born die within one year of their birth. 40 per cent of the Asian children do not even get a chance to go to primary schools, 68 per cent do not move to secondary schools and more than 90 per cent do not get education beyond secondary school.

In South-Asia, where the major countries are Pakistan, India, Nepal, Sri Lanka (previously Ceylon) and Bangladesh, all the countries are less developed countries. Here the per capita income is between 80 dollars to 140 dollars, literacy rate as low as 20 per cent (Pakistan, Nepal), population as high as 820 million (India) and annual growth rate of population as high as 3.3 per cent (Pakistan) and combined population of over 1040 million people. Let us see certain hard facts about one of the most industrialised among South-Asian countries, i.e. India which will easily give us an idea about other countries where the condition is no better. India accounts for one-third of an estimated 900 million people living in absolute poverty which lives under the condition of disease, malnutrition, illiteracy, short expectancy and high rate of infant mortality (95 in 1000 : UNICEF *Report*, 1989). In 1980, almost 50 per cent of the Indian population was below poverty line. Of this, about 170 million do not have the capacity to spend more than 3 dollors *per* month *per* person. To this section of 170 million, basic necessity, i.e. adequate food, shelter, potable water and clothing, remain a distinct reality. Large section of this population is just able to manage two times meal and, during draught or floods, even that possibility recedes. The incident of 1987 drought, in which large-scale selling of women-folk and children took place in Rajasthan, Orissa and other places is noteworthy. Hundreds of them used to die everyday and thousands of cattle perished.



The stark reality noted above requires a new understanding on the part of western world and leaders of third world countries about under-developed countries in which the whole of South-Asia is included. Even after analysing these facts, can we ask for civil and political rights alone without paying attention to the fulfilment of basic needs of these people. Unless basic needs like food. shelter, minimum education and medical facilities are fulfilled, talking only of civil and political rights will not make much sense to this vast population. According to the national survey on the incidence of bonded labour in India in 1981, 2.6 million people are bonded of which 87 per cent are scheduled caste and scheduled tribe (economically backward class). Doesn't this show lack of jobs which had forced these people to accept the bondage of the economicaly powerful ? Fulfilment of social and economic rights is a prerequisite for enjoyment of civil and political rights. However, it cannot be said that civil and political rights must be relegated to second position. What is to be said is that economic and social rights and their fulfilment is no less important, especially to the people of less developed countries, than civil and political. They must be given the same priority as we give to civil and political rights as all these rights co-exist. Merely by having civil and political rights, one cannot achieve economic and social rights. One has to strive for it. Then only the concept of human rights can have relevance in South-Asian countries.

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# BOOK REVIEWS

JURISPRUDENCE AND LEGAL THEORY by P.S. Atchuthen Pillai (3rd ed., 1985). Eastern Book Co., Lucknow. Pp. 341. Price : Rs. 25.00.

JURISPRUDENCE AND LEGAL THEORY by V.D. Mahajan (5th ed., 1987). Eastern Book Co., Lucknow. Pp. 742. Price : Rs. 75.00.

JURISPRUDENCE AND LEGAL THEORY by K.P. Chakravarti (1989). Eastern Law House, Calcutta. Pp. 496. Price : Rs. 195.00.

THE ABOVE three books are reviewed together for the simple reason that all of them are the plagarised version of standard texts of established authors in the subject. The established authors and authorities have a consistency of approach whereas the above plagarised text books are hotch potch of everything with nothing of their own and these authors have borrowed everything belonging to others.

The study of jurisprudence essentially is an opportunity for the law persons, be they the law students, the lawyers, the judges *et al;* to bring theory and life into focus for it concerns human thought in relation to social existence. Therefore, any worthwhile book on jurisprudence should encourage how to think rather than just what to know, and jurisprudence is peculiarly suited to this end because it sets law in its wider contexts and proceeds by way of stimulating ideas and not simply providing instruction. The books on jurisprudence should not be compendiums of theorists, publicists and jurists but should provide approaches about law. The books on jurisprudence should not be half-baked compilations of already established authors but should essentially furnish materials in such a way that they facilitate the evolution of ideas and an understanding of other theories thereby developing a healthy and critical analysis of the matrix of jurisprudence.

A text book of jurisprudence in the context of Indian legal materials and matrix should guarantee an independent and originality of thought perceptions inducing a sense of perspective and a sympathetic appreciation of what Indian legal system is about, how best to organise the jural postulates in human endeavour in India and how best to use legal institutions for achieving desired ends in the mix of Indian social settings. Admittedly, no single theory provides the absolute truths and jurisprudence in that sense represents a wide variety of fields crossed by many paths and it is the choice of the path which one may trod to go but the ultimate goal is the basic understanding of the subject matter in question.

Jurisprudence since its inception as a subject of legal study has undergone shifts of meanings and has never been austere in its abstraction, rather it has continually trenched upon other social sciences, more pronouncedly on philosophy and sometimes making one to wonder as to what exactly is the scope of jurisprudence. The breadth of the scope of jurisprudence is so vast that it is scattered in voluminous literature written in many tongues, and wealth of references to the learning past and present. The scope of jurisprudence is so vast that not only it is scattered in voluminous literature written in many languages but also obscure in too



many works containing a wealth of references to the past and present learning that they become tedious, unintelligible and difficult to master.

The most hesitating part of jurisprudence is the language, be it English or any other language. Every jurisprud is a craftsman and the words of a language are the tools of his trade inextricably bound into his thought processes. Every jurisprud, therefore, manipulates language and every language consisting of as many words has tremendous potential for vagueness, ambiguity, non-sense and imprecision and indeed all the other horrors recognised by the teachers teaching the subject of jurisprudence.

Indeed every author of jurisprudence must be the master of language and must understand the nature, scope, scientific basis, syllogism and semantics of language in which he is attempting to write. However, it may be difficult for any system of knowledge to use the terms of popular speech and invent terminology which may be used entirely in a unique way causing confusion to all except himself and invent technical apparatus which can only be explained by a glossary of another volume. Jurisprudence in that matter does not lag behind and the subject of jurisprudence is not only flooded by *isms,* but has been concealed in elaborate and difficult language. But this reviewer believes that the problems of jurisprudence can fairly be expressed in simple and popular language though, of course, opinions may well differ as to the real solutions.

Nobody can deny the educative value of jurisprudence since the logical analysis of legal concepts sharpens the law person's logical techniques and helps overcome lawyer's occupational vice of formalism, too much dependence on legal rules and legal forms neglecting social realities and social functions of law, by setting the law in its proper context, by considering the needs of society, and by taking note of advances in related and relevant disciplines. Jurisprudence should teach him to realise that answers to new legal problems must be found by consideration of present social needs rather than in the distilled wisdom of the past.

*Jurisprudence and Legal Theory* by P.S. Pillai lacks all the above paradigms of jurisprudence and is a contrived summary of theories of some ancient and modern jurists on the subject. The book is divided into three parts; Part I : Principles of Jurisprudence contains chapters 1-16—Introduction, Kinds of Law, Questions of Fact , Administration of Justice et al; Part II : Elements of Law contains chapters 17-23—Legal Rights : Classification of Rights, Intention et al ; and Part III : Legal Theories contains chapters 24-34—History of Natural Law, Sociological theories et al.

The first two hundred and thirty-four pages do not deserve more than a casual glance as these pages are veritable random picking of sentences from authoritative text books on the concerned topics with least consistency. From pages two hundred and thirty-four to pages two hundred and fifty-one, the author while discussing Pound's jurisprudence of interests has referred to some of the fundamental rights of the Indian Constitution to demonstrate how Pound's interest classification can be applied to the fundamental rights. However, the author has failed in

both his pursuits. He has neither understood Pound's sociological jurisprudence in the perspective which Pound would like to maintain nor has the author succeeded in demonstrating the link between the fundamental rights and the social engineering.

The rest of the chapters do not deserve any attention as they are hotch potch of everything. The astigmatism of the author is so great and novel that after going through the book, one comes out more ignorant about jurisprudence than what one was. This reviewer believes that such types of books should neither be allowed to be published nor recommended in the Law Faculties, nor allowed to be studied by the law students.

The second book, *Jurisprudence and Legal Theory* by V.D. Mahajan deserves the amount of contempt equal to that of Pillai's book. Although V.D. Mahajan, an old timer in legal writing of cheap, bizarre and expeditious books for students, has in his book taken into account the syllabi of jurisprudence of LL.B. degree course and competitive examinations, yet the book contains very little to contemplate for the students. The book, divided into twenty-nine chapters, is a veritable condensation of literature on the various topics of jurisprudence drawn from the standard texts of jurisprudence. There is not even a single sentence which might not have been borrowed from some other author but the beauty of the arrangement of the sentences is such that it apparently satisfies the legal test of original work (compilation) not infringing other persons copyright. It is nevertheless a plagarised version of some other authors. The author, while trying to condense the opinions of other authors on a topic, has confused the issues involved in it. The discussion concerning law and morals (ch.V) is a testimony of such confusion. Instead of clarifying the nuances of this topic, the author has made worst of it. All in all, Mahajan's book is a comprehensive collection of the views of various authors on basic legal principles arranged under appropriate headings which would under no circumstances arouse the sensibilities of law students to philosophise the law. At the same time, this book is a poor guide to pass the law examinations.

The third book, *Jurisprudence and Legal Theory* by K.P. Chakravarti is in no way different from the other two books reviewed above. Chakravarti has marginally differed from the other two authors in the sense that he has broken the subject-matter of jurisprudence into more than desired headings and has added an appendix of Soviet Jurisprudence and Perestroika. From chapter I to chapter 37 (pp.2-424), the author has taken the usual course of other compilators in law and there is hardly a line, an idea, a concept or definition, which could have given this book some respectability amongst the books of jurisprudence. The topics and their headings are arranged in such an awkward way that the real content of the topic goes astray. Such books, in the opinion of this reviewer, instead of imparting knowledge, tend to confuse the readers and this reviewer does not know the utility of writing such cheap and sub-standard books.

These books, at best,represent the unholy state of affairs which has been



created consciously or unconciously by various examining bodies including the central and state services boards where jurisprudence has been included as one of the subjects for objective-type examinations requiring yes and no answers. These books are, therefore, a false guide to measure up the depth of knowledge in the subject of law of which jurisprudence is the cornerstone and the bedrock. These books and similarly churned-out books may be short-cuts to earn fast bucks by the authors and the publishers but in the long run they would take a heavy toll of the students and the subject alike. These books should not be encouraged at all.

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LAW OF TORTS —AN OUTLINE WITH CASES by Kumud Desai (1985). N.M. Tripathi Pvt. Ltd., Bombay. Pp. 215. Price: Rs. 40.00.

LAW OF TORT by P.S. Atchuthen Pillai (1987). Eastern Book Co., Lucknow. Pp. 488. Price : Rs. 75.00.

THE TWO books under review on the subject of law of torts are of standards apart. Whereas Kumud Desai's book is merely a sketchy treatment of this vast area, Pillai's book is a standard work. The book by Desai contains fifteen chapters. Besides the specific torts such as defamation (ch. 4), negligence (ch. 12), nuisance (ch. 13), deceit (ch. 7), injurious falsehood (ch. 8) etc., it also discusses the general principles of tortious liability. Separate chapters are devoted to the nature of torts (ch. 1), general conditions of liability in torts (ch. 2), capacity of the parties (ch. 15), termination of liability (ch. 16), general defences to tortious liability (ch. 17) and remedies (ch. 18). However, despite the impressive table of contents, the treatment of the subject is very elementary. It lacks in essential details, depriving the reader of the comprehensive view of the topic under discussion. The case in point is that of remoteness of damages which is so essential for the understanding of the law of negligence. The cases are discussed merely in their outline. The discussion in relation to the general principles of liability is more convincing than the treatment of the specific torts. It is elaborated with the help of cases, though few Indian cases are cited.

Desai's book, thus, can neither be recommended for a serious minded student nor it can be of any help to a practising lawyer. It does not provide enough information to grasp the subject properly.

The work of Pillai makes a stimulating reading. The book has 39 chapters, beside the subject index. The cases upto February, 1987 are incorporated therein. The author has widely discussed the Indian cases while giving the leading English law and the cases. The cases are critically examined and become integral part of the topics under discussion. It deals very lucidly with the purpose and function of the law of tort (pp. 8-9) and origin and development of the law of torts in England as well as in India (ch. 2). The book, besides discussing the general principles of tortious liability, capacity of parties and specific torts which one may come across in every book on torts, has separate chapters on foreign torts (ch. 36), right of privacy (ch. 28) and injury to servitudes (ch. 16), thus giving new dimensions to the subject of torts. The foreign torts pertain to the conflict of laws arena. But its inclusion in the book gives a complete picture of the subject-matter. The topic has been elaborated with the help of decided cases, but one does not find mention of any Indian case. On the right of privacy, the author is of the opinion that in India, it is a well recongnised right under the criminal law (sec. 509 of the Indian Penal Code, 1860) and the civil law.[1] But the case cited in support of this right has a limited relevance and connot be generalised for the entrenchment of the right under civil law in India. The right is still at the formative stage in England as well as in the United States (p. 324). Injury to servitudes is understood to be the domain of law of property

1. *Gokql Prasad* v. *Radho*, (19 80) ILR 10 All. 358.



but its treatment under the law of torts makes an interesting reading. Once again, the Indian cases are missing from the discussion.

The author has also listed certain other torts which, at present, are in the formative stage, for example, abuse of statutory powers by persons holding public office, and an area of administrative law (p. 327). Thus, the book, in some aspects, is an inter-disciplinary study and the author has broken the rigid compartmentalization of different laws. It is a study not only in *lex-lata* but in *de lege ferenda*.

Overall, the book by Pillai is scrupulously researched and well-written. It is a meritorious contribution to the study of law of torts. It is highly recommended to all concerned as a valuable treatise on the subject and a valuable addition to the existing literature.

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AN INTRODUCTION TO LEGISLATIVE DRAFTING by P. M. Bakshi (3rd ed., 1985). N.M. Tripathi Pvt. Ltd., Bombay. Pp.112. Price : Rs.50.00.

COMMUNICATION IS the essence of every society and the task of the draftsman is to frame the communication of policy decisions having legal consequences to the members of society. Legal drafting is legal thinking made visible. This visible legal thinking is to precipitate legal rights, duties, privileges and functions in definitive form. The tasks of a legislative draftsman are complex and varied. His work is never easy in the best of times. His ability to understand what exactly the politician of the day wants is always superficial given the vagaries of political processes and politician's moods. His competence to give legal shape to his requirements in an intelligible way demands more than the knowledge of law; he must be skilled in sciences other than law also. He must safeguard that when the law comes out from Parliament it should be still intelligible, notwithstanding any amendments made to it. He must realise that incomprehensive laws tend to annoy the administration and estrange the citizens at a time when quick justice and less sterile legislation are the desiderata. The majesty of law and its processes can command the allegiance of the lay and the lord only by its simplicity.

It is impossible to write a perfect statute as it is to dole out perfect justice and the draftsman is beset with worst difficulties of langauge for no language including English is perfect. Legislative process for that matter puts too much stress on the draftsman and the whole piece of legislation often makes him blush. Legislative draftsman is, or must aim to be, a craftsman in the use of langauge as the words are the tools of his trade, nay, they are the raw materials with which the draftsman works, inextricably bound with his thought processes. But any language consisting of as many words has tremendous potential for vagueness, ambiguity, non-sense, imprecision, and indeed all the other horrors recognised by the legislative draftsman. Indeed legislative draftsman has to do his best to produce drafts as straight-forward as possible and as clear that the full intended sense of his meaning is not misunderstood or lost.

Draftsman must be the master of language and must understand the nature and scope of langauge; its scientific basis and its syllogism and semantics. It is essential that only such words should be used by the law-giver as are bound to produce the same notions in the minds of all men. Here is a task for superman.[1] Some of the typical sections of modern Acts are a veritable cobweb of words and in the thicket of their verbosity, the reader dare not enter and if he enters, he is bound to lose his sanity.

All the books written so far on legislative drafting happpen to devotail on the personal prejudices and experiences, rather pitfalls of draftsmen which they encountered while doing the job of drafting. In the process, some practical outlines and drafting techniques were made available for the use of draftsmen to make their drafts more effective and scientific, of course drafting legislation cannot be learnt completely from a book. No book worth the name can be comprehensive on the

1. S. K. Hiranandani, "Legislative Drafting - An Indian View", 27 *Mod. L. Rev.* 1 at 2 (1946).



ways and means of how to start the drafting process and achieve the best possible draft. All the standard treatises by authors such as Bentham, Montesquieu, Dickerson, Dreidger, George Coode, Robert C. Dick, Mellinkoff, Thorntone *et al*, are aids to legislative drafting but not the legal matrix on which legislative drafter could develop draft.

P.M. Bakshi's book under review must be viewed in the light of what has been said above. This book in a brief compass of one hundred and eleven pages gives a fairly lucid introduction to the subject. The book has been divided into twenty-four chapters and each chapter is comprised of an average four pages. These pages are veritable instructions to draftsman what to do and what not to do. After explaining the qualities of a good draft (ch. 2) and how to collect materials for drafting (ch. 3) as well as classification of statutes (ch. 4), the author straight away discusses the mechanism of an Act (ch. 5). The author has miserably failed while discussing the implications of statutes in the light of judicial and statutory interpretative techniques to make clear the distinctions between the various types of statutes. This reviewer believes that chapter 4 could have been discussed in more mature manner and in finer detail than what the author has attempted, after all the various statutes classified have distinctiveness, different from one another which the author ought to have developed.

The machanism of an Act (ch. 5) could have been given an extended treatment in the light of implications of the parts of the Act as well as the recent High Court and Supreme Court judicial pronouncements. Chapter 10, on Clarity, is most unclear. Legal questions asked in the context of clarity have not been answered at all. Rest of the chapters are equally of no use to the legislative draftsman as very little can be proffered by the legislative draftsman from these chapters.

The chapters, Subordinate Legislation (ch. 14) and Municipal Bylaws (ch. 15) are stuffed with English precedents whereas the author has forgotton the fact that Indian legal system is replete with better precedents concerning these chapters. The chapter, Delegation of Legislative Powers (ch. 16) is drawn very clumsily and contains nothing worthwhile for the legislative draftsman. The delegation of legislative powers, on the other hand, could have been attempted on the scientific lines given the fact that this field is most prolific in Indian legal process. The chapters, Some Model-Clauses and Some Skelton Bills are of some use to legislative draftsman.

In the final analysis, as the purposes of legislation are to establish legal rules and to communicate them to the members of the society who are affected, the book under review hardly serves the draftsman any purpose either by making his tasks simpler or in laying down certain scientific yardsticks to trod upon by the legislative draftsman. The book at best is a bare outline of how little a draftsman should know while attempting a legislative bill. This reviewer would simply wish the author to attempt to write a scientific treatise on legislative drafting using Indian matrix, comparable to any of the standard treatises referred to in the preceding page.

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GUARANTEEING TITLE TO LAND—A PRELIMINARY STUDY by D.C. Wadhwa (1989). N.M. Tripathi Pvt. Ltd. Bombay, Pp. 45. Rs. 25.00.

AS THE title of the *Monograph* under review suggests, it is a preliminary study relating to records of rights in land in our country. This study is prelude to a bigger exercise undertaken by the author at the instance of the Planning Commission that had set up a one-man committee in 1987 to prepare a detailed status report relating to records of rights in land and suggest measures for its improvement. The limited objective of the study, in the words of the author himself, is "to create awareness among the citizens about the practice of registration of title to land and its prevalence in other countries.[1]

The *Monograph* is divided into twelve parts. The first four parts deal with the nature and dimensions of the Indian law and practice relating to right over land. Parts 5 to 9 discuss the systems prevailing in Australia, U.K., Canada, U.S.A. and certain Afro-Asian countries. Parts 10, 11 and 12 are devoted to an exercise of suggesting a blue-print of an ideal system for India.

The main thrust of the present study is to propagate the idea of a system of registration of title to land or the 'Torrens System' for India as well. The study is not final about the model of registration of title to land system, but desires that the system most suited to Indian conditions be adopted. It is strongly in favour of the registration of title to land system for reasons of secuity, expedition and cheapness.[2] The study also opines that the change to a new system would reduce the land litigation substantially for the following reasons :

> As continuous finality of title of land tends to reduce litigation, both civil and criminal, the system should be welcomed not only by general public but even by the government and the public bodies because it will reduce a great deal of litigation between the state and the citizens, between the citizens and public bodies as well as between the citizens themselves.[3]

The suggestion of replacing the existing system of registration of deeds in all cases where the value of the land is above rupees one hundred (vide section 54 of the Transfer of Property Act, 1882) by a system of registration of the title to land in the name of a specific claimant would certainly do away with a lot of uncertainty and speculation about the real title holder, thereby introduce a kind of open and predictable system. But would it not prove equally counter-productive for those sections of the property right holders who are unaware of their rights because of their poverty or illiteracy? After all even the simplest form of registration of title proceedings would involve some kind of procedural formalities, which might be just too much for the poor and illiterate right holders. Therefore, to be really an effective measure for all the sections of the right holder population, particularly the

1. *The Monograph, the Preface.*
2. *Id. at* 43.
3. *Id. at* 44.



right holders drawn from amongst the weaker sections, the system will have to be, as far as possible, non-technical and expeditious, so that the registration of title to land can be easily availed of by all the genuine land right holders.

The author has succeeded in initiating a debate in the area of land rights which have so far remained obscured by primitive notions and technologies. However, one does hope that this preliminary study will be followed by a detailed account not only of the existing system and its shortcomings, but also of the alternative system and its social relevance for our society.

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PRINCIPLES OF MERCANTILE LAW by Avtar Singh (4th ed., 1985). Eastern Book Co., Lucknow. Pp. I - CVIII + 1 to 1064. Bound Price : Rs. 85.00.

THE BOOK under review has gone through four editions, the first edition was published in 1973 and 4th, being the latest, in 1985. It consists of five parts. Part I is a topical commentary on the Contract Act, 1872. Part II discusses Law of Partnership. Part III analyses the Sale of Goods and the Hire Purchase Acts. Part IV deals with Negotiable Instruments and Part V deals with Company Law. Each Part is sub-divided into various chapters. For example, general principles of contract are discussed in chapters 1 to 10 of Part I; specific contracts of indemnity, guarantee, bailment, pledges and agency are discussed in chapters 11 to 18 of Part I. Part II containing partnership is discussed in chapters 19 to 24. In Part III, the sale of goods is discussed in chapters 25 to 31 and law of hire purchase is discussed in chapter 32. Part IV dealing with negotiable instruments runs from chapter 33 to 39 while Part V on company law runs from chapter 40 to 51. Each chapter is sub-divided into various topical subjects and each topical subject is further sub-divided according to topical sub-headings. Stating the legal rules under that subject, limitations or exceptions, if any, are illustrated with relevant text of the statutory provisions and the decided case both English and Indian.

One outstanding feature of the book under review is that the author has taken pains to give material facts of the cases along with holding of the court to illustrate the interpretation of various statutory provisions. This will be very useful for the law students who are studying the subject with the help of case method. There is a detailed table of contents, table of cases, table of statutes and a subject index which will be very useful for searching and locating the relevant law according to the topical subject, statutory provision and the decided cases. These factors will make the book widely readable and popular not only amongst the law students but also amongst candidates appearing for competitive examinations, offering mercantile law as one of their options. The printing is nice thought at places one or two letters in a word are missing, perhaps due to use of old types. Mistakes are few, the paper used is of good quality and the get up and binding are attractive. The price of the book is moderate.

At some places, the law requires to be re-stated. For example, on p. 4 of the book, it is stated that a bid at an auction is an *implied* offer to buy (emphasis added). The word implied needs clarification. Similarly, law as to acceptance of tenders on p. 56 needs re-statement. The author is of the view that a tender is not an offer. But this is not correct. The author should re-state the law according to the type of tender. Statutory protection from exemption clause in a standard form contract has been mooted by Law Commission of India in its 103rd report but the author has not discussed it. On pp. 329 to 333, while discussing section 70 of the Contract Act under quasi-contracts, the author is confused about the essentials. The author has used the word "secondly" twice, firstly on p. 330 and then on p. 332. It ought to be secondly and thirdly respectively. Likewise, the essential "thirdly" on p. 333 would be "fourthly". On p. 224, on the subject of legality of object, the author has stated, "Money lent for an illegal purpose is recoverable". This is confusing. It needs clarification because later on the author has given exceptions. These exceptions



appear to state that though normal rule is that money lent for an illegal purpose is irrecoverable but in five cases this may not apply. So the author must re-state the rule and the exception with clarity. On p. 792, in footnote 49, the title of the case omits to give 'versus'. On p. 791, in footnote 46, line 4, 'whee' be read as 'where'. On p. 797, chapter 35 is entitled 'Nigotiation & Liability'. It is Negotiation and Liability. On pp. 808 and 809, the author has given twelve circumstances when a bank is justified in refusing payment of cheque. Circumstance Nos. 4 and 8 are analogous, viz. when the customer has countermanded payment. Such repetition is not justified.

In the new edition, the author should also give his views on the Consumer Protection Act, 1986 as to its effects on mercantile law which would be useful to candidates for competitive examinations. The author has not discussed the importance of forty-sixth amendment to the Constitution on sale of goods. This is a serious lacuna which must be removed in new edition. The author has given English cases without pointing out how far they are binding or relevant in India. If the author could do this, it would add to the readability and clarity of the law. In the chapter on consideration, the author has given the phrase "promissory estoppel" on p. 68 while stating that consideration should be given at the desire of the promisor. The readers would be unable to understand what is the difference in this promissory estoppel and the one discussed on p. 99 of the book. The author should clarify this confusion. He can take help of the Law Commission's 108th *Report on Promissory Estoppel.*

The reviewer has test checked the facts and citations of various cases and text of the statutory provisions. By and large, they are correct. There are minor discrepancies here and there. For example, in *Chinnayya* v. *Ramayya* , on p. 75 (chapter on consideration), the plaintiff was not the sister of the old lady but her brother. This correction may be noted. Similarly, on p. 146, while giving statutory provision relating to fraud (sec. 17 of the Contract Act), the author has not given its explanation. This is confusing when one reads the discussion that follows. The author has not noticed an important Supreme Court decision on agreement with *pardanashin ladies*, viz. *Mst. Kharbuja Kuer* v. *Jang Bahadur Rai.*[1] On p. 764, year of the Negotiable Instruments Act is given as 1882. It ought to be 1881. Similarly, on p. 765, while giving statutory definition of promissory note, there is omission of words "not being a bank note, a currency note", without indicating that ommission. This is misleading. On p. 785, footnote 29, the reference to footnote 74 above is wrong. It ought to be 'note 27 above'.

A brief summary at the end of each chapter, if not possible, at the end of each part will add to the value of the book for quick revision and remembrance by the law students. This will get rid of the habit of the students for law made-in-easy book and would serve the purpose of quick reference before examination. Since the book is meant primarily for law students, the indication of the fact as to which case has come in various civil services examinations or in any other law examination or which topic or quotation has come in the relevant law examination will be of

1. AIR 1963 SC 1203.

immense use to them. This will also increase the readability and popularity of the book.

In the alternative, author can add a section at the end of the book giving model problems, indicating therein the pages of the book where answers can be found or located by the students of law and those preparing for competitive examination offering merchantile law as their option.

It is hoped that author is aware of the latest amendments in the Negotiable Instruments Act and the Companies Act which he will incorporate in the new edition.

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ARBITRATION LAW by Salil K. Roy Chowdhury and H. K. Saharay (1986). Eastern Law House, Calcutta. Pp. 739. Price : Rs. 170.00.

ARBITRATION, A DISPUTE settling mechanism by mediation and reconciliation, is an old legally recognised alternate to the remedies available in the courts. Arbitration is better than litigation. It provides to the litigants an inexpensive, informal and speedy justice normally by persons of their own choice. Despite many shortcomings of arbitration, it has acquired popularity both in the national and international market owing to tremendous increase in the commercial and industrial transactions. Arbitration has taken various forms, viz. arbitration by agreement with or without the intervention of courts, arbitration in pending suits and statutory arbitration. Problems of varied nature relating to interpretation of contracts containing arbitration clauses and application of law on arbitration do arise everyday almost at each stage of the arbitration proceedings.

The book under review is an exhaustive commentary on law of arbitration. The contents of the book have been broadly devided into five parts : (i) Principles of the Law of Arbitration (ii) The Arbitration Act, 1940 (iii) Problems of Arbitration and Suggested Solutions (iv) Selected English cases on Arbitration (v) Appendices. Parts I, II and III in turn have been sub-divided into several chapters. Part I, principles of law on arbitration, has been sub-divided into eleven chapters. The authors after tracing the history and origin of the law of arbitration in the first introductory chapter, have underlined the advantages and disadvantages of arbitration in preference to litigation in courts. In the remaining ten chapters of this part, the authors have discussed the principles of law of arbitration topic-wise, making separate chapter for each such principle. Both English and Indian cases have been cited at appropriate places which make the discussion exhaustive, instructive, informative and more useful.

Part II contains section-wise detailed commentary on the Arbitration Act, 1940. Virtually, more than half of the book is devoted to this part only and is full of references both from foreign and Indian reports. The discussion is lucid and clear. Part III, which purports to deal with problems of arbitration and suggested solution, in fact, contains chapter-wise discussion on arbitration in question and answer form and there are only few extracts of the section-wise commentary in Part II of the book. However, discussion in question and answer form may provide a ready guide to a busy lawyer or a judge concerned with a particular question or questions on arbitration. This part does not deal with the pitfalls of arbitration as claimed by the title of the said part. Part IV does not contain any chapter. This part provides a brief summary of many English cases on certain important issues of arbitration. Although, this makes the study comprehensive and detailed one, still this reviewer feels that the worth of the book could have enhanced had the authors followed an analytical approach in dealing with the English and Indian cases and given concrete suggestions to overcome the difficulties faced in dealing with the Arbitration Act, 1940.

The authors have brought out the entire material on arbitration in 19 appendices contained in Part V of the book. The appendices reproduce extracts from

the Indian and English Arbitration Act, the High Court Rules, the rules and regulations of arbitral proceedings followed in different chambers of commerce and associations in India and abroad, the standard forms of pleadings in arbitrations and the list of certain countries and arbitral organisations. These appendices are very useful for practising lawyers and the judges.

The authors have incorporated in the book relevant statutory provisions in original and case law both Indian and foreign. They have given their own comments as well, wherever required. The suggestion for compulsory arbitration in suits mooted by the authors is a laudable step and needs serious consideration, if pressure on courts is to be reduced.

It is evident that the book is fairly comprehensive. The authors' scholarship and deep knowledge of the subject reflects throughout the book. This book is well produced with clear printing, good quality paper and good binding. Its price appears to be slightly on the higher side. It, however, lacks proper analysis of case law. Proof-reading mistakes check the flow of the reader. On the whole, however, the work is a commendable attempt on the law relating to arbitration and will be a useful addition to the law libraries all over. The book should also prove to be of great utility to lawyers, judges, law teachers and the students.

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GANGULY'S CRIMINAL COURT PRACTICE AND PROCEDURE by M. N. Das (8th ed., 1984). Eastern Law House, Calcutta. Pp. 13 + 879. Price 120.00.

THE BOOK under review is eighth revised edition of eminent author A. C. Ganguly's *A Practical Guide to Criminal Court Practice and Procedure*, first published in 1937. The fact that this work has gone through eight editions since its first publication speaks volumes of its utility and popularity. The main objective which the book addresses to itself to accomplish is to serve as a rapid referencer and preparative to a fresher practising in criminal courts.

As a preliminary to the main theme, the book commences, very appropriately, with an introduction providing for a general outline of criminal procedural law with special reference to juvenile offenders, military personnel, preventive detention, *ex post facto* legislation, double jeopardy and testimonial compulsion. In addition, some of the important topics like *mens rea*, vicarious liability, liability of corporations, separation of the judiciary from the executive, public inquiries, contempt of court and limitation in criminal proceedings have also been dealt with in this introductory chapter. A reading of this chapter would give a bird's eye view of some of the salient features of criminal court practice and procedure to the neophyte.

To carry out the main purpose, the book deals with the subject under eight Parts entitled Code of Criminal Procedure, 1973, Indian Penal Code, 1860, Law of Evidence, Medico-Legal Jurisprudence, Hints on Advocacy in Criminal Trial, Important Words and Phrases, Models of Petitions and Affidavits and Miscellaneous. These Parts are followed by Part IX which comprises of seven appendices containing the Code of Criminal Procedure (Amendment) Act, 1978 and 1980, the Essential Commodities Act, 1955, the Prevention of Corruption Act, 1947, the Special Courts, Act, 1979, the Probation of Offenders Act, 1958, and the Economic Offences (Inapplicability of Limitation) Act, 1974. Das would have done well by including the Criminal Law (Amendment) Act, 1983 and the Criminal Law (Second Amendment) Act, 1983 also in these appendices to the present edition of the book. At the end, the book has a reasonably good subject index to help the readers in locating conveniently the materials on a particular subject spread over at different places in the book. It would have, however, been wholesome if a table of cases were also given for quick reference to the case law by enabling the reader to pick out the exact pages wherein the relevant cases were commented upon.

As should be evident from the contents of the book, it is designed to be a self-contained compendium on criminal court practice and procedure bringing within its fold the law encompassing the three major Acts, viz. the Code of Criminal Procedure, 1973, the Indian Penal Code, 1860 and the Indian Evidence Act, 1872. These Acts are of daily use in the criminal courts. The book also contains useful materials on certain allied subjects, such as medico-legal jurisprudence, examination-in-chief, cross-examination in criminal cases, examination of witnesses and the role of judges, arguments, law lexicon, glossary of medical terms, model petitions, affidavits, process fees in criminal cases, expenses of witnesses in

criminal cases, copies and copying charges, payment of expenses of complainant or witness, diet money and compensation, Supreme Court Rules as to criminal matters, adaptation of existing laws, etc. The inclusion of all this material has made the book run into 879 pages and no book of this size can hope to do more than give the barest outline of the subject. Within this single volume, the book has attempted rather too much, the presentation is terse and even incomplete on some vital topics. All said and done the book is undoubtedly of great help to the beginners.

The administration of justice is primarily concerned with discovering the true version between two versions placed before the court by the state/complainant and the accused in a criminal trial. Investigation is carried out to bring the criminal to book. Crimes are defined by the substantive law and the manner and method of investigation into the crime is governed by the procedural law. Parts I and II of the book are meant to acquaint all concerned with these two important branches of the law. The treatment given to some of the areas relating to interpretation given by the Supreme Court as to what orders shall amount to interlocutory orders within the meaning of section 397 (2) of the Code of Criminal Procedure, the power of the High Court to pass orders under its inherent power vis-a-vis the interlocutory order, the circumstances under which the provisions of anticipatory bail under sections 438 of the Cr. P. C. can be invoked, powers of the magistrate vis-a-vis the powers of the investigating agency, the circumstances under which the High Court can exercise the inherent powers and the applicability of *mens rea* to the statutory offences are some of the highlights of these parts.

A sound knowledge of the law of evidence is as essential to a successful lawyer as the knowledge of the science of navigation is to the captain of a ship. It is not an uncommon experience in a court of law that even a good case has failed because of lack of adequate and necessary knowledge of the law of evidence on the part of the lawyer steering the case. Part III of the book has been devoted to a discussion of the Indian Evidence Act. Those provisions of the Act which present problems to young practitioners have been specifically selected for treatment at some length. The rulings chosen for discussion are nearly the leading ones, mostly of a representative nature. The chapter titled "Appreciation of Evidence" is of special importance to the beginners inasmuch as it lays down the general principles on the subject alongwith the principles relating to approver's evidence, chance witness, child witness, defence witness, inimical witness, interested or partisan witness, police witness, relative and trap witness, based on the authoritative decisions of the Supreme Court.

It is equally important for a practitioner in the criminal courts to have sufficient acquaintance with the broad principles of the medico-legal jurisprudence if he aims at any measure of success. In Part IV, the author discusses, *inter alia*, toxicology, poisoning, changes after death, gun-shot wounds, sexual offences, medico-legal examination, the problem regarding the identification of the living and the dead and the medical aspect of the determination of age. This Part should provide real help to the practitioners. Cross-examination is to an advocate what laboratory work is to a science student. Part V, captioned "Hints on Advocacy in



Criminal Trial" is apt to help a young advocate in acquainting himself with the art of advocacy, especially the art of cross-examination and examination-in-chief of a witness in a criminal trial.

The drafting of petitions poses considerable difficulty to one just called to the Bar. A commendable attempt has been made to lighten the difficulty by incorporating a large number of models of petitions and affidavits. The relevant law in case of some important situations has also been stated in the form of explanatory notes in Part VII. Parts VI and VIII of the book include law lexicon and glossary of medical terms and process fees in criminal cases and other related matters. These parts have surely enhanced the utility of the book as a hand book of criminal court practitioners.

On account of the wide sweep of themes and diversity of topics running into ninety-four chapters, the book at times suffers from inappropriate emphasis and incomplete discussions in some of the areas. For example, under the topic "Withdrawal From Prosecution" in chapter 30 (Part I) of the book, the discussion has become lop-sided. The treatment comprises of barely stating the circumstances under which withdrawal from prosecution can be validly made. The position regarding seeking remedy against the order passed under section 321, Cr. P. C. has not at all been touched upon. A practical guide to beginners could do better by explaining further that the public prosecutor has a statutory discretion under section 321 to withdraw a prosecution.[1] His discretion is, however, neither absolute nor unreviewable but subject to the court's supervisory power. Though no appeal lies against an order passed under that provision, yet the remedy lies in invoking the revisional jurisdiction of the court of session or of the High Court under section 397, Cr. P. C. The revisional court can exercise its power either *suo motu* or on the application of any person under section 397 (3) of the Code of Criminal Procedure, 1973.

Similarly, in chapter 31 (Part I), titled "When Previous Conviction or Acquittal Bars a Subsequent Trial", the discussion has been restricted only to the provisions of sub-sections (1) and (2) of section 300, Cr. P. C. omitting the situations covered under sub-sections (3) and (4) of that section. Even a reproduction of the illustrations (b), (c) and (f) to that section would have explained the provisions fairly well. Yet another instance of inadequate presentation of law relates to the distinction between culpable homicide and murder. At pp. 395-97, the book fails to crystalise the seminal points of distinction in the light of the leading judicial pronouncements like *Reg* v. *Govinda*.[2] At p. 358, there is bare re-production of section 105 of the Indian Penal Code and the law relating to the commencement and continuance of the right of self defence of property has not at all been explained. Whereas space has been rather needlessly used in re-producing in 79 pages, the two schedules of the Cr. P. C. In his day to day work, a fresher to the legal profession needs, in addition to the basic principles of law available in the book, bare Acts also as his bare minimum tools which always provide for these schedules.

Besides the above, the book also suffers from mistakes of content and

1. *State of Punjab* v. *Gurdip Singh*, 1980 Cr LJ 1027 at 1029 (P & H).
2. ILR (1876) 1 Bom. 342.

grammar. For example, the discussion pertaining to the law of theft does not seem to be quite correct. The ingredients of the offence of theft given at p. 419 are " (i) Moving a movable property of a person *out of his possession* (emphasis added) without his consent; and (ii) the moving being in order to take it with dishonest intention." The discussion of the subject on the basis of these two ingredients seems to be inconsistent with the definition of the offence given in section 378 of the Indian Penal Code. The definition does not require that in all cases, to constitute the offence of theft, the movable property in question should have been moved *out of the possession* of the other person. Illustration (a)[3] to that section demonstrates this point clearly. Illustration (h)[4] to that section makes the law still clearer.

Since the enforcement of the Code of Criminal Procedure, 1973, the present book is the third revised edition but surprisingly the provisions of the present Code have not been substituted for the provisions of the old and repealed Code of Criminal Procedure, 1898 at many places.[5] A little more careful proof-reading and proper editing would have added to the quality of the book. Other things apart, one comes across mistakes such as '*Special* Relief Act, 1963' for *Specific* Relief Act, 1963 (p. 73), the Code of Criminal Procedure, 1974 for the Code of Criminal Procedure, *1973* (p. 341), sub-section (5) of section 107 for sub-section (5) of section 167 (p. 63), *imperial* the public safety for *imperil* the public safety (p. 70), *right on appeal* for *right to* appeal (p. 153), *on devision* to Sessions Judge for *no revision* to Sessions Judge (p. 207), etc.

On the whole, being a single compact and concise volume, the book will effectively serve the needs of the new entrants to the legal profession as convenient ready referencer and dependable guide to criminal court practice and procedure, inspire confidence in young practitioners to take up independent conduct of cases, given the kind of improvement the present edition of the book under review deserves.

**T. D. Sethi***

3. Illustration (a) to section 378 of the Indian Penal Code, 1860 reads :

   A cuts down a tree on Z's ground, with the intention of dishonestly taking the tree out of Z's possession without Z's consent. Here, *as soon as A has severed the tree in order to such taking, he has comitted theft* (emphasis supplied).

4. Illustration (h) to section 378 of the Indian Penal Code, 1860 reads :

   A sees a ring belonging to Z lying on a table in Z's house. Not venturing to misappropriate the ring immediately for fear of search and detection, A hides the ring in a place where it is highly improbable that it will ever be found by Z, with the intention of taking the ring from the hiding place and selling it when the loss is forgotten. Here A, at the time of *first moving* the ring, commits theft (emphasis supplied).

5. E.g. at p. 62, line 10, section 257, Cr. P. C., 1898 should be replaced by section 247 of Cr. P. C., 1973; at p. 77, line 12, sec. 537, Cr. P. C., 1898 should be replaced by sec. 465 of Cr. P. C., 1973; Similar exercise should be done at pp., 180, 344, 378, 383, 387, 394 by substituting the provisions of the present Code for the repealed 1898 Code.

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EKADHIKAR AVRODHAK TATHA ANUCHIT VYAPARIK VYAVHAR VIDHI (in HIndi ) by Avtar Singh (2nd ed., 1990). Eastern Book Co., Lucknow. Pp. *XXIV + 170*. Paper Back Price : Rs.25.00.

THE BOOK under review is the second edition of its first edition published in 1985. It seeks to incorporate 1986 and 1988 amendments to the Monopolies and Restrictive Trade Practices Act, 1969. It also incorporates case law on the Act subsequent to the first edition including the landmark judgment of the Bombay High Court in which it was held that the Act did not apply to the expansion and development of newspapers.[1] The book is Hindi version of the commentaries on Monopolies and Restrictive Trade Practices Act, 1969 as amended upto date. It runs into eight chapters. Each chapter is on a main topic which is sub-divided into various sub-topical headings. Sometimes the sub-topical headings are grouped in various parts.[2] Each sub-topical heading is analysed with a critical comment on the relevant statutory provisions and the decided cases. The language is simple and the printing is nice. The book is not having printing errors. The book has a table of cases, a table of various statutes, a table of contents and a detailed subject index. It will be very useful for law students and students appearing in competitive examinations, like IAS opting for law and who are taking the examinations through Hindi medium.

The first chapter is on objects and outline of the Monopolies and Restrictive Trade Practices Act. The second chapter discusses constitution, procedure, etc. of the Monopolies and Restrictive Trade Practices Commission. The third chapter is on concentration of economic power to the common detriment and is divided into three parts. Part A discusses undertakings to which this chapter applies. Part B deals with division of undertakings and Part C deals with matters to be considered. This arrangement is according to the scheme of the Act. Chapter IIIA deals with restrictions on purchase and sale of shares. Chapter IV discusses monopolistic trade practices. Chapter V deals in two parts with restrictive and unfair trade practices. The discussion is quite detailed and lucid. Chapter VI deals with powers of registrar and the commission to obtain information and appoint inspectors. It also deals with offences and penalties. Chapter VII contains the Monopolies and Restrictive Trade Practices (Amendment) Act, 1984.

The discussion in each chapter is according to various sections of the Act related with the title of the chapter. The presentation is quite clear and illustrated with relevant case law. The book will be very useful as a ready referencer for the busy lawyers also.

**N.K.Rohatgi***

1. See Preface to second edition, p. v.
2. See chapters 3 and 6 which are divided into various parts for sub-topical headings.

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S.M. LAHIRI'S THE TRANSFER OF PROPERTY ACT by N. M. Lahiri and A. Bhattacharjee (10th ed., 1986). Eastern Law House, Calcutta, Pp. 70 + 854. Price: Rs. 155.00.

THE LAW relating to transfer of property is in fact one of the most fascinating and important subjects of law. Though it concerns everyone, there was practically no law relating to real property in India prior to the passage of the Transfer of Property Act, 1882. The Indian courts had been applying the English law with suitable modifications and adaptations in cases before them on the ground of justice, equity and good conscience. This was, however, not satisfactory since these rules of English law were not always adaptable to social conditions prevailing in India. The Indian law regulating transfers of property was accorded a statutuory shape by the enactment of the Transfer of Property Act (IV of 1882) which was brought into force on the first day of July, 1882. Some major amendments made in 1929 introduced drastic changes in the existing law. Under the Act, the application of the rules of justice, equity and good conscience is still possible in certain cases. The Act is not exhaustive of all transfers of property but it deals only with transfers *inter vivos*; i.e. the transfer of property by the act of parties. It excludes from its purview the transfers by operation of law, e.g. succession to property which is governed separately under the personal law of the parties.

The book under review indeed enjoys popularity and has already run into a number of editions. In order to cater to the requirements of the students, teachers and legal practitioners, the present tenth edition has been brought out after thorough revision of the ninth edition. The whole book is divided into eight chapters. Chapter I deals with the preliminary sections. Chapter II deals with transfer of property by the act of parties and it is further divided into two parts : Part A deals with transfer of property whether movable or immovable and Part B relates to transfer of immovable property alone. Chapter III deals with sales of immovable property while chapter IV discusses mortgages and charges. Chapter V deals with leases of immovable property and chapter VI is devoted to exchange. Chapter VII deals with gifts while the last chapter relates to transfers of actionable claims. The utility of the book has been enhanced by inclusion of three appendices. Appendix A consists of some important provisions of the Code of Civil Procedure, 1908 with explanations. These provisions have been discussed with the help of latest cases. Appendix B contains the relevant provisions of the Indian Registration Act, 1908 with one U.P. State Amendment Act, 57 of 1976 which amends section 17 of the Registration Act for the state of Uttar Pradesh. Appendix C contains the Government Grants Act, 1895.

Examined from all the angles, each paragraph in the book has been logically related to, and synthetically connected with, the preceeding and following paragraphs. As a matter of fact, the book presents the law on the subject in a very effective manner. One may like to use it very often to seek guidance on intricate problems of transfers of property. Explanatory notes have also been added whereever considered necessary. It is a matter of deep satisfaction that the latest cases have been incorporated which help to elucidate the provisions of the Act. Many new



problems have been added on the basis of latest cases. Some chapters have been rewritten not only in order to reflect some changes but also to present a fuller account of the topics such as mortagages of immovable property and charges.

The author has tried to update the case law but all significant cases have not been included while the discussion of some cases has not been adequate. There are numerous printing and spelling mistakes and wrong citation of cases. No purpose would be served by listing them here but it is hoped that the author will be more careful in not repeating such mistakes. The reviewer has also come across cases in which the names of the parties are not correctly cited. The page number of cases have been omitted in the table of cases. Some cases are unnecessarily repeated in the table of cases with different names of the parties when the cases are actually the same. Some cases discussed in the text do not find place in the table of cases. Some cases are not listed alphabetically in the table of cases. The provision of a few statutes such as the Indian Majority Act, 1875, the Hindu Succession Act, 1956, the Indian Succession Act, 1925, the Mussalman Waqf Validating Act, 1913, and the Specific Relief Act, 1963 having a bearing on the subject deserved to be discussed in the book which has not been done by the author.

It would have been useful to give a list of abbreviations used in citing cases as it becomes almost impossible to locate some of the cases from the original reports given in abbreviated form. Citations are not even uniform. It is desirable that all these shortcomings are carefully removed in the next edition by the author to make the book more useful. This reviewer is, however, of the opinion that despite the above shortcomings, this book would be of immense use to all those who intend to study this branch of law as a student, researcher or legal practitioner. This book can be regarded an authoritative work on the subject of transfer of property.

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UNITED NATIONS FOR A BETTER WORLD edited by J.N. Saxena, Gurdip Singh and A.K. Koul (1986). Lancers Books, New Delhi. Pp. xv+313. Price: Rs.250.00 :US $ 30.

INTERNATIONAL LAW has been ever changing since its inception but the twentieth century has witnessed radical changes. The important international events necessarily affect the role and content of international law. Some new and practically more important subjects such as adoption of the Convention on the Law of Sea in 1982, non-compliance of the 1986 judgment in Nicaragua case given by the International Court of Justice by the United States, the exercise of veto by the United States in the Security Council, etc. have posed new challenges in the field of international law. New problems have also created grave danger for the mankind, for example star wars, nuclear threats, etc. In view of the tremendous changes in various fields, many of our old ideas about international law have become obsolete for the present requirements

The United Nations since its inception in 1945 has been playing a major role in promoting and maintaining international peace and security, developing friendly relations among the nations on the basis of respect for the principle of equal rights and self determination of peoples and achieving international cooperation in solving international problems of economic, social, cultural and humanitarian nature and in promoting and encouraging respect for human rights, etc. Its achievements are considerable. It has been able to reshape the world through its active role in various fields. The non-political organs and the specialised agencies like ICAO, ILO, IMCO, FAO and WHO have been quite successful in their respective spheres of international activity. Although it is felt that the United Nations has failed or has not been able to achieve its goal, yet it has to be accepted that it is the last hope for the peace on earth. The book under review points out the pros and cons of the working and achievements of the United Nations during the last forty years of its existence.

The book under review has been brought out on the occasion of fortieth anniversary of the United Nations. It is the outcome of a Seminar on United Nations for a Better World held at the Faculty of Law, University of Delhi from 28 November to 1 December 1985. The book includes 26 learned papers contributed at the above Seminar by eminent legal scholars, political scientists and economists from India and abroad. The papers published in the book highlight the divergencies and complexities faced by the United Nations. They provide a good deal of information and throw considerable light on four major topics: (a) United Nations Peace and Disarmaments; (b) United Nations Economic Development; (c) United Nations Human Rights and Refugee Law and (d) United Nations and Lawmaking. While the book does not purport to be an exhaustive study of the working of the United Nations during last forty years, the topics selected for the book are organised very well.

The entire book is divided into five sections. Section I is devoted to peace and disarmament which contains nine very well written papers. Some of these are extremely useful, e.g. " The Emperor Has No Clothes : Article 2(4) and the Use of Force in Contemporary International Law" by W.N. Reisman ; "United Nations



Peace, Disarmament and Development" by P.S. Sangal; "United Nations and Peace Keeping" by C.N.K. Raja and H.R. Sreenivasa Murthy; "The Developing Role of the General Assembly" by B.Mitra; "Ballistic Missile Defence—Disarmament Strategy" by Gurdip Singh; " The Nuclear Winter: Human Survival at Stake" by Rahmatullah Khan, etc. Other papers also add to the framework of this section by addressing to a broad range of practical concern which can affect international affairs. This section helps the uniformed reader to begin the understanding of the complexity and importance of the United Nations. The analysis of various issues is thought- provoking. The effectiveness of the United Nations has been pointed out in these papers. Valuable suggestions have also been given to strengthen it.

Section II of the book outlines the basic types of international economic cooperation. It contains three papers: "The United Nations and the International Economic Cooperation for a Better Future" by A.K.Koul; "The Current Recession and the Need for Global Economic Cooperation" by B.B. Bhattacharya and "Global Service Economy and Developing Countries" by S.K. Verma. These papers provide ins and outs of the ECOSOC, an organ of the United Nations and also focus attention on specialised agencies such as ITU, ILO, FAO, IMF, IBRD, IFC, WIPO, WIYO, etc. An assessment of the international economic institutions and cooperation is very well presented in these papers. In her paper, Professor S.K. Verma examines various issues in the service trade and identifies the interests of developing countries. The author has made valuable suggestions for the future course of action at the international level.

Section III of the book contains nine papers on human rights and refugee law. Some of the notable among these papers are: "The United Nations and the Principle of Self- Determination in the Post-Colonial Era" by A.M. Connelly; "The United Nations Human Rights and Humanitarian Law" by V.Muntarbhorn; "Human Rights Implementation: The Asian Context" by H.C. Dholakia; "Some Suggestions Towards the Management of Future Refugee Situations" by S.N.Chetty; "United Nations and Massive Exodus of Refugees" by J.N.Saxena; "Crimes Against the Right to Development" by Upendra Baxi. The authors have given an in-depth account of human rights and refugee problems. They have examined the principal mechanisms based on the U.N. Charter for implementation of human rights, Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, Geneva Conventions of 1949, the right to development as a human right, problem of the refugees and the functions of UNHCR, etc. Section IV of the book contains papers relating to the "United Nations Sixth (Legal) Committee and Development of International Law" by P.S. Rao; "Legal Development, Law Making and Consensus as a Decision-Making Technique in the United Nations" by D.P. Verma and "United Nations Law Making: The UNCLOS III Model" by G. Plant. This section also deals with special or ad hoc committees on the non-use of force, the Charter of the United Nations, Drafting of an International Convention on Mercenaries, Reports of ILC, UNCITRAL, etc. Attention has also been paid to the UNCLOS III model and the author analyses the mechanisms of how to achieve consensus and package deal. In the fifth and final section, the book contains two papers: "United Nations for a Better World" by Z. Rahman and "United Nations in the Twenty-first

Century; A Study from the Perspective of the Developing Nations" by T.S.Rama Rao. These papers deal with the provisions of the U.N. Charter and focus attention on the Charter of Economic Rights and Duties, respectively.

This book is a very valuable addition in the field of international law in general and the activities of the United Nations in particular. It examines the effectiveness of the U.N. during last forty years of its existence. Further, it analyses the applicable principles and rules of international law within the framework of the United Nations and the papers offer a fair assessment. Needless to say that the book pulls together immense wisdom and knowledge. The thoughts contained in the papers are illuminating. The reviewer, however, wishes more carefulness in correcting many spelling and printing mistakes which occur throughout the book. The citations are wrong at many places while some are not even complete. No uniform method of citations has been adopted. Despite these minor shortcomings, the book would be very useful to all those interested in the study of international law and the working of the United Nations.

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V.D. KULSHRESHTHA'S LANDMARKS IN INDIAN LEGAL AND CONSTITUTIONAL HISTORY by B.M. Gandhi (6th ed., 1989). Eastern Book Co., Lucknow. Pp. xxiv + 518. Price : Rs. 65.00.

THE INDIAN legal and constitutional history encampassing the origin and development of legal institutions, systems, principles and concepts from the ancient times to the modern period is being taught in most of the Indian universities at the LL.B. level. A close study of the evolutionary process by which the people of India experienced a qualitative structural transformation during the British rule is indeed fascinating. Unfortunately, no scholar in India has so far undertaken a research to discern the overall social, political and legal transformation of Indian society that took place during the British period. The British introduced new principles of political rule, developed new criteria of political sovereignty and established a new bureaucratic set up and judicial system. The colonial rulers induced changes in India's social physiognomy, not for improving its socio-economic conditions but for subserving the interests of British capitalism. They completely destroyed the Indian economy, village autarchy, system of social stratification and introduced private property. They created conditions for the emergence of new social classes of landlords, capitalists, and zamindars who became exploiters of the peasants and the working classes. The judicial system and the laws of the Company *raj* largely favoured the proprietorial classes and helped in the oppression of the weak and the disadvantaged. The colonial India had no independent legislature and no independent judges free from governmental influence. All the branches of the government owed allegiance to the British government and served the interests of the British capitalism. The 'autonomy' of law and the legal system was simply an illusion and the laws were nothing more than the edicts of the executive branch.

Since most of the studies on Indian legal system are based upon the western writings, written in the milieu of imperialism, we have yet to look for indigenous studies disclosing or portraying the overall transformation that took place in India during the entire British period and then to see whether the Independent India has made real progress on capitalist path or socialist path. The real study of the Indian legal system should, therefore, endeavour to portray the history of political economy of law in order to assess the efforts made by the present rulers in re-shaping the Indian society in the light of the social background and aspirations of national movement that was launched to counter the evils of British rule.

The book under review[1] revised by B.M. Gandhi makes a feeble attempt to raise some of the points noted above. Since Gandhi is not the original author of the book, he has only a limited scope of improving its overall quality. The present review would, therefore, be limited only to the contribution made by Gandhi[2] to the book originally written in 1959 by V.D. Kulshreshtha.

1. *V.D. Kulshreshtha's Landmarks in Indian Legal and Constitutional History* (6th edition, 1989 by B. M. Gandhi). Hereinafter referred to as *Gandhi*.
2. The fifth edition of this book was reviewed in 8 & 9 *Del. L. Rev.* 198-200 (1979-1980) and third edition was reviewed in 4 & 5 *Del. L. Rev.* 218-219 (1975 & 1976).

Gandhi has added five new chapters to the present edition, bringing the total number of chapters to 21. Wherever possible, the old material has been refurbished and up-dated. He has now included discussions on racial distinction (ch. 13), emergence of Muslim communalism (p. 350), rise of nationalism and birth of the Indian National Congress (p. 352), India since Independence (ch. 18), concepts and sources of law (ch. 19), rule of law and constitutional developments (ch. 21). The book has three new appendices.

In the new chapter 13 titled "Racial Distinction", Gandhi very helpfully traces the practices of racial discrimination adopted by the British administrators in the administration of justice. He shows how throughout the British *raj* the Indians were continuously humiliated, insulted and oppressed due to the policy of racial discrimination. The British subjects were exempted from the jurisdiction of Company's courts. Discriminatory laws empowered the British subjects to acquire property in India and the legal issues arising out of clashes between the natives and the English always remained unresolved. According to Gandhi, the Indians were humiliated, oppressed and insulted with respect to their properties, persons and religious opinions because of the eagerness of the British subjects to obtain quick monetary advantages.[3]

The discussion on the emergence of Muslim communalism and the Indian national movement is a welcome addition to the book. But the chapter entitled "India since Independence" provides a very sketchy and elementary information about the Constituent Assembly, the essential features of the Indian Constitution and the amendments to the Constitution. Reference has been made upto the Constitution (Fifty-ninth Amendment) Act, 1988. In the opinion of this reviewer, the difficulty with Gandhi is that he wants to include almost everything pertaining to constitutional law in a book on legal history the result of which is that he is not able to do justice with any of the subjects taken up by him. Thus, for instance, he has referred to the basic structure doctrine developed in *Kesavananda*[4] and reads the same as deciding that "power to amend the Constitution could be exercised in respect of Part III consisting of fundamental rights."[5] Later, he has referred to basic structure limitations, and without checking the post-*Kesavananda* decisions specifying basic features of the Constitution like rule of law and fair elections, harmony and balance between the directive principles and fundamental rights, judicial review and limited amending power of Parliament, goes on enumerating his own list of basic features as gathered by him by reading the Preamble to the Constitution. Such a reading of the Preamble makes Gandhi to mention "supremacy of the Constitution, federal structure, democratic system of government, equality and personal liberty, distribution of sovereign power between the legislature, executive and judiciary"[6] as the basic features of the Constitution. One wonders as to how the Preamble could be read to provide for these basic features. Gandhi fails to recognise

3. *Gandhi* at 305.
4. *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225.
5. *Gandhi* at 305.
6. *Id.* at 395-96.



that basic structure is bound to be nebulous and inarticulate, to be defined and developed from case to case. Similarly, his treatment of chapter 20 on "Rule of Law and Constitutional Developments" makes an amazing reading. While explaining the application of rule of law in the Indian Constitution, Gandhi considers the entire Part III dealing with fundamental rights as affirming the rule of law ideology. Surprisingly, he still regards articles 19 (1) (f) and 31 as guaranteeing right to property.[7] Even the *Habeas Corpus* case[8] has been included among the landmark decisions affirming rule of law.[9] The last part of this chapter includes preliminary but useful information about public interest litigation, consumer protection movement, environmental control measures, lok adalats and legal aid movement.

Chapter 19 of the book entitled "Concept and Source of Law" provides to the readers a very elementary information about the meaning and schools of law. Gandhi devotes only four pages for explaining various schools of law which required somewhat detailed explanation. Perhaps the space did not permit the author to devote more than one paragraph each for discussing law and morality, law and custom, law and equity and law and juristic opinion.

Gandhi also incorporates discussion on legal profession, legal education and law reporting. The discussion on these matters provides information about the aims of legal education and its future, law reports and legal periodicals, legal research and methodology.

Gandhi has done a commendable job in improving the utility of the book for the students joining law studies. It is hoped that in the next edition of the book, Gandhi would further improve the quality of the materials on the lines suggested above.

PARMANAND SINGH*

7. *Id.* at 426.
8. *A.D.M., Jabalpur* v. *Shivkant Shukla*, (1976) 2 SCC 521.
9. *Gandhi* at 429. He, however, refers to Khanna J's. dissenting opinion as affirming rule of law.
10. *Id.*, appendix E, p. 489.

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TREATISE ON SOCIAL SECURITY AND LABOUR LAW by Suresh C. Srivastava (1985). Eastern Book Co., Lucknow. Pp. 464. Price: Rs. 60.00.

THE INDUSTRIAL accidents and diseases are far more frequent and damaging than what most of the persons, not concerned directly with industry, realise. In terms of human misery, suffering and domestic hardship, they have terrible impact. In economic terms, the loss of productive power and of production is very serious. In view of tremendous effect and impact of these accidents and diseases, the state cannot remain a helpless spectator. A welfare state is under a duty to protect the interest of the victims and their families. The directive principle of state policy contained in article 43 of the Constitution of India casts a duty on the state to provide work, living wage, proper conditions of work and decent standard of living to the industrial workers by enacting legislations. In pursuance of this provision, several legislations have been enacted from time to time which aim at securing social security and workers' welfare.

The book under review[1] takes into consideration various positive and negative aspects of the so-called 'social security' measures adopted in this country till now. It begins with the origin and general implications of the concept of social security, goes into the colonial background of the problem and examines the adequacy and efficacy of the existing social security measures in India. Parts I and II of the book are devoted to these aspects. The concept of social security is dynamic. Srivastava is of the opinion that social security is multi-dimensional in its contents. To bring home his point, he has quoted some important definitions of the concept such as the one given by the International Labour Organisation, according to which:

> The security that society furnishes through appropriate organisations against certain risks to which their members are exposed. These risks are essentially contingencies against which the individuals of small means and meagre resource cannot effectively provide by his own ability or presight or even in private combination with his fellows, these risks being sickness, maternity, invalidity, old age and death. It is the characertistics of these contingencies that they imperil the ability of the working man to support himself and his dependants in health and decency.[2]

Thus, the concept of social security is based on ideals of human dignity and socio-economic justice. Underlying the concept is also the desire to give protection to the citizens who have contributed or are expected to contribute to the country's growth and development against certain hazards of life to which they are exposed. These hazards are essentially economic though in some cases they might even be social.[3] The basis and functions of social security have been highlighted

1. Suresh C. Srivastava, *Treatise on Social Security and Labour Law* (1985).
2. I.L.O., *Approaches to Social Security* 80 (1942).
3. The author has extensively quoted form the *Report of the National Commission on Labour* (1969) and *Encyclopaedia of Social Work in India*, vol. II (1968).



with the help of well known humanist and economist like Sir William Beveridge and B.P. Adarkar.[4] This reviewer is, however, of the opinion that the term social security must belie any conceptual jacket as that concept has been borrowed from the Anglo-Saxon system of law which operates in England, where its sphere is not confined to industrial force alone. It may, therefore, not be possible to borrow in totality the social security legislations of industrially advanced countries and to enact legislations on the subject for the industrial workers in India on the same lines since the socio-economic conditions are altogether different and the country is still on the formative stage of industrial revolution. The main problem in this country is to provide the basic minimum social security benefits rather than the supplementary and incidental social security benefits which could be thought of by the industrial workers in advanced countries.[5]

In view of the above, it would be better to confine oneself to the importance of the social security measures in the proper perspective. The merits and demerits of any social security legislation should be judged from its underlying socio-economic goals like redistribution of income in order to reduce the existing disparities between the rich and poor; the maintenance of income to a reasonable extent during unforeseen contingencies such as death of the bread-earner, illness, old age, industrial accidents, occupational diseases involving a state of unemployment, etc.

Parts III and IV of the book deal with the Fatal Accidents Act, 1855 and the employer's liability in the context of the doctrine of common employment. The most substantial portion of the book deals with the Workmen's Compensation Act, 1923 and the Employees' State Insurance Act, 1948 in Parts V and VI. In these two Parts, the author has amply demonstrated his scholarly skill and grasp of the subject. The presentation of the subject in these Parts is very effective. The author has critically analysed the topics and has come out with a very lucid and illustrative exposition of the entire law relating to workmen's compensation. One has to appreciate that the authors are generally bound to have limitations particularly in those areas in which case law has not developed to any considerable extent. But given the fact that the law on workmen's compensation is largely based on the English law, the decisions given by the courts in England while interpreting the expression "accidents arising out of and in the course of employment" used in the Indian statute has necessarily to be relied upon. Even the English judges have expressed their reservations while interpreting the expression. It is to the credit of the author that he has very precisely presented the entire law in a most simple manner for the students for whom the author undertook the task of writing the book.

Another distinctive part of the book is the discussion of the "triple retiral benefit", viz. gratuity, provident fund and pension, which he has discussed in Parts VIII to X after discussing the Maternity Benefit Act, 1961 in Part VII. Most of the

4. See *Report on Social Insurance and Allied Services*: Chairman — Sir William Beveridge (1942) and B.P. Adarkar, *Planning of Social Security in India* (1944).
5. E.g. G. Varandani, *Social Security for Industrial Workers in India* (1987) and N.H. Gupta, *Social Security Legislation for Labour in India* (1986) also support this line of approach.

available literature on the subject is scattered and generally the approach to analyse it is more sociological and economic than legal. These measures are of recent origin and not much of case law has come to limelight focussing the lacuna in the Act, barring the law relating to gratuity where one has the advantage of a spectrum of judicial dicta before the codification of law in 1971.[6] Nevertheless, the author has, as far as possible, tried to examine the relevant provisions of the enactments in the light of the intention of the legislature and the scanty judicial decisions.

The concluding Part of the book is devoted to un-employment benefits and un-employment insurance, where the author has discussed the relevant provisions of the Industrial Disputes Act, 1947, particularly those dealing with lay-off and retrenchment compensation, a subject which is generally over-looked by the authors writing on social security. A perusal of the scheme of the book would show that the main thrust of the author is to examine in depth the lacunae and short-comings in the existing statutes. The book contains a critical survey of various enactments dealing with social security. In view of the presentation, systematic exposition and comprehensive treatment of the subject, the book is bound to be useful to the students of labour law in general and for the study of social security in particular.

Sunil Gupta*

6. For these cases and later developments, see Sunil Gupta, "Law Relating to Gratuity—Some Reflections" in S.N. Singh (ed.), *Law and Social Change* 28-37 (1990).

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LEGAL AND CONSTITUTIONAL HISTORY OF INDIA by M. Rama Jois (1984). N.M. Tripathi Pvt. Ltd., Bombay. Vol I—Ancient Legal, Judicial and Constitutional System. Pp. xxiv + 723. Price : Rs. 32.50 and Vol. II—Modern Legal, Judicial and Constitutional System. Pp. xx + 388. Price : Rs. 21.00.

The present monumental work[1] has already been widely reviewed, publicised, welcomed and acclaimed in the academic circle. The credit for such a grand reception to the work goes entirely to its quality and contents and to the courage, commitment and devotion of the author who, in spite of many pressing demands of the profession on his time, could undertake and did successfully complete this herculian task. Surely, something like *Bhishma Pratigyana* must have inspired and sustained him for long years of hard labour.

In the production of this work, the author has performed a great and unique task. He has presented at one place the origin and development of law and legal institutions from the earliest to the most recent times in this land. It is not that the idea of such presentation, which he has modestly expressed in the very first sentence of the *preface*,[2] is entirely new. Any one having a genuine interest in an over-all comprehensive and complete historical background of the legal institutions of this country must have felt the need of such presentation. In view of that need some attempts, however weak and inadequate, have also been made towards such presentation.[3] However, in comparison to the work under review, the attempts of other authors stand at a very low pedestal in terms of their reach to the readership as well as their quality, content and size. In this sense, the present work is clearly distinctive and most outstanding.

This work neither does, nor professes, to make any claim to explore anything un-explored. In addition to the most celebrated and authentic multi-volume P.V. Kane's *History of Dharmasastra*, there are many other well researched and recognised works on the ancient Indian legal and constitutional system.[4] Similarly, works are not lacking in respect of Islamic period though their number may not be as much as in respect of pre-Islamic period.[5] As regards the period since the arrival of the Englishmen, a large number of works have appeared and continue

1. M. Rama Jois, *Legal and Constitutional History of India* (1984). Hereinafter referred to as *Rama Jois*.
2. *Id.* at vii, the author writes :

   > The idea of writing a book on this subject was conceived when I was working on the staff of B.M.S. College of Law, Bangalore, as a Part-time Reader, during 1986-1970 and found that there was no text book covering the entire syllabus on this subject including the ancient Indian system.

3. It was almost at the time when the present work was conceived by the author but much before its actual publication in 1984, the present reviewer had also written two books on the subject: M.P. Singh, *Outlines of Indian Legal History* (Ancient & Medieval Periods), Western Law House, Meerut, 1969 and its companion, *Outlines of Indian Legal and Constitutional History* (Modern Period), Western Law House, Meerut, 1970.
4. For example, see the works mentioned in the bibliography in *Rama Jois*, vol. I, pp. 707ff and also the bibliography in R. Lingat, *The Classical Law of India* 275ff (1973).
5. See the bibliography in *Rama Jois*, vol. II and M.P. Singh, *supra* note 3.

to appear.[6] Thus it would be clear that there is no dearth of materials on the subject matter of the present work. Such materials are, however, either inaccessible or beyond the reach of the average reader or the same are too voluminous to be gone through and grasped even by very serious type of students. Moreover, none of them presents a complete picture of all the legal developments from the beginning to the end. The greatest contribution of the work under review to the legal literature is that it has put together vast, scattered and not easily accessible materials at one place within reasonable limits and at a very reasonable, almost unbelievable price. To this extent, the work is certainly *sui generis*.

Volume I, which is almost double the size of volume II, is devoted exclusively to the *sastric* system of law, judiciary and legal institutions and sources of law including the legal literature up to the post-*Smriti* period and the major legislative and judicial changes introduced till recently; a very detailed description of the various topics of civil law; law of crimes including the concept of *patakam* (sin), *dandaha* (punishment) and different classes of crimes; law of evidence, principles of *mimamsa* or interpretation; administration of justice including the constitution, powers and functions of the courts, judicial and extra-judicial proceedings and ordeals; and *rajadharma* or constitutional law comprising the origin and purpose of state, the King, his powers, duties and functions, constitutional and administative structure of the state and its operations. To create, sustain and even rejuvinate interest in these materials, far detached from our present context, the author has constantly tried to relate them to the present issues and institutions. Of course, not much effort has been made to establish their impact on the present law and legal institutions but the ground has been prepared for such a study also.

One of the two appendices given at the end of volume I reproduces, with English translation, the text of a judgment in Sanskrit by a Mithila court on 10 June 1794. The other appendix gives an English translation of royal Charter issued in 592 A.D. by King Vishnu Sena of the Lohata Dynasty in Kathiavar. These two documents, belonging to two distant parts of the country separated by more than a millenium, are living testimony of the quality and extent of the exercise of legislative and judical power in India. Definitely, they induce the reader to search for more materials of similar nature. Volume I has also a long bibliography and a detailed general index.

Volume II, which deals with the legal developments during the Islamic and British rule, is divided into six parts. Part one deals exclusively with the organisation and operation of state, law and judicial system under the Islamic rulers. Comparatively much less space has been devoted to this part of our past legal system. In the subsequent parts, the evolution and development of modern legal system since the arrival of the Britishers has been traced covering the development of the civil and criminal law in the Presidency towns and mofusil areas including the codification of law during the British rule and the constitution and function of Law Commissions constituted before and since independence; development of modern judicial system

6. See the bibliography in *Rama Jois*, Vol. II.



since the establishement of the first courts in Madras, Bombay and Calcutta and the establishment of the Crown's courts including the Supreme Courts, High Courts, Privy Council and the Adalat system until the commencement of the Constitution of India in 1950, judiciary since the commencement of the Constitution and the constitutional developments during the British rule including various Charters and Acts up to the Government of India Act, 1935; and finally, the making of the Constitution and its evolution up to the forty-fifth amendment of the Constitution. Thus, this volume is not just a history of our legal institutions but also an introduction to the present legal system. It also contains a short bibliography and general index.

Compared to volume I, volume II is not only smaller in size but also lacks much in substance. It hardly contributes anything to the existing knowledge or literature except that it devotes some space to the Islamic period and completes the story very ably started and narrated in volume I. The author might be having his own reasons for such treatment to volume II but it may be surmised that in view of easy and enough availability of literature on the period, he did not want to voluminise it further and felt contended by having established a continuam and link between the various stages of the development of law and legal institutions in our society and its law. If that were the reason, the author is perfectly justified in his presentation in volume II.

There is of course always scope for improvement in any work and Rama Jois would not definitely claim that his work cannot be improved upon. But now it is the turn of others to produce better and superior works on the subject. Rama Jois has done an immense service to the legal community in writing this book and he deserves all praise for the same. By getting his work subsidised through the National Book Trust of India, he has enhanced its accessibility to average readers and law students. These could be some of the reasons for the book having been so well received.

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